

LIABILITY FOR WORK STRESS: KOEHLER TEN YEARS ON

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Peter Johnston was much more than just a public lawyer. Although most of his endeavours as scholar, teacher and advocate were devoted to constitutional law, administrative law, human rights law and public international law, his horizons were much wider. In the courtroom he represented clients in many different fields, often pro bono, and in the classroom at various times he taught in fields as diverse as mining and energy law, environmental law, criminal law and taxation. Furthermore, he had, and retained, an interest in private law, and torts in particular. The subject of his master's thesis, completed in the 1960s under Professor Douglas Payne, was products liability, and in later years he occasionally returned to the area of torts: for example, in the early 1980s we shared responsibility for continuing education seminars and the occasional opinion on torts, and more recently we wrote articles which appeared in the same issue of the *Tort Law Review*.¹ It is therefore entirely appropriate that the *UWA Law Review* in honouring Peter should include an article on torts.

However, there is a much more significant reason for writing this particular article. In one of our last conversations Peter drew my attention to the importance of *AZ v The Age (No 1)*,² a recent decision of McMillan J of the Victorian Supreme Court on liability for psychiatric injury caused by stress at work.³ Such cases are rather different from the classic 'nervous shock' situation where psychiatric injury results from viewing or otherwise experiencing the death or injury of another, often a close relative; rather than a single incident, the work stress cases involve psychiatric injury caused by gradual pressure, often over a considerable period. Not until the 1990s did such cases begin to appear in the courts, but a 1997 prediction that they loomed as the next growth area in psychiatric injury law⁴ has proved correct. In the first decade of the 21st

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¹ Peter Johnston, 'Constitutional Limitation on Abolition or Restriction of Common Law Damages' (1999) 7(2) *Tort Law Review* 102; Peter Handford, 'Psychiatric Injury in the Workplace' (1999) 7(2) *Tort Law Review* 126.

² [2013] VSC 335.

³ It is possible that the case came to Peter's notice as a result of the companion case, *AZ v The Age (No 2)* [2014] VSC 436, where McMillan J had to deal with an application for her to stand down on the ground of apprehended bias.

⁴ See Nicholas Mullany, 'Fear for the Future: Liability for the Infliction of Psychiatric Disorder' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 101 at 197 n 24 (quoted by Hale LJ in *Hatton v Sutherland* [2002] ICR 613, [3]). The first Australian text on liability for work stress appeared in 2002:

century, both in England and Australia, appellate courts found it necessary to impose some order on this body of law. In Australia, in *Koehler v Cerebos (Australia) Ltd*⁵ in 2005, the High Court, by focusing on the content of the duty of care as reflected in the contract of employment, placed a considerable brake on expansion; in England, as the result of the decision of the Court of Appeal in *Hatton v Sutherland*⁶ in 2002, the restrictions have taken a different form. Ten years on from *Koehler*, it seems that the time has come to review the Australian situation, and assess how it differs from its English equivalent, when the two lines of cases are derived from common roots. Peter Johnston's initial impressions of the *AZ* case were percipient: it proves to be a very good example of the way Australian courts now approach problems of work stress.

Accordingly, this article will briefly review the early case law and the differing approaches to this area now manifested in the leading English and Australian cases.⁷ An analysis of the judgment in *AZ* will show the way Australian cases currently approach the various elements of negligence in the work stress context. An attempt will then be made to analyse the jurisdictional differences.

I THE EARLY CASES

The first of the work stress cases was *Gillespie v Commonwealth*,⁸ decided by Miles CJ in the ACT Supreme Court in 1991. Mr Gillespie, an employee of the Department of Foreign Affairs and Trade, was sent to the diplomatic mission in Caracas, Venezuela, but found it difficult to do his job in the special conditions that prevailed there – people were abusive, bribes were demanded, and there were difficulties in engaging local staff – and his health ultimately broke down. He claimed that this breakdown resulted from the negligence of the Commonwealth in posting him to a position involving unusual stresses and a hostile environment. Miles CJ recognised that the Commonwealth owed him a duty of care, and was in breach by failing to give him an appropriate warning, but held that the action failed because causation was lacking. An appeal to the

Des Butler, *Employer Liability for Workplace Trauma* (2002), followed by the first English text in 2004: Katherine Awadalla, *Stress Claims* (2004).

⁵ (2005) 222 CLR 44.

⁶ [2002] ICR 613.

⁷ For a fuller account, see Peter Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, 2006), 541-565.

⁸ (1991) 104 ACTR 1.

Full Court was dismissed.⁹

What was new about this case was that, unlike the traditional ‘nervous shock’ cases, the damage complained of was not the result of a particular incident; however, it was well accepted that employers were under a duty to take reasonable care for the health and safety of their employees, and this extended to cases where the harm was purely psychiatric: according to Dixon J in *Bunyan v Jordan*,¹⁰ such illness was sufficient damage.¹¹ The issues under debate were whether the anxiety state suffered by the plaintiff was something the defendant should have foreseen, and whether the defendant took such steps as were reasonably necessary to obviate or at least minimise the risk of this kind of harm occurring. In an important passage, Miles CJ addressed these issues as follows:

In the present case it is not necessary to consider foreseeability with respect to the existence of a duty of care, because the relationship of employer and employee itself gives rise to that duty of care. Foreseeability for present purposes is to be considered only in so far as the degree of remoteness of the harm sustained by the plaintiff set the parameters of the steps that a reasonable person in the position of the defendant would have taken to reduce the risk to the extent that any ‘unnecessary’ risk was eliminated. In practical terms this means that the plaintiff must show that the defendant unreasonably failed to take such steps as would reduce the risk to what was a reasonable, that is a socially acceptable, level.¹²

As to the first issue, Miles CJ said that the magnitude of the risk was considerable, but it could not be said that there was a high degree of probability that the harm would eventuate. His Honour held that some risk of psychiatric harm was reasonably foreseeable, but said that it was not foreseeable that the plaintiff had some particular vulnerability which made him more susceptible to psychiatric harm than an ordinary member of the Caracas diplomatic mission. As to the second issue, his Honour concluded that the discharge of the duty required that an officer posted to Caracas be given some preparation beyond that appropriate to less stressful posts. However, the action failed because even

⁹ (1993) Aust Torts Rep 81-217.

¹⁰ (1937) 57 CLR 1, 16.

¹¹ Miles CJ confirms that ‘this is not a nervous shock case’: (1991) 104 ACTR 1, 17. It is interesting that though his Honour makes reference to the judgment of Windeyer CJ in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, he does not quote Windeyer J’s statement (at 404) that ‘Foreseeable harm caused by a master to the mind of his servant is just as much a breach of his duty of care for him as harm to his body would be’.

¹² (1991) 104 ACTR 1, 15.

if the plaintiff had been warned prior to departure about the conditions he was likely to face, his enthusiasm was such that the warning was unlikely to have deterred him from taking up the post, and so causation was lacking.

A few months later, in a very similar case, *Wodrow v Commonwealth*,¹³ Miles CJ became the first judge to award damages for work stress and its consequences, but this award was overturned on appeal by the Full Federal Court.¹⁴ The plaintiff, an engineer employed in the Department of Defence, suffered a chronic anxiety neurosis as a result of the treatment he received at the hands of his superiors, specifically in a minute criticising his failure to prepare a report on the 'Fast Frigates Project' and his work generally over a long period. Miles CJ held that issuing the minute constituted a failure to take reasonable care for the plaintiff's safety, and that it was reasonably foreseeable that it was likely to result in the harm which the plaintiff had suffered. However, on appeal it was held that the minute was incapable of injuring an ordinary person, and that the Commonwealth therefore owed no duty to do anything more by reason only of the possibility that the plaintiff might have been affected. The joint judgment of Gallop and Ryan JJ emphasised that the case was to be decided by applying the principles developed in mainstream psychiatric injury cases, referring to the leading High Court authorities,¹⁵ and noted specifically that what was required was foreseeability of psychiatric harm.

The first case to hold an employer liable for work stress was an English case, *Walker v Northumberland County Council*,¹⁶ building on the principles established by the early Australian authorities. Two earlier English cases also helped to lay the foundation for the principle finally established in *Walker*. The first, *Johnstone v Bloomsbury Health Authority*,¹⁷ was dominated by contractual issues: faced with a claim by a young hospital doctor for work stress caused by having to work more than 88 hours a week, the defendant applied to strike it out on the basis that his contract of employment required him to work a 40-hour week and be on call for a further 48 hours. Significantly, in light of later developments in Australia, a majority of the Court of Appeal held that the

¹³ (1991) 105 FLR 278.

