

**KOEHLER V CEREBOs (AUSTRALIA LTD):
WORK STRESS AND NEGLIGENTLY INFLICTED
PSYCHIATRIC ILLNESSES**

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I INTRODUCTION

The phenomenon of work stress-induced psychiatric illness claims in the 1990s has continued apace into the new millennium. Stress-related disability claims have been virtually removed from the workers' compensation legislation applicable in the State of Western Australia¹ and this has facilitated common law claims for work stress-related psychiatric illnesses. On 6 April 2005, the High Court in *Koehler v Cerebos (Australia) Ltd*² ('*Koehler*') handed down a major decision on an employee's negligence action arising from the State of Western Australia against the employer for stress-induced psychiatric illness due to excessive workload.

The facts in *Koehler* are not complicated. The employee was originally employed as a full-time sales representative prior to being retrenched by the employer. Upon retrenchment, she accepted an offer from the employer to re-engage her on a part-time basis (for three working days per week). However, during the course of her part-time employment, she complained to the management on many occasions about the workload. She suggested reducing the number of stores she was required to cover or to work an additional fourth day. However, the management did not take any action.³

Subsequently, she developed a psychiatric illness which was found to have been caused by her work. The employee duly commenced an action in negligence based, inter alia, on the employer's breach of its common law duty to

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1 *Workers Compensation and Injury Management Act 1981* (WA), amended by *Workers Compensation Reform Act 2004* (WA) (formerly *Workers' Compensation and Rehabilitation Act 1981* (WA)). On work stress-related disability issues under the Act, see generally *Housing Industry Association Limited v Murten* [2004] WASCA 139 (Unreported, Steytler, Em Heenan and Le Miere JJ, 25 June 2004); *FAI General Insurance Co Ltd (De-Registered) v Goulding* [2004] WASCA 167 (Unreported, Murray, Steytler and Templeman JJ, 9 August 2004).

2 [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005).

3 Ibid [10].

provide a safe system of work.⁴ The Commissioner in the District Court of Western Australia found that the workload was indeed ‘excessive’.⁵ Further, the Commissioner indicated that the employer did not require any particular expertise to foresee that the employee would suffer a risk of injury in the circumstances. As the employer could have easily provided the employee with assistance without much difficulty or expense but failed to do so, judgment was given in favour of the employee. However, on appeal, the Full Court of the Supreme Court of Western Australia overturned the Commissioner’s decision.⁶ The Full Court decided that the employer could not have reasonably foreseen the employee’s psychiatric illness arising from the workload. More importantly, there was no specific evidence to suggest that the employer should be alerted to the employee’s risk of psychiatric injury.⁷ On further appeal, the High Court⁸ unanimously confirmed the decision of the Full Court that the employer had not breached its duty of care to the employee.

In reaching their decision, the majority of the High Court in *Koehler* took pains, in a joint opinion, to delineate the scope of the employer’s duty of care. Indeed, the learned judges regarded the duty of care issue as a ‘proper starting point’⁹ instead of focusing solely on the issue of the requisite standard of care.¹⁰ Two important issues were explored in the decision: first, with regard to the nature of ‘reasonable foreseeability’ and the vulnerabilities of employees in workplace stress-induced psychiatric illness cases and secondly, in relation to the more controversial issue of the impact of the employment contractual framework in determining the duty of care.

4 The alternative claims were in respect of the breach of (i) an implied term of the contract that the employer would provide a safe system of work; and (ii) statutory duty under the *Occupational Safety and Health Act 1984* (WA). For a discussion on an action for breach of the implied term of mutual trust and confidence, see Douglas Brodie, ‘Health and Safety, Trust and Confidence and *Barber v Somerset County Council*: Some Further Questions’ (2004) 33 *Industrial Law Journal* 261.

5 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [16] (McHugh, Gummow, Hayne and Heydon JJ).

6 *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322 (Unreported, Malcolm CJ, McKechnie and Hasluck JJ, 15 December 2003).

7 *Ibid* [75]–[76]. For a comment on the Full Court’s decision, see Peter Handford, ‘Work Stress: Rubbing Salt in the Wounds’ (2004) 12 *Tort Law Review* 126.