¹⁴ (1993) 45 FCR 52.

¹⁵ Namely *Bunyan v Jordan* (1937) 57 CLR 1; *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1; *Mount Isa Mines v Pusey* (1970) 125 CLR 383; *Jaensch v Coffey* (1984) 155 CLR 549. Gallop and Ryan JJ also referred to the then leading House of Lords case, *McLoughlin v O'Brian* [1983] 1 AC 410, and to the discussion of these issues in the first edition of Handford, above n 7. Interestingly, *Gillespie v Commonwealth* was not cited by either Miles CJ or the Full Court.

¹⁶ [1995] ICR 702.

¹⁷ [1992] 1 QB 333.

contract did not provide a good defence: according to Stuart-Smith LJ the employer's obligation to take reasonable care not to injure the plaintiff's health prevailed over the contractual undertaking, and Sir Nicolas Browne-Wilkinson VC agreed on the more restricted ground that the employer owed an obligation to take such care of the employee's health as was consistent with the contract. Then, in *Petch v Customs and Excise Commissioners*,¹⁸ a case of a civil servant who had a mental breakdown, was transferred to another department on his return to duty but subsequently fell ill again and had to retire on medical grounds, the defendant admitted that following the plaintiff's return to work after the initial breakdown it was under an obligation to take reasonable care that the duties allotted to him did not damage his health, but the Court of Appeal held that it was not in breach: the steps that had been taken, far from being negligent, were a sensible attempt to solve the problem.

The duty recognised in *Johnstone* and admitted in *Petch* was confirmed, and held to have been breached, in *Walker*. The plaintiff was employed by the defendant local authority as a social services officer responsible for an area with a growing population and a high proportion of childcare problems. Due to his caseload, and the shortage of staff available to assist him, he suffered a nervous breakdown due to stress and was off work for three months. It was agreed that extra assistance would be provided when he returned to work, but this happened only for a short period, and the plaintiff found himself not only catching up with the backlog of work which had accumulated in his absence but carrying as big a load as before. He suffered a second mental breakdown six months later and had to stop work permanently. Colman J held that though the initial breakdown was not foreseeable, once he returned to work the defendant ought to have foreseen that if he was exposed to the same workload there was a risk he might suffer another nervous breakdown. By failing to provide additional assistance, they were in breach of duty and liable for the damage suffered.

Colman J set the relevant duty in the context of the duties owed by employers to their employees. He said:

There has been little judicial authority on the extent to which an employer owes to his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform. It is clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take

¹⁸ [1993] ICR 789.

reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employee as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care . . .¹⁹

Once the duty had been established the standard of care was to be measured by the normal yardstick of reasonable conduct, taking into account not only the foreseeability of harm but other considerations such as the magnitude of the risk, the seriousness of the consequences of the risk eventuating and the cost and practicability of preventing it. His Lordship said that the approach to reasonable foreseeability of work-engendered psychiatric injury was helpfully illustrated by the approach of Miles CJ in *Gillespie*, quoting the passage quoted above.²⁰

Following the decision in *Walker*, there was a steady accumulation of English case law on work stress. Though *Walker* and the other early cases involved stress due to overwork, the principles were clearly capable of application to other situations, as shown by two cases involving police defendants: one where a voluntary worker was subjected to a traumatic experience by being asked to be present as an appropriate adult while police interviewed the suspected perpetrator of the 'House of Horrors' murders,²¹ and another where a female police officer had been subjected to a campaign of victimisation and harassment by other officers.²²

Australian courts, while they had begun to identify the applicable principles, had not up to this point made a finding of liability in a work stress case. However, the importance of work stress as an identifiable category of psychiatric injury claims was confirmed by a group of cases between 1998 and 2000, culminating in the decision of the New South Wales Court of Appeal in *New South Wales v Seedsman*,²³ and Colman J's judgment in *Walker* played a key part in this process. The first of the series was *Arnold v Midwest Radio Ltd*,²⁴ where the plaintiff claimed damages for a major depressive illness sustained during a three-month period as sales manager and features

¹⁹ [1993] ICR 702, 710.

²⁰ (1991) 104 ACTR 1, 15, quoted above, text p 152.

²¹ *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421.

²² *Waters v Commissioner of Police of the Metropolis* [2000] 4 All ER 934.

²³ (2000) 217 ALR 583.

²⁴ (1998) Aust Torts Rep 81-472.

coordinator of the *Townsville Independent News*, caused by the conduct of the defendant's manager, for example constant swearing and abuse, homophobic behaviour, throwing chairs across the room, asking the plaintiff to procure someone to commit a murder, and refusing to allow her to visit her dying father. Cullinane J found that the plaintiff had stated a cause of action, confirming that the work stress cases were founded on general principles relating to the duties of employers. He cited *Gillespie* and *Wodrow*, bracketing them with the leading mainstream psychiatric damage cases. However, the Queensland Court of Appeal reversed the decision, though only on evidential and factual grounds.²⁵

Next, the work stress principle was expressly accepted by Queensland first instance judges in two cases concerning prison officers. In *Gallagher v Queensland Corrective Services*,²⁶ the plaintiff, the operations manager of a correctional centre, suffered a depressive illness which he alleged was due to the stress of his position, in particular overcrowding in the prison, inadequate staff, and an increase in the number of high security prisoners. Jones J found that the defendant was in breach of the duty it owed as an employer to take reasonable care not to cause psychiatric injury, citing *Wodrow* and Windeyer J's judgment in *Pusey*. The Queensland Court of Appeal accepted that this duty of care was 'uncontroversial',²⁷ but reversed the initial finding of liability on the ground that the decision on the breach and causation issues was flawed. In *Zammit v Queensland Corrective Services Commission*,²⁸ where another prison officer claimed to have suffered work-related stress disorder, Muir J said that the defendant, as the plaintiff's employer, owed him the ordinary employer's duty to take reasonable care to avoid exposing employees to unnecessary risk of injury. He held that the duty had been breached, and awarded damages. There was no appeal. Though this appears to be the first Australian case in which damages were awarded for work stress, its impact is reduced because the defendant admitted that the duty extended to psychiatric injury. However, Muir J made brief reference to mainstream cases such as *Pusey*, plus a brief mention of *Wodrow*.

In contrast, *Sinnott v FJ Trousers Pty Ltd*²⁹ is particularly valuable for its full discussion of the duty issues in a work stress context. The plaintiff complained that he was required to work long hours and do work he was not

²⁵ *Midwest Radio Ltd v Arnold* (1999) EOC 92-970.

²⁶ [1998] QSC 150.

²⁷ *Queensland Corrective Services Commission v Gallagher* [1998] QCA 426, [14] (de Jersey CJ).

²⁸ [1998] QSC 169.

²⁹ [2000] VSC 124.

qualified to do, and that his requests for assistance and training were ignored, resulting in him suffering mental illness. The defendant sought to strike out the statement of claim, which caused Gillard J to concentrate on the issue of duty. The defendant argued that there was no liability for mental illness unless this was consequent on physical injury or 'nervous shock', ie a 'sudden shock' of the kind required by Brennan J in *Jaensch v Coffey*³⁰ (but subsequently rejected by the High Court³¹). Gillard J described this as a 'startling proposition', one which meant that 'although an employer cannot break the body of his employee during the course of his employment, nevertheless he is permitted to break the mind at will irrespective of the circumstances'.³² His Honour held that Brennan J's statement was not intended to lay down a principle of general application, and did not exclude recovery of damages for purely mental illness consequent on negligence by an employer. This statement was supported by reference to all the leading Australian cases – *Gillespie, Wodrow, Arnold and Gallagher* – plus the English decisions in *Petch* and *Walker*. More than any previous decision, Gillard J in this case firmly identified the work stress cases as a separately identifiable category.

One month after this decision, the New South Wales Court of Appeal in *New South Wales v Seedsman*³³ finally confirmed that Australian law recognised the work stress cases as one particular category of case within the employer's general duty of care. The short judgment of Mason P, dealing specifically with the duty aspects, is of especial importance in this regard: though his Honour did not refer to *Sinnott*, he identified the essential nature of the duty in exactly the same way. Beth Seedsman was a police constable who spent several years in the child mistreatment unit dealing with badly abused children, and was then transferred to the Major Crime Squad, where she had to deal with sexual assault cases. As a result, she began to experience symptoms of post-traumatic stress disorder. At first instance, it was found that this illness was caused by negligence on the part of the Police Service, in that they had failed to provide her with a safe system of work and had failed to take sufficient steps to prevent her from the mental injuries which could result from exposure to such cases. On appeal, Spigelman CJ affirmed that it was reasonably foreseeable that police work of this kind could cause psychiatric illness, and that the case fell into the

³⁰ (1984) 155 CLR 549.

³¹ *Tame v New South Wales* (2002) 211 CLR 317.

³² [2000] VSC 124, [39].

³³ (2000) 217 ALR 583.

work stress category. Mason P agreed with the Chief Justice, but added a valuable discussion of the duty aspects. He said that, provided breach of duty and foreseeability of psychiatric harm could be established, a claim for pure psychiatric illness could succeed if the plaintiff could establish a duty based on breach of the employer's duty of care. This proposition, he said, was supported by the work stress cases such as *Walker* and *Gillespie*, which showed that in this regard English law and Australian law were the same. In particular, even though in other areas of psychiatric injury law the courts had adopted control devices requiring sudden shock and a normal standard of susceptibility, these were not essential to a successful claim for pure psychiatric illness if brought by a person who could establish an independent duty of care, such as that owed by an employer to employees.³⁴ Over the next few years, the principles outlined in *Seedsman* were consistently adopted.³⁵

II RESTATEMENT IN ENGLAND

By 2002, there was some feeling in England that the law had perhaps gone too far – that lower courts were making damages for the effects of work stress too readily available. The awards in three of the four appeals before the English Court of Appeal in *Hatton v Sutherland*³⁶ were substantial: £90,756, £101,041 and £157,541 respectively.³⁷ This case has now become the leading English authority on liability for work stress. The plaintiffs were two teachers, an administrative assistant at a local authority and a raw materials operative in a factory. Whereas the teachers had not told their employers that their health was suffering due to overwork, the local authority worker had made two formal complaints, but no additional assistance had been provided even though the authority had acknowledged it was necessary. The Court of Appeal allowed the appeals in all but the third case.

Hale LJ referred to the wider considerations involved in properly setting

³⁴ Ibid [154]-[165]. These general control devices were later rejected by the High Court in *Tame v New South Wales* (2002) 311 CLR 317.

³⁵ See eg *Allen v Western Australia* [2000] WASCA 221; *State Rail Authority of New South Wales v Reodica* [2000] NSWCA 371; *Finn v Queensland Ambulance Service* [2000] QSC 472; *Kelly v Northern Meat Holdings Pty Ltd* [2001] QSC 14; *Mannall v New South Wales* [2001] NSWCA 327; *New South Wales v Coffey* [2002] NSWCA 361; *O'Leary v Oolong Aboriginal Corporation* [2004] NSWCA 7.

³⁶ [2002] ICR 613.

³⁷ Note also *Lancaster v Birmingham City Council* (unreported, Birmingham County Court, 5 July 1999), in respect of which the *Birmingham Evening Mail* commented: 'The story of Beverley Lancaster, awarded £67,000 for stress brought on by her job, will send shivers down every boss's spine'; and a contemporary cartoon showing a solicitor referring a client's question to a barrister: 'He wants to know if he can sue the justice system for cutting his stress payout'.

the standard of liability for the effects of stress at work:

The law of tort has an important function in setting standards for employers as well as for drivers, manufacturers, health care professionals and many others whose carelessness may cause harm. But if the standard of care expected of employees is set too high, or the threshold of liability too low, there may also be unforeseen and unwelcome effects upon the employment market. In particular, employers may be even more reluctant than they already are to take on people with a significant psychiatric history or an acknowledged vulnerability to stress-related disorders. If employers are expected to make searching inquiries of employees who have been off sick, then more employees may be vulnerable to dismissal or demotion on ill-health grounds. If particular employments are singled out as ones in which special care is needed, then other benefits which are available to everyone in those employments, such as longer holidays, better pensions or earlier retirement, may be under threat.³⁸

Against this background, Hale LJ restated the principles to be applied in work stress cases, summarising the applicable law in a series of 16 propositions clearly intended for the future guidance of lower courts.³⁹ The list of propositions is too long to be quoted here, but in essence Hale LJ said that there are no special control mechanisms applying to claims for psychiatric injury arising from the stress of doing the work the employee is required to do: the ordinary principles of employers' liability apply. Because the parties are already in an employment relationship, the threshold question is whether this kind of harm to this particular employee is foreseeable. A number of factors are listed as relevant in applying this test, for example the nature and extent of the work done, and signs from the employee of impending harm to health. Employers are usually entitled to assume that the employee can withstand the normal pressures of the job, and to take what they are told by the employee at face value. Employers are only in breach of duty if they have failed to take steps which are reasonable in the circumstances, taking into account the usual considerations – the magnitude of the risk, the gravity of the harm, the cost and practicability of prevention and so on. Among various particular considerations listed, it was suggested that an employer who offers a confidential counselling service, with reference to appropriate counselling or treatment services, will be unlikely to be in breach of duty. Finally, as regards causation, the claimant must show that the

³⁸ [2002] ICR 613, [14].

³⁹ *Ibid* [18]-[42]. The 16 propositions are summarised at [43].

breach of duty has caused or materially contributed to the harm suffered: it is not enough simply to show that occupational stress has caused the harm.

The importance of *Hatton* was confirmed by the House of Lords in *Barber v Somerset County Council*,⁴⁰ an appeal by one of the teachers whose damages award had been overturned by the Court of Appeal in *Hatton*. The House of Lords unanimously upheld Hale LJ's principles but ruled that the Court of Appeal had taken the wrong view of Mr Barber's case on its facts. Even if he had not said enough about his workload and his symptoms in his meetings with the senior management team at his school, more importance should have been attached to his unexplained absences, and the team should have made inquiries about his problems and asked what might be done to ease them. The House of Lords made particular reference to Hale LJ's discussion supporting the proposition that an employer was usually entitled to assume that the employee could withstand the normal pressures of the job unless aware of some particular problem or vulnerability. Lord Walker preferred an earlier statement of Swanwick J in a case from the 1960s,⁴¹ but Lord Scott took a different view.⁴² In an attempt to provide further guidance for first instance judges, the Court of Appeal in *Hartman v South Essex Mental Health and Community Care NHS Trust*⁴³ suggested that there was no real inconsistency between the two statements. Scott Baker LJ said that 'Lord Walker was not expressing disagreement with anything Hale LJ said but simply sounding a word of caution that no two cases were the same and that Hale LJ's words should not be applied as it were by rote regardless of the facts'.⁴⁴

Thirteen years on, it is clear that Hale LJ's propositions in *Hatton*, together with the supplementary explanations provided by *Barber* and *Hartman*, have had the desired effect of satisfactorily regulating work stress claims in the English courts.⁴⁵ Judges consistently quote and apply the principles set out in

⁴⁰ [2004] ICR 457.

⁴¹ *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783.

⁴² [2004] ICR 457, [65] (Lord Walker), [5] (Lord Scott).

⁴³ [2005] ICR 782.

⁴⁴ *Ibid* [10].

⁴⁵ Examples from Court of Appeal cases include *Harding v Pub Estate Co Ltd* [2005] EWCA Civ 553; *Vahidi v Fairstead House School Trust Ltd* [2005] EWCA Civ 765; *Heyward v Plymouth Hospital NHS Trust* [2005] EWCA Civ 939; *Hone v Six Continents Retail Ltd* [2005] EWCA Civ 922; *Pakenham-Walsh v Connell Residential (Private Unlimited Company)* [2006] EWCA Civ 90; *Deadman v Bristol City Council* [2007] EWCA Civ 822; *Connor v Surrey County Council* [2011] QB 429. There are many more at first instance, *Daniel v Secretary of State for the Department of Health* [2014] EWHC 2578 (QB) being perhaps the most recent.

these three cases. A couple of minor qualifications apart,⁴⁶ they work satisfactorily and have produced a stable body of case law.