8 McHugh, Gummow, Hayne and Heydon JJ delivered a joint opinion while Callinan J provided a separate opinion.

9 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [19] (McHugh, Gummow, Hayne and Heydon JJ).

10 See the House of Lords’ decision in *Barber v Somerset County Council* [2004] 1 WLR 1089 which focused primarily on the issue of whether the employer breached the standard of care. However, it is noted that the House did not overrule and, indeed, some of the Law Lords endorsed Lord Justice of Appeal Hale’s propositions (in the English Court of Appeal decision in *Hatton v Sutherland* [2002] 2 All ER 1, [29]) which included, inter alia, the criteria for ascertaining the existence of a duty of care. See also *Barber v Somerset County Council* [2004] 1 WLR 1089, [35] (Lord Rodger).

II THE NATURE OF FORESEEABILITY AND THE VULNERABILITIES OF EMPLOYEES

The joint opinion of the High Court in the present case concluded that a reasonable person in the shoes of the employer would *not* have foreseen the risk of psychiatric illness to the employee. Hence, the employee's claim in negligence failed. One major basis for the conclusion was that the employer in *Koehler* had no reason to suspect that the employee was at risk of psychiatric illness.¹¹ The joint opinion emphasised that the proper test is to ascertain whether 'psychiatric injury to the *particular* employee is reasonably foreseeable',¹² and this is not based on 'a matter of general knowledge that some psychiatric illnesses may be triggered by stress'.¹³

According to the learned judges, the employer is entitled to assume that the employee would be able to perform his or her work in the absence of 'evident' signs warning of the possibility of psychiatric illness.¹⁴ In the particular context of employee stress arising from the workload, this principle has been adopted in various case precedents, including *Petch v Customs and Excise Commissioners*,¹⁵ *Walker v Northumberland County Council*¹⁶ (with its unusual factual matrix) as well as in *Hatton v Sutherland*¹⁷ ('*Hatton*'). Further, Lord Justice of Appeal Hale's statement of the principle above in *Hatton* was considered by Lord Walker in the House of Lords' decision in *Barber v Somerset County Council*¹⁸ ('*Barber*') as 'useful practical guidance'.¹⁹

The joint opinion determined that *Koehler's* complaints in the present case 'did not suggest danger to her psychiatric health' but merely indicated an 'industrial relations problem'.²⁰ Hence, there was no reason for the employer to suspect any risk to the employee's psychiatric well-being. However, this reasoning and conclusion of the High Court per se does not take into consideration some possible objections to the above principle.

Objections may, for instance, be raised that the principle appears to favour employees who exhibit early warning signs of impending mental breakdown which are reasonably apparent to the employer *or* who are ready and willing to

11 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [27] (McHugh, Gummow, Hayne and Heydon JJ).

12 *Ibid* [34].

13 *Ibid* [35].

14 *Ibid* [36]; *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322 (Unreported, Malcolm CJ, McKechnie and Hasluck JJ, 15 December 2003) [59], [61] (Hasluck J).

15 [1993] ICR 789.

16 [1995] 1 All ER 737. The employee's *second* mental illness was foreseeable based largely on the 'risk of repetition' as the employer knew of the occurrence of the first mental illness and yet did not accede to the employee's request for reduction of workload; however, the *first* mental illness was not foreseeable as there was no evidence that the employee was particularly vulnerable to stress-induced psychiatric injury.

17 [2002] 2 All ER 1, [29]. See also *Bonser v UK Coal Mining Limited* [2003] EWCA Civ 1296, [25], [27], [31], [36].

18 [2004] 1 WLR 1089.

19 *Ibid* [5]–[6], [65] (Lord Scott).

20 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [41] (McHugh, Gummow, Hayne and Heydon JJ).

complain to the employer of health problems prior to the occurrence of the psychiatric harm. Thus, ironically, in terms of liability in negligence, the employers would seem better off if they were blissfully ignorant about these warning signs and problems.²¹ At the same time, it may also be objected that the principle does not take cognisance of the possibility that psychiatric harm can result *without* any warning signs. As in the present case, Koehler was not aware of the impending psychiatric illness, so all she could do in the circumstances was to raise complaints about the workload. As such, it might be argued that it would not be appropriate to deny her recovery for damages.