III RESTRICTION IN AUSTRALIA

Hatton clearly performed a very important role in restating the English law of work stress, but did not represent a decisive break with the past – the overall impression is of continuity of development going all the way back to the original *Walker* decision. The experience in Australia has been very different. In *Koehler v Cerebos (Australia) Ltd*,⁴⁷ The High Court of Australia adopted a wholly new approach to work stress claims, one which places much more emphasis on the content of the duty and its relationship with the employee's contract of employment – a line of inquiry which was not pursued in previous Australian cases and has been almost totally absent in England. *Koehler* means that it is now much more difficult for Australian workers to claim for psychiatric injury caused by stress at work, at least in cases where the stress was caused by the amount of work which the worker had to do.

Mrs Koehler had been a sales representative negotiating sales of the defendant's products to supermarkets but was made redundant. Instead she was offered a job setting up displays in supermarkets, working three days a week. When she saw the list of stores she was required to visit, she immediately notified her superiors that it would be impossible to cover them all in three days, and that she would either have to have help, or more time to do the work. She repeated these complaints on a number of occasions, both orally and in writing, but there was no reduction in her duties. After five months, she resigned. She went to see her doctor, complaining of aches and pains and difficulty in moving as a result of lifting heavy cartons, but the doctor diagnosed a stress-related condition which over the next few months developed into a moderately severe depressive illness. At first instance in the District Court of Western Australia it was held that the defendant, with its knowledge of the industry and the plaintiff's workload, should have foreseen that if it did not review its operation and her workload, there was a risk of injury of the kind that occurred, but on appeal to the Full Court it was held that the judge had not properly determined this fundamental issue, since the plaintiff had not made

⁴⁶ See eg *Daw v Intel Corporation UK Ltd* [2007] 2 All ER 126; *Dickens v O2 plc* [2009] IRLR 58 (effect of providing counselling service); *Dickens v O2 plc* (apportionment).

⁴⁷ (2005) 222 CLR 44.

any specific complaint about the likelihood of physical or psychiatric injury.⁴⁸ However, the Full Court referred to *Hatton* and noted, with no apparent disapproval, that the Court of Appeal had said that there were no specific control mechanisms applying to work stress claims, and that the question was simply whether this kind of harm to this particular employee was reasonably foreseeable. It was also observed that Hale LJ had said that harm to health may sometimes be foreseeable without an express warning,⁴⁹ though the Full Court's holding does not seem to be consistent with this principle. In an attempt to have the first instance decision restored, Mrs Koehler obtained special leave to appeal to the High Court.

The High Court dismissed the appeal. In a judgment concurred in by four of the five sitting judges,⁵⁰ it was confirmed that the Full Court was right to conclude that a reasonable person in the position of the employer would not have foreseen the risk of psychiatric injury to the employee.⁵¹ Given the nature of Mrs Koehler's complaints, which related entirely to the physical problem of getting her work done in the time available, and gave no suggestion that the difficulties she was experiencing were affecting her health, her employers had no reason to suspect that she was at risk of psychiatric injury.⁵² There was no indication of any particular vulnerability on Mrs Koehler's part which might have affected the position.⁵³ It might be thought that this is a somewhat inflexible application of the foreseeability test. If the employee complains that it is physically impossible to do the work required in the time given to do it, and the employer offers no relief but simply requires the employee to keep going month after month (or resign), are there no circumstances in which the employer might be expected to deduce that some sort of breakdown in physical or mental health may be on the cards, despite the absence of an express warning? The employee who stoically battles on, or who makes some sort of reference to his or her workload but is reluctant to disclose personal medical details, will be in a worse position than one who pours out a litany of problems at the earliest opportunity.

The failure to foresee the risk of psychiatric injury was the reason why the

⁴⁸ *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322.

⁴⁹ *Ibid* [57] (Hasluck J).

⁵⁰ McHugh, Gummow, Hayne and Heydon JJ.

⁵¹ Callinan J delivered a separate concurring judgment.

⁵² (2005) 222 CLR 44, [27].

⁵³ *Ibid* [41].

High Court ultimately dismissed the appeal,⁵⁴ but of much greater significance was the new approach outlined by the High Court to the duty of care. Hitherto, the duty had simply been said to be part of the employer's obligation to provide a safe workplace, and courts would then proceed to the central question of whether this kind of harm to this particular employee was foreseeable – the 'threshold question' identified by Hale LJ in *Hatton*.⁵⁵ The High Court, however, said that the proper starting point was to identify the content of the employer's duty of care:

The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. ... Consideration of these obligations will reveal a number of questions that bear upon whether, as was the appellant's case here, an employer's duty of care to take reasonable care to avoid psychiatric injury requires the employer to modify the work to be performed by an employee. At least the following questions are raised by the contention that an employer's duty may require the employer to modify the employee's work. Is an employer bound to engage additional workers to help a distressed employee? If a contract of employment stipulates the work which an employee is to be paid to do, may the employee's pay be reduced if the employee's work is reduced in order to avoid the risk of psychiatric injury? What is the employer to do if the employee does not wish to vary the contract of employment? Do different questions arise in cases where an employee's duties are fixed in a contract of employment from those that arise where an employee's duties can be varied by mutual agreement or at the will of the employer? If an employee is known to be at risk of psychiatric injury, may the employer dismiss the employee rather than continue to run that risk? Would dismissing the employee contravene general anti-discrimination legislation?⁵⁶

The Court accordingly rejected the proposition that the 'threshold question' was the only question that needed to be considered.⁵⁷

Given that issues about the content of the duty of care were not examined

⁵⁴ *Ibid* [40].

⁵⁵ [2002] ICR 613, [23].

⁵⁶ (2005) 222 CLR 44, [21].

⁵⁷ *Ibid* [23].

in any detail in the courts below, the Court suggested that it was sufficient for the purposes of the present case to note that Mrs Koehler's agreement to undertake the work assigned to her ran contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to her psychiatric health.⁵⁸ In other cases the agreement to perform the work might have greater significance:

An employer may not be liable for psychiatric injury to an employee brought about by the employee's performance of the duties originally stipulated in the contract of employment. In such a case, notions of 'overwork', 'excessive work', or the like have meaning only if they appeal to some external standard. ... Yet the parties have made a contract of employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care.⁵⁹

The Court also referred to the ruling in *Tame v New South Wales*⁶⁰ that 'normal fortitude' was not a precondition to liability for psychiatric injury, and said it was not to be reintroduced into the employer-employee field.⁶¹ Though it might be right to say as a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress, it was a much greater step to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.⁶² Because the employer's duty was owed to each particular employee, seeking to read the contract as subject to a qualification which would excuse performance if it was or might be injurious to psychiatric health encountered two difficulties:

First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job. Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle. Secondly, seeking to qualify the operation of the contract as a result of information the employer *later* acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of

⁵⁸ Ibid [25], [28].

⁵⁹ Ibid [29].

⁶⁰ (2002) 211 CLR 317.

⁶¹ (2005) 222 CLR 44, [33].

⁶² Ibid [34].

basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied.⁶³

The High Court's newfound focus on the content of the duty of care can be traced to the speech of Lord Rodger of Earlsferry in *Barber v Somerset County Council*,⁶⁴ an appeal to the House of Lords by one of the teachers whose cases were considered by the English Court of Appeal in *Hatton*. His Lordship said that in determining what steps the Council should have taken to provide Mr Barber with assistance, insufficient attention had been paid to the contract between them. Given that the demands made on Mr Barber were not excessive in themselves, but only because of some factor in his personality which made him more vulnerable to developing a mental illness as a result of work stress, the issue was what steps the Council had to take when by reason of this vulnerability Mr Barber was liable to suffer injury to his mental health if he carried out his duties as stipulated in his contract. Lord Rodger said:

[W]hat matters is the view that an employer can be under a duty of care to provide an employee with assistance, of uncertain scope and duration, to enable him to perform his contractual duties.

That view also lies at the heart of the judge's perception of the council's duty of care in this case. Mr Barber would be at work, drawing his normal pay but doing less than his contractual duties – the council being obliged to provide him with assistance to top up the deficit. It is easy to see that in practice, colleagues would often rally round to help a teacher when he returned after being off sick. And they might well do so at other times when they felt that, perhaps because of a family illness, a colleague was going through a difficult patch. No doubt, a head teacher would try to create an atmosphere that would be conducive to such mutual assistance. But it is rather a different thing to say that the council's duty of reasonable care to an employee requires them to provide him with assistance for an indefinite period even to the extent of employing a supply teacher so that he can do the amount of work he can cope with, but less than the amount for which he is being paid in terms of his contract.⁶⁵

Lord Rodger concluded that the imposition of a tortious duty of reasonable care on the employer to provide such assistance did not sit easily with the contractual arrangements in such cases.

⁶³ *Ibid* [36] (*italics in original*).

⁶⁴ [2004] ICR 457, [17], [24]-[35].

⁶⁵ *Ibid* [31]-[32].

The High Court's focus on the content of the duty of care and its relationship with the contract between the parties is clearly of major importance in cases such as *Koehler* itself when the issue is stress caused through overwork. It might be thought to have less relevance in other kinds of cases, such as those where a work stress claim is based on harassment, victimisation or bullying by other employees. However, ten years' experience of the effect of *Koehler* on Australian work stress jurisprudence shows that the various considerations brought to the fore in this case constitute the basis of the inquiry in all sorts of cases. It is now time to examine the decision of McMillan J in *AZ v The Age*⁶⁶ as a characteristic and important example of the current approach of Australian courts in work stress cases.⁶⁷

IV *AZ v THE AGE* AND THE CURRENT AUSTRALIAN APPROACH

*AZ*⁶⁸ was first employed by *The Age* newspaper as a photographer in 1984. She alleged that she became sensitised to the risk of psychiatric injury during the course of her employment, as a result of the kinds of assignments she was given to cover. Then, in 2003, she was assigned to photograph families of the victims of the 2002 Bali bombings, who were being interviewed for a first anniversary story. The job required her to be present at the interviews. She claimed that the contents of the interviews were 'heart-wrenching and sad', and that she was given no support to help her deal with the effect they had on her. Following the Bali assignment, she continued to be affected by the interviews: her condition gradually worsened, she ceased working for the newspaper in 2005 and had not worked since. She claimed that the defendant owed her a duty to take reasonable care to avoid her suffering psychiatric injury or at least minimise such suffering, and that the breach of this duty had caused her to suffer psychiatric injury, described as post-traumatic stress disorder and major depression.

McMillan J, after briefly outlining the essential facts and issues, summarised the law of negligence as it applied to such cases.⁶⁹ An analysis of

⁶⁶ *AZ v The Age (No 1)* [2013] VSC 335.

⁶⁷ For other good examples, see *Hegarty v Queensland Ambulance Service* [2007] QCA 366; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; *S v New South Wales* [2009] NSWCA 164; *Hardy v Mikropul Australia Pty Ltd* [2010] VSC 42; *Reeves v New South Wales* [2010] NSWSC 611; *Taylor v Haileybury* [2013] VSC 58; *Brown v Maurice Blackburn Cashman* [2013] VSCA 122; *Swan v Monash Law Book Co-operative* [2013] VSC 326; *Doulis v Victoria* [2014] VSC 395; *Johnson v Box Hill Institute of TAFE* [2014] VSC 626.

⁶⁸ Pursuant to an order made by McMillan J, the plaintiff's identity was suppressed.

⁶⁹ *AZ v The Age (No 1)* [2013] VSC 335, [18]-[38].

her approach shows the continuing importance of the High Court's judgment in *Koehler*, together with contributions made in subsequent cases, where similar analyses may be found. Following McMillan J, the inquiry proceeds through several stages.

A *Duty of care*

The employer's duty of care in work stress cases is an aspect of the employer's general, non-delegable, duty to take reasonable care for the safety of their employees. McMillan J, like most other judges, cited the High Court's statement of this duty in *Czatyрко v Edith Cowan University*⁷⁰ (a case decided on the same day as *Koehler*). She then noted that it was now well-established that an employer's duty extends to taking reasonable steps to prevent its employees from suffering psychiatric harm, as demonstrated by *Koehler* and other cases.

B *Foreseeability and content of the employer's duty of care*

The existence of the duty is usually uncontroversial, as it was in *AZ*.⁷¹ The court then has to ask what *Koehler* confirmed was still the central question, namely whether psychiatric injury to the particular employee was reasonably foreseeable. However, *Koehler* has made it clear that this question has to be considered in the context of the content of the employer's duty,⁷² and more recently, in *Kuhl v Zurich Financial Services Australia Ltd*,⁷³ the High Court has emphasised that the scope and content of the duty depend on the circumstances of the case. Accordingly, McMillan J in *AZ* said that, in considering what a reasonable employer had to do in discharging its duty to the plaintiff in cases involving psychiatric harm to an employee, a number of considerations were relevant.

First, as *Koehler* emphasised, looking to the content of the duty focuses attention on the obligations of the parties under the contract of employment. McMillan J quoted the two passages from the High Court's judgment quoted

⁷⁰ (2005) 214 ALR 349, [12].

⁷¹ But duty is occasionally in issue, as in *Rawlings v Rawlings* [2015] VSC 171, where the court had to determine whether the relationship of the parties was an employment relationship or a family relationship.

⁷² (2005) 222 CLR 44, [18].

⁷³ (2011) 243 CLR 361, [20], [22], referred to in work stress cases such as *Swan v Monash Law Book Co-operative* [2013] VSC 326, [154].

above, the first stating the general principle⁷⁴ and the second affirming that the employer is entitled to assume, in the absence of signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job, and that information later acquired would not affect the obligations of the parties, because they are fixed at the time of contracting.⁷⁵ These passages are almost always quoted or referred to in work stress cases.

Secondly, McMillan J drew attention to the fact that the High Court has held that normal fortitude is not a precondition to liability for psychiatric injury,⁷⁶ a principle echoed in *Koehler*.⁷⁷ This cleared the ground for her Honour to restate general principles: that as confirmed by *Koehler*, the central inquiry remained whether in all the circumstances the risk of a particular plaintiff sustaining recognisable psychiatric illness was reasonably foreseeable, and that the test of foreseeability was the *Shirt* test of whether the risk was not far-fetched or fanciful.⁷⁸

Applying this to the industrial context, McMillan J referred to a number of considerations that had been emphasised in *Koehler*. Assessing foreseeability invited attention to the nature and extent of the work being done by the particular employee, and the signs given by the employee concerned.⁷⁹ However, there was no positive duty on an employer to acquire knowledge of special weakness. The fact that a psychiatrist placed in the same position as an employer might have foreseen a risk of psychiatric injury does not mean that a reasonable employer should be regarded as likely to form the same view.⁸⁰ Pressure and stress are part of the system of work under which people carry out their daily responsibilities.⁸¹ McMillan J also referred to other High Court cases emphasising the relevance of industry and contemporary community standards.⁸²

⁷⁴ (2005) 222 CLR 44, [21].

⁷⁵ *Ibid* [36].

⁷⁶ *Tame v New South Wales* (2002) 211 CLR 317, 384 (Gummow and Kirby JJ).

⁷⁷ (2005) 222 CLR 44, [33]. In *Nationwide News Pty Ltd v Naidu*, nothing turned on the fact that the trial judge had erroneously stated that the test was based on normal fortitude: (2007) 71 NSWLR 471, [13] (Spigelman CJ). The *Civil Liability Acts* have now endorsed the minority position in *Tame* that the test is whether it is foreseeable that a person of normal fortitude might suffer a recognised psychiatric illness: see eg *Civil Liability Act 2002* (WA) s 5S(1).

⁷⁸ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J). The *Civil Liability Acts* have now adopted a different test: see eg *Civil Liability Act 2002* (WA) s 5B.

⁷⁹ (2005) 222 CLR 44, [35].

⁸⁰ *Ibid* [55] (Callinan J).

⁸¹ *Ibid* [57] (Callinan J).

⁸² Eg *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, 308-309 (Mason, Wilson and Dawson JJ).