However, it is submitted that the objections are, on an overall analysis, not entirely convincing and that the above principle enunciated by the learned judges should be endorsed. The law of negligence is concerned with balancing the interests of the employers (freedom of action in the smooth running of the enterprise or the avoidance of unacceptable risks) and the interests of employees (in this case, mental well-being).²² And the balance is to be struck at the level of reasonableness, and not on the mere possibility that psychiatric harm can result without any warning. In a related vein, it is argued that the employer cannot and should not be expected to be clairvoyant about the employee's particular vulnerabilities to psychiatric harm where there are no visible signs or employee complaints of health problems. This is particularly significant in the context of psychiatric harm as compared to the foreseeability of physical harm which is relatively determinate.

Thus, where both employer and employee would not be in a position to know that psychiatric harm would ensue, the responsibility should not fall squarely and solely on the employer's shoulders. Where the employee is solely aware of his or her particular vulnerability, then the onus should be on the employee to protect himself or herself by relating the health problems to the employer. The possibility that this might result in an excess of caution amongst the employees in raising health issues with the employer is likely to be tempered by the resistance of the employees against disclosing their particular physical or mental frailties to the employers lest such revelations adversely affect their jobs. Thus, the principle above based on evident signs and symptoms of psychiatric illness apparent to the employer should be endorsed as it does not lead to excessive intrusions on the freedom of action of an unsuspecting employer and, at the same time, provides due protection for the employee's mental well-being.

With respect to the threshold of foreseeability, the joint opinion appeared to have equated 'reasonable foreseeability' with the risk not being 'far-fetched' or 'fanciful'.²³ Yet, this foreseeability test was not *directly* applied to the facts of the

21 See Alan Sprince, 'Recovering Damages for Occupational Stress: *Walker v Northumberland County Council*' (1995) 17 *Liverpool Law Review* 189, 195: 'For the employer, that would seem to put a premium on ignorance and the "Nelsonian" eye'.

22 See Lesley Dolding and Richard Mullender, 'Law, Labour and Mental Harm' (1996) 59 *Modern Law Review* 296, 299.

23 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [33]. The decisions in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 were cited in support.

case. Justice Callinan, on the other hand, specifically applied Justice Mason's principle in *Wyong Shire Council v Shirt*²⁴ ('*Wyong*') that any risk is foreseeable as long as it is not far-fetched or fanciful, even if the likelihood of the risk materialising is low or remote. It should be noted that Callinan J did not appear to be particularly persuaded by the test in *Wyong* but nonetheless, was 'bound' to apply it.²⁵ In applying Justice Mason's principle in *Wyong*, Callinan J took the view that it was 'far-fetched' for the employee to suffer psychiatric illness within six months of taking up the part-time work.²⁶ Hence, the risk to the employee was not foreseeable. The joint opinion, on the other hand, referred briefly to *Wyong* without relating it to the criterion of foreseeability.²⁷ Thus, while it was not possible to draw from the present decision in *Koehler* any firm conclusions on the status of the foreseeability test in *Wyong*, it is noted that this issue will likely be subject to further scrutiny by the High Court in the near future.²⁸

III DUTY OF CARE AND THE CONTRACTUAL FRAMEWORK

The link between the employment contract and the employer's tortious duty of care was regarded as relatively significant by the High Court in *Koehler*.²⁹ As mentioned above, the joint opinion in *Koehler* concluded that the risk of psychiatric illness was not reasonably foreseeable by the employer. An important basis was the agreement of the employee to perform the work. The agreement was a manifestation of her *willingness* to make the attempt to complete the contractual tasks and, at the same time, was also inconsistent with any concerns of ill-health on her part.³⁰ More importantly, the learned judges considered the existence and nature of this contractual matrix as contrary to the argument that the employer ought reasonably to have foreseen the risks. Thus, the learned judges observed that the effect of her complaints about the workload were diluted. Though the *existence* of the employment contractual relationship was not in question, it is noted that the judges arrived at the opinions and observations above despite the paucity of evidence on the *content* of the contractual relationship.³¹

24 (1980) 146 CLR 40.