Finally, McMillan J drew attention to some important considerations adumbrated by Keane JA – now, of course, a Judge of the High Court – in one of the most influential post-*Koehler* work stress cases, *Hegarty v Queensland Ambulance Service*.⁸³ In this case, an ambulance officer who was required to attend many distressing scenes, but received no counselling or psychiatric support, claimed damages for psychiatric injury. The Queensland Court of Appeal held that even if the defendant had adopted a system of training of supervisors suggested by the plaintiff it would not have come to the conclusion after discussions with the plaintiff and his wife that it should advise him to seek psychological assessment and treatment. Keane JA noted that special difficulties may attend the proof of cases of negligent psychiatric injury, because the risk of injury may be less apparent than in cases of physical injury;⁸⁴ and that determining what a reasonable employer would do in response to a foreseeable risk of harm raised important considerations respecting the private and personal nature of psychiatric illness.⁸⁵

Occasional cases (not cited in *AZ*) address the limits of the employer's duty. Thus police authorities are not responsible for remarks by fellow-officers, official complaints, or advice given by a lawyer about being called as a witness before a Royal Commission;⁸⁶ and an employer does not owe a duty in respect of the harm caused to employees working away from home who are influenced by other employees to consume alcohol and use drugs.⁸⁷

C Breach of duty

If a reasonable employer should, in the circumstances of the case, have foreseen the risk of psychiatric injury to the particular employee, the next question is whether the employer is in breach. As McMillan J noted, this was a matter of applying general negligence principles: 'In assessing what a reasonable employer would do in response to a risk of foreseeable harm, it is also relevant to consider the probability and gravity of the harm to the plaintiff, the nature and capacity of the employer and the cost and inconvenience of precautions.'⁸⁸ Here McMillan J referred to a number of judicial statements emphasising the importance of avoiding 'litigious hindsight', including a Victorian medical

⁸³ [2007] QCA 366.

⁸⁴ *Ibid* [41].

⁸⁵ *Ibid* [43]-[47].

⁸⁶ *New South Wales v Rogerson* [2007] NSWCA 346.

⁸⁷ *Hardy v Mikropul Australia Pty Ltd* [2010] VSC 42.

⁸⁸ *AZ v The Age (No 1)* [2013] VSC 335, [33].

negligence case where the Court of Appeal said that ‘in a case like this, where something unforeseen has gone wrong, it is important to avoid the temptation of looking back from the patient’s present condition and reasoning that, because of what has occurred, there must have been a significant risk of its occurrence that should have been avoided’.⁸⁹ Other work stress cases emphasise the importance of avoiding litigious hindsight: for example, statements to this effect in judgments of Keane JA and Spigelman CJ.⁹⁰ The emphasis is therefore on what the employer did in response to the risk.⁹¹

D Causation

As McMillan J noted, if the defendant is found to have breached its duty, the court must consider whether the breach caused the harm suffered. There is, of course, nothing new about this as a general principle, but her Honour noted the importance of another statement of Keane JA in *Hegarty v Queensland Ambulance Service* to the effect that whether a response to a perceived risk is reasonably necessary to ameliorate that risk is likely to be attended with a greater degree of uncertainty in psychiatric injury cases, because ‘the taking of steps likely to reduce the risk of injury to mental health may be more debatable in terms of their likely efficacy than the mechanical alteration of the physical environment in which an employee works’.⁹² The task of the plaintiff was to establish that it was more probable than not that the risk of injury would have been prevented or ameliorated.

A useful summary of the task of the court at the causation stage (not cited by McMillan J) is provided by Maxwell P in *Findlay v Victoria*, who said that:

When ... a plaintiff alleges a negligent failure to act, the causal link between the breach of duty and the claimed damage can only be established by means of a counterfactual hypothesis. That is, the plaintiff must propound an alternative state of facts premised upon the

⁸⁹ *Hookey v Paterno* (2009) 22 VR 362, [109] (Nettle and Redlich JJA). McMillan J also quoted *Rosenberg v Percival* (2001) 205 CLR 434, [16] (Gleeson CJ).

⁹⁰ *Hegarty v Queensland Ambulance Service* [2007] QCA 366, [47] (Keane JA); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, [19] (Spigelman CJ).

⁹¹ In cases where the *Civil Liability Acts* apply, the statutory provisions on breach supersede the common law: see eg *Civil Liability Act 2002* (WA) s 5B. For an example, see *Doherty v New South Wales* [2010] NSWSC 450. However, in some jurisdictions the Acts do not apply to workplace injuries, a point not appreciated by the trial judge in *Miskovic v Stryke Corporation Pty Ltd* [2011] NSWCA 369. In *Christos v Curtin University of Technology (No 2)*, it was not necessary to decide whether the statutory provisions applied: [2015] WASC 72, [631] (McKechnie J).

⁹² [2007] QCA 366, [41]. In cases where the *Civil Liability Acts* apply, the statutory provisions on causation supersede the common law: see eg *Civil Liability Act 2002* (WA) s 5C.

defendant's having exercised reasonable care and, specifically, upon there having been no relevant failure to act. The plaintiff's counterfactual hypothesis must identify: (a) what the defendant would have done had reasonable care been exercised; and (b) how the taking of that action (or those actions) would have averted the loss or damage which the plaintiff in fact suffered.⁹³

E *The resolution of the issues in AZ*

The plaintiff's case was that if not by 2002, then certainly by 2003, the defendant knew or ought to have known that there was a risk of psychiatric injury to journalists when they undertook tasks of the nature that the plaintiff was undertaking and that there was a need to protect them against this risk. It was submitted that the defendant was under a duty to put in place trauma awareness training, a culture of education and support, a program of monitoring and responding to issues and in particular a peer support program, and a system for education, relocation and counselling. There was also an alternative argument that the defendant had knowledge of the plaintiff's vulnerability by virtue of her cumulative exposure to trauma over the period of her employment, known as early as 2003, and that the defendant, armed with this knowledge, should have taken a number of listed actions. It was contended that on either argument, by not taking the specified measures the defendant was in breach, and this was causative of the injury.⁹⁴

McMillan J said that there were three issues for decision:

- Whether there was a foreseeable risk of psychiatric injury to the plaintiff at the time of and following the Bali assignment owing to her work on that assignment;
- If a risk was foreseeable, what a reasonable employer in the position of the defendant would do in response to that risk, and in particular whether the scope and content of the duty of care extended to the measures suggested by the plaintiff;
- In the event that the defendant had breached its duty of care, whether that aspect of the breach was causative of the injury to the plaintiff.⁹⁵

Applying these principles to the facts, the case failed at the first hurdle. McMillan J came to the conclusion that the plaintiff's injury was not

⁹³ [2009] VSCA 294, [2].

⁹⁴ *AZ v The Age (No 1)* [2013] VSC 335, [39]-[41].

⁹⁵ *Ibid* [45].

foreseeable.⁹⁶ The defendant was not aware and should not have been aware that the plaintiff's photographic career put her at particular risk, if indeed it did so. The evidence showed that her career was not centred on coverage of events that could be characterised as traumatic or stressful such that a reasonable employer would be put on notice of a risk of psychological sensitisation.⁹⁷ The argument based on known vulnerability also failed.⁹⁸ Though strictly speaking it was unnecessary to go further. McMillan J also held that even if the risk to the plaintiff of psychiatric injury as a result of her work was foreseeable, the defendant was not in breach of its duty to the defendant, and that in any case any failure did not cause injury to her.⁹⁹

V TRENDS AND CONTRASTS

The High Court's decision in *Koehler* marked the emergence of a distinctively Australian law of liability for work stress. This was the point at which Australia rejected the English doctrine as restated by the Court of Appeal in *Hatton* and the House of Lords in *Barber*. Ten years on from *Koehler*, it is evident that some important differences have emerged between the two jurisdictions. An attempt will now be made to identify some trends and contrasts which can be found in the case law of the two countries.

First, the separateness of Australian and English law is confirmed by the citation practice of the courts. In contrast to the early years, when the recognition of liability for work stress in England was assisted by the citation of Australian case law, and English cases helped to bring about the final endorsement of employer liability for workplace trauma in Australian jurisdictions, it is now rare for the jurisprudence of one country to be referred to in the other. In Australia, as already noted, the High Court decision in *Koehler* forms the starting point, and English cases are now cited only rarely. For example, Hale LJ's leading judgment in *Hatton* has been cited in only a handful of post-2005 Australian cases,¹⁰⁰ and Dixon J in *Swan v Monash Law*

⁹⁶ Ibid [233].

⁹⁷ Ibid [239]-[240].

⁹⁸ Ibid [247].

⁹⁹ Ibid [281], [304].

¹⁰⁰ The only cases in which *Hatton* has been cited (apart from references to the judgment of Hale LJ having been disapproved by *Koehler*) are *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, [223] (Beazley JA); *Swan v Monash Law Book Co-operative* [2013] VSC 326, [171]; *Rawlings v Rawlings* [2015] VSC 171, [54]; note also *New South Wales v Burton* [2006] NSWCA 12, [74] (Basten JA) (on apportionment of damages). In *MacKinnon v Bluescope Steel Ltd* [2007] NSWSC 774 *Hatton*

Book Co-operative noted that ‘UK cases must be approached with care’.¹⁰¹ In England, the citation of Australian cases is almost unknown. Courts address themselves to the principles as stated by Hale LJ and the other leading English cases, and *Koehler* and other Australian cases hardly ever receive a mention.¹⁰²

Secondly, *Koehler* on its facts involved a plaintiff whose complaint was that she was unable to carry out her stipulated duties in the time allotted to her. Cases where psychiatric injury results from stress due to overwork provide the most obvious scenario for the employer to rely on the employee’s contractual obligations. This argument proved very attractive to the High Court, even if it ultimately dismissed the plaintiff’s case on foreseeability grounds. It was suggested in the wake of *Koehler* that it would now be very difficult for a claim to succeed where stress resulted from the amount of work the employee was required to perform as part of his or her ordinary duties; and that given the High Court’s emphasis on what was agreed at the time of entering into the contract and the consequent irrelevance of subsequent attempts to vary the terms as a result of information later acquired about the vulnerability of the employee, it might be difficult for an Australian employee to succeed in a case like *Walker*, where an English court held that psychiatric injury to an employee caused by the stress of carrying out the agreed contractual duties became foreseeable after the initial breakdown.¹⁰³ Ten years on, no Australian plaintiff is known to have been successful in recovering damages in a work stress claim based on having to do too much work.¹⁰⁴ In contrast, overworked plaintiffs

was cited at length by the trial judge but his judgment was overturned on appeal sub nom *Mackinnon v Bluescope Steel (AIS) Pty Ltd* [2009] NSWCA 94.

¹⁰¹ [2013] VSC 326, [170].

¹⁰² The only case in which *Koehler* is known to have been cited is *Garrod v North Devon NHS Primary Care Trust* [2006] PIQR Q1. Counsel for the defendant referred to the statement in *Koehler* at [21] (quoted above p 163) that the content of the duty of care cannot be considered without taking into account the obligations under the contract. Henriques J (at [78]) simply brushed this submission aside, saying: ‘The facts of that case were very different. The Claimant had never sustained any breakdown and the hours worked were within contract.’

¹⁰³ Peter Handford, ‘Work Stress: Retreat or Revolution?’ (2005) 13 *Tort Law Review* 159; Handford, note 7 above, 564.

¹⁰⁴ Claims based on the amount of kind of work the employee was required to do failed in *Miskovic v Stryke Corporation Pty Ltd* [2011] NSWCA 369; *Taylor v Haileybury* [2013] VSC 58; *Larner v George Weston Foods Ltd* [2014] VSCA 62; and *Rawlings v Rawlings* [2015] VSC 171. In *Doulis v Victoria* [2014] VSC 395, where the plaintiff succeeded, the claim was based in part on a heavy workload but also on being exposed to highly stressful circumstances in the work environment and allegations of bullying.

have recovered damages in a long line of post-*Hatton* English cases.¹⁰⁵

There may be limited value in comparing different cases because ultimately the decisions always turn on the facts. However, it is noteworthy that there are a few English decisions where plaintiffs have succeeded even though they have not gone so far as to make a specific complaint about the effect their work is having on their mental health, whereas in *Koehler* it was specifically noted that the plaintiff's complaints were limited to the physical difficulty of doing the work in the time available. *Hone v Six Continents Retail Ltd*¹⁰⁶ is a prominent example. The plaintiff, having been employed by the defendant as a pub manager for the past four years, was sent to work at a different hotel in August 1999. The workload was excessive, causing him to suffer stress, and he saw his doctor in May 2000 and complained of headaches and insomnia. A few days later he collapsed at work and had not worked since. His case was that he suffered from psychiatric injury caused by stress attributable to being required to work excessive hours without adequate support. Originally there had been four employees at the hotel, but two left in April 2000 and were not replaced. On 19 April the plaintiff had a meeting with the defendant's operations manager and voiced concerns about his workload and the lack of an assistant manager (something he had complained about previously). The manager accepted that the plaintiff needed help but none was provided. The judge found that the plaintiff made no mention of his headaches or other symptoms at this meeting. Despite this, it was held that on and after the date of this meeting injury to health attributable to stress at work was reasonably foreseeable. *Sayers v Cambridgeshire County Council*¹⁰⁷ was another case where the plaintiff complained about her heavy workload, plus the attitude of her manager. Eventually she left work suffering from a psychiatric illness, never to return. Unknown to her employers, the plaintiff had a past history of depression; she had been tearful and upset on occasions, and had taken limited time off work, but concealed the true nature of her illness. It was held that even assuming her illness was caused by overwork, it was not foreseeable in the circumstances, and even if the court had reached a different conclusion on this issue the employers were not in breach of duty because they had reduced her workload and taken

¹⁰⁵ *Hone v Six Continents Retail Ltd* [2006] IRLR 49; *Garrod v North Devon NHS Primary Care Trust* [2007] PIQR Q1; *Hiles v South Gloucestershire NHS Primary Care Trust* [2006] EWHC 3418 (QB); *Daw v Intel Corporation UK Ltd* [2007] EWCA Civ 70; *Dickins v O2 plc* [2008] EWCA Civ 1144; *Whiteside v Croydon London Borough Council* [2010] EWHC 329 (QB).

¹⁰⁶ [2006] IRLR 49.

¹⁰⁷ [2007] IRLR 29.

effective steps to manage her grievance. However, what is important for present purposes is that Ramsey J accepted that there was no requirement that the employee must specifically complain that his or her health is at risk in order to make the necessary risk foreseeable.¹⁰⁸ *Clark v Chief Constable of Essex Police*¹⁰⁹ was somewhat different in that the plaintiff complained of stress and psychiatric injury caused by bullying rather than overwork. Tugendhat J refused a strikeout application. It was held that psychiatric injury was foreseeable because senior officers knew that the plaintiff was unable to cope with the treatment he was receiving from his superiors, even if the plaintiff had not used the complaint systems that were in place to make any allegation of breach of duty affecting his health (as opposed to complaining about the police officers concerned).¹¹⁰

A third point of comparison between the Australian and English cases relates to the importance of the argument based on the plaintiff's contractual obligations which proved so attractive to the High Court in *Koehler* in filling out the content of the employer's duty and rejecting the contention that in light of the well-recognised duties of employers to employees, which extended to psychiatric as well as physical harm,¹¹¹ work stress was simply a matter of foreseeability. The High Court's argument was derived from a passage in the speech of Lord Rodger of Earlsferry in *Barber v Somerset County Council*¹¹² which has already been quoted,¹¹³ and as we have seen, the view adopted by the High Court in *Koehler* has now become a pillar of the orthodox Australian approach to work stress cases. However, in England, Lord Rodger's argument has had virtually no effect. The case which paid most attention to the employee's contractual obligations was the pre-*Hatton* case of *Johnstone v Bloomsbury Health Authority*,¹¹⁴ the case of the young hospital doctor required by his contract to work 40 hours a week and be on call for another 48 hours, who became ill as a result. He sought a declaration that he should not be made to work more than 72 hours a week, and damages for his illness. The Court of Appeal recognised that the defendant owed a duty to take reasonable care not to injure the plaintiff's health, but also that the plaintiff was under a contractual

¹⁰⁸ Ibid [136]. This point is also supported by *Barber v Somerset County Council* [2004] ICR 457 (above p 8).

¹⁰⁹ [2006] EWHC 2290.

¹¹⁰ Ibid [227], see also [20].

¹¹¹ Above p 167.

¹¹² [2004] ICR 457.

¹¹³ Above p 165.

¹¹⁴ [1992] 1 QB 333.

duty to be available for a stated number of hours. Leggatt LJ held that the express contractual term should prevail over the tort duty, but Stuart-Smith LJ reached the opposite conclusion, supported on slightly more restricted grounds by Sir Nicolas Browne-Wilkinson VC who held that the employer owed an obligation to take such care of the employee's health as was consistent with his contractual undertaking.