25 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [54] (Callinan J).

26 *Ibid* [55].

27 *Ibid* [19].

28 *See Paua Nominees Pty Ltd v Miller* [2005] HCA 232 (Unreported, Callinan and Heydon JJ, 22 April 2005).

29 *Cf Barber* [2004] 1 WLR 1089, [30]. Lord Rodger stated that an employer does not owe a duty of care to the employee to offer alternative safe employment and added that if the employer were to reduce the employee's workload to 'make it safe' for the employee, it would amount to a shift in the contractual duties of the parties. Yet, it is noted that the Law Lord did not adopt in *Barber* a firm position on the impact of the contractual matrix on the tortious duty of care: *Barber* [2004] 1 WLR 1089, [35].

30 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [28] (McHugh, Gummow, Hayne and Heydon JJ).

31 *Ibid* [40]. The judges admitted that the courts below could have paid 'closer attention' to the content of the contractual relationship between the parties.

Although the employment contract stipulated a workload which was 'excessive' as compared to the industry standard, the learned judges took the view that the '[i]nsistence upon performance of a contract cannot be in breach of a duty of care'.³² The judges proceeded to state that they are not inclined to inhibit the making of agreements between the employer and employee as long as they are within the confines of the statutory framework, even in a case where it is found that the employee's contractual duties extend beyond the industry standard.³³

As a further indication of the predominant effect of the employment contract in determining the tortious duty of care, the joint opinion suggested that an employer's knowledge of the employee's vulnerability to the risks of psychiatric injury acquired *after* entering into the employment contract cannot 'qualify' the original contract. This legal proposition rests on the basis that the contractual obligations are 'fixed' unless and until varied by the parties.³⁴ It is submitted, however, that the legal proposition enunciated above is not persuasive.

As a general rule, it is recognised that the employment contract is an important factor in determining the scope of the employer's duty of care due to the respect for party autonomy and for reasons of both efficiency and equity.³⁵ Yet, caution must be exercised before permitting the employment contract to serve as an almost insurmountable barrier to an employee's claims in negligence.

First, the work duties which the employee was required to perform were not *expressly* 'fixed' in a contract at the time of her engagement as a part-time sales representative.³⁶ There was no *express* provision in the letter of engagement about the workload. She was given the 'territory listing' only when she first reported for work whereupon she promptly complained of the number of stores she had to cover. She was then told to try out the job for a month and let the supervisor know if problems ensued, which she did.³⁷ Thus, it seemed that the scope of work duties were subject to possible adjustments and modifications. Hence, the legal proposition that the *express* contractual obligations (particularly the work scope) were 'fixed' at the time of the employment contract does not, with respect, appear relevant to the particular facts in *Koehler*.

Secondly, instead of the express terms of the letter of engagement, the majority may have had in mind *implied* contractual provisions.³⁸ For example, we can refer to the *implied* contractual term to take reasonable care to ensure a safe

32 Ibid [29].

33 Ibid [31].

34 Ibid [36]. However, the judges did state that the general legal proposition may not apply in a case where the employer is entitled to vary the contractual duties of the employee and does so: [37]. But this latter exception is not relevant in the present case: [39].

35 See Wanjiru Njora, 'Employment, Implicit Contracts and the Duty of Care' (2005) 121 *Law Quarterly Review* 33, 34–5. See further the equity issues arising from possible redistribution of work to other employees as mentioned by Hale LJ in *Hatton* [2002] 2 All ER 1, [43].

36 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [8] (McHugh, Gummow, Hayne and Heydon JJ).