Lord Rodger's arguments in *Barber* have received almost no attention in subsequent English cases. There are only two cases where such arguments are known to have been put to the court, and on each occasion they were brushed aside. In *Garrod v North Devon NHS Primary Care Trust*,¹¹⁵ Henriques J noted that counsel for the defendant had referred to the passage in which Lord Rodger asked what steps the defendant Council had to take when by reason of some individual vulnerability Mr Barber was liable to suffer material injury to his health if he carried out the duties that were stipulated in his contract and for which he was paid his salary.¹¹⁶ Counsel also cited the High Court's statement in *Koehler*¹¹⁷ about contract and the content of the duty of care. These arguments were not further referred to in the judgment, and Henriques J had no difficulty in coming to a finding that the defendant was in breach of its duty. In *Dickins v O2 plc*,¹¹⁸ an issue arose whether the claimant should have been granted time off when she requested it due to stress. Counsel for the defendant submitted that to do so, when she was presenting herself at her place of work, would have been a breach of contract because the employer was under a duty to provide work, a submission described by Smith LJ as 'nonsense'. 'This was a woman who was asking for time off to recover from her feelings of exhaustion. To send her home on full pay pending investigation of her problem by Occupational Health could not possibly be described as a breach of contract.'¹¹⁹

Finally, in Australia at least, it is clear that the courts are developing an awareness that not all work stress cases are the same. Though the influence of *Koehler* and contractual considerations is strongest in overwork cases, other categories of case are developing, for example those where the essence of the complaint is that the plaintiff has been subject to bullying, victimisation or

¹¹⁵ [2007] PIQR Q1, [76].

¹¹⁶ *Barber v Somerset County Council* [2004] ICR 457, [26].

¹¹⁷ Above pp 164-165.

¹¹⁸ [2008] EWCA Civ 1144.

¹¹⁹ *Ibid* [33].

harassment,¹²⁰ and another group of cases involving plaintiffs subjected to particular kinds of traumatic situations due to the nature of their work. *AZ* is an example of this third category, in which police and ambulance officers also feature prominently.¹²¹ The first judicial intimation that all kinds of cases are not the same came from the New South Wales Court of Appeal in *New South Wales v Fahy* (albeit not really a work stress case, because it involved a specific incident), where Spigelman CJ noted that trauma situations were not really comparable to cases like *Koehler* which dealt with excessive workload.¹²² More recently, Dixon J in *Swan v Monash Law Book Co-operative*,¹²³ a case of bullying, harassment and intimidating conduct by the plaintiff's manager, commented on *Koehler* and other overwork cases as follows:

Although the general principles that are identified in these decisions are plainly those that must be applied in determining the content of the defendant's duty of care in the circumstances, there are material distinctions between stressful situations that are a consequence of accepted working conditions or work overload and those that are a consequence of unreasonable behaviour in the form of workplace bullying by a work colleague. The plaintiff did not choose to work with a bully, or work in stressful conditions arising other than from the nature and extent of the tasks that she agreed to perform. The plaintiff's complaints to the board were not about the onerous nature of the tasks. Her complaints suggested, and were understood as suggesting, her psychiatric health may have been at risk albeit that the complaints might also be suggesting an industrial relations type problem.¹²⁴

Most recently, the same judge in *Rawlings v Rawlings*,¹²⁵ referring to the observations of the High Court in *Kuhl v Zurich Financial Services Australia*

¹²⁰ Successful claims include *New South Wales v Mannall* [2005] NSWCA 367; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; *Swan v Monash Law Book Co-operative* [2013] VSC 326; *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64; *Johnson v Box Hill Institute of TAFE* [2014] VSC 626. For an example of a claim that failed, see *Brown v Maurice Blackburn Cashman* [2013] VSCA 122.

¹²¹ Successful actions brought by police officers include *S v New South Wales* [2009] NSWCA 164; *Doherty v New South Wales* [2010] NSWSC 450; *Reeves v New South Wales* [2010] NSWSC 611. *Hegarty v Queensland Ambulance Service* [2007] QCA 366 was an unsuccessful claim by an ambulance officer.

¹²² *New South Wales v Fahy* [2006] NSWCA 64, [12] (Spigelman CJ). The successful appeal to the High Court (*New South Wales v Fahy* (2007) 81 ALJR 1021) concerned breach of duty.

¹²³ [2013] VSC 326.

¹²⁴ *Ibid* [163].

¹²⁵ [2015] VSC 171.

Ltd that the scope and content of the duty depend on the circumstances of the case,¹²⁶ commented: ‘Psychiatric injury in the workplace can be suffered from stress in at least two distinct scenarios, one is circumstances of bullying and/or employee behaviour that creates stress for a plaintiff, the other scenario being circumstances of overwork or pressure from employer directed workload or tasks. In this proceeding, the court is concerned with the latter scenario.’¹²⁷ The statements offer some hope that in cases factually different from *Koehler* some of the statements made by the High Court, particularly those about contract, may not be so rigidly applied, though it has to be admitted that such considerations did not meet with much success in the recent Western Australian bullying case of *O’Donovan v WA Alcohol and Drug Authority*.¹²⁸

In England, there is perhaps not the same consciousness that different categories are developing, although the *Hatton* principles have been successfully applied in at least two bullying cases.¹²⁹ The argument that categories do not seem to be developing can perhaps be met by the rejoinder that they do not need to do so, since it is clear that Hale LJ’s principles can be satisfactorily applied in every class of case.¹³⁰ Though the trauma category, for example, does not yet seem to have developed in England,¹³¹ cases of this kind can be found in other jurisdictions where the *Hatton* principles have been adopted – Scotland and Northern Ireland.¹³²

VI CONCLUSION

Ten years on from *Koehler*, perhaps not all the author’s previous forebodings about the future of Australian work stress law¹³³ have been realised. *AZ* and other cases show how the courts have begun to use the arguments in *Koehler*

¹²⁶ Above p 167.

¹²⁷ [2015] VSC 171, [60].

¹²⁸ [2014] WASCA 4. The Court of Appeal adopted the view that threats of disciplinary action by the plaintiff’s superior should have been treated as raising a cause of action based on an intentional tort.

¹²⁹ *Melville v Home Office*, one of six cases before the Court of Appeal in *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782; *Clark v Chief Constable of Essex Police* [2006] EWHC 2290 (QB); note also *Green v DB Group Services (UK) Ltd* [2006] IRLR 764 where there was prior vulnerability.

¹³⁰ See *Mullen v Accenture Services Ltd* [2010] EWHC 2336 (QB), [37] (Judge Clark QC).

¹³¹ *Connor v Surrey County Council* [2011] QB 429 (pressure on head teacher from Muslim-dominated school governing body) is perhaps an exception: the case deals mainly with principles of administrative law.

¹³² *Fletcher v Argyll and Bute Council* [2007] CSOH 174 (teacher faced with unruly pupils); *McCarthy v Highland Council* 2012 SLT 95 (teacher suffered series of assaults at hands of autistic boy); *McClurg v Royal Ulster Constabulary* [2007] NIQB 53 (exposure to trauma during terrorist campaign).

¹³³ Above n 103.

and other cases as the foundation for a consistent approach to work stress claims, and there are at least some indications that Australian courts may be prepared to recognise that not all work stress claims are the same. This said, it remains curious that when in the context of psychiatric injury claims generally Australian common law has accepted that the general test that should be applied is one of reasonable foreseeability, and that other suggested limitations are hard to defend,¹³⁴ it adopts a more restrictive approach in the work stress context. This seems more curious when it is realised that English law is the other way round: though the House of Lords in the 1980s came close to accepting reasonable foreseeability as the governing principle in psychiatric injury cases,¹³⁵ it endorsed the need for policy restrictions in the 1990s¹³⁶ – while in the following decade accepting that in the work stress context the existence of a well-recognised duty of care owed by employer to employee allowed the courts to adopt foreseeability of harm as the threshold principle.¹³⁷ One day the High Court may perhaps get an opportunity to reconsider the impact of *Koehler* in cases not falling within the overwork scenario: until that day comes, it is difficult to foresee the future direction of Australian work stress cases.

¹³⁴ *Tame v New South Wales* (2002) 211 CLR 317.

¹³⁵ *McLoughlin v O'Brian* [1983] 1 AC 410.

¹³⁶ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

¹³⁷ *Barber v Somerset County Council* [2004] ICR 427, endorsing *Hatton v Sutherland* [2002] ICR 613.