37 Ibid [9].

38 Ibid [57]. Justice Callinan, however, was of the view that there were no relevant implied terms which impose a duty on the employer not to ask or require employee to perform the tasks as contracted.

system of work for the employees (which corresponds to the duty in tort). In this regard, the majority may be suggesting that this *implied* obligation is 'fixed' at the time of the formation of the employment contract. However, it should be noted that to assess whether a party had in fact breached the *implied* contractual provision, the surrounding circumstances prior to or at the relevant time of the party's alleged breach of that provision would be relevant. Relevant circumstances may include the employer's subsequent acquisition of knowledge of the employee's particular vulnerability to psychiatric illnesses which could have been avoided by modifications in the work system. There is a material difference between the content of a contractual obligation and the proper manner in which the obligation is given effect or applied in the light of the prevailing circumstances. The majority, in emphasising the 'fixed' nature of the content of the contract, may have unwittingly ignored the significance of the effect and application of these *implied* contractual provisions which *varies* with the prevailing surrounding circumstances.³⁹

Thirdly, the legal proposition outlined by the judges appears, with respect, somewhat restrictive on the employer's post-contract knowledge. Such information about the vulnerabilities of the employee's risk to injury would in the majority of circumstances be acquired *after* the employment contract is entered into. This is because an employer is unlikely to hire a person whom he or she knows is vulnerable to stress-induced psychiatric illnesses. Further, the very nature of stress-induced psychiatric illness means that the signs and symptoms, if any, will likely develop in the course of employment, and *not* before.

Still on this issue of the impact of the contractual relationship, Callinan J appeared to place significantly more emphasis than the majority in *Koehler* on the need for the employee to utilise self-help measures. The learned judge stated of the employee: 'If asked to do more, or if what she agreed to do was more than she could do, then it was for her either to refuse to do it at all, or to relinquish her position'.⁴⁰ It would, however, be more helpful if Justice Callinan's statement was framed as an issue of finding the proper balance between the employer's risks and the employee's well-being. This should take into consideration the surrounding circumstances (including the 'bargaining power' of the employee to refuse the workload entirely or relinquish her position). In *Koehler*, for example, the employee had been retrenched from her full-time employment and it was 'intimated' that she would be restored to a full-time position in six months.⁴¹ In view of the circumstances, a complete refusal to perform the contractual responsibilities or abandonment might jeopardise her chances of securing a full-time position (and the attendant benefits), not to mention the obligation to pay

39 Note also that implied duties can in some circumstances take precedence over the express contractual terms: *Johnstone v Bloomsbury Health Authority* [1991] ICR 269.

40 *Koehler* [2005] HCA 15 (Unreported, McHugh, Gummow, Hayne, Callinan and Heydon JJ, 6 April 2005) [57] (Callinan J).

41 *Ibid* [44].

damages for contractual breach.⁴² It is thus submitted that Justice Callinan's statement above that the employee is free to refuse work or relinquish her position should perhaps be slightly tempered so as to take into account the respective bargaining positions and workplace realities.

IV CONCLUSION

It is hoped that the High Court decision in *Koehler*, in denying recovery to the employee, would ameliorate any undue concerns pertaining to the spectre of indeterminate liability of employers in such claims for stress-induced psychiatric illnesses.⁴³ In this respect, the *Koehler* decision, by emphasising (or re-emphasising) the importance of examining closely the test of foreseeability in respect of stress-induced psychiatric illnesses, serves as a timely reminder. In the context of stress-induced psychiatric illnesses in the workplace, the High Court has decided that this concept of foreseeability must be (a) based on signs and symptoms of psychiatric illness of the particular employee which are reasonably apparent to the employer; and (b) interpreted against the contractual matrix which, as we have seen in *Koehler*, prima facie favours the employer. In this regard, whilst the author agrees with the High Court's approach in (a), he has expressed some reservations about the approach stated in (b).

Nevertheless, the *Koehler* decision has been lauded by the Australian Chamber of Commerce and Industry. In particular, the Chamber welcomed the High Court's approach to foreseeability and stated that it should be adopted in the occupational health and safety statutes in Australia.⁴⁴ As Hale LJ suggested in *Hatton*, the problems of stress at work involve 'difficult issues of policy and practice which are unsuitable for resolution in individual cases before the courts', such that legislation imposing duties on the employer may be preferred to the common law of negligence.⁴⁵ However, in view of the difficulties discussed

42 *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322 (Unreported, Malcolm CJ, McKechnie and Hasluck JJ, 15 December 2003) [10], [19] (Hasluck J). The prospect of obtaining full-time employment in the near future weighed on the employee's decision to persevere with the work.

43 Indeed, in England, there has been a spate of employee claims for stress-induced negligence in the wake of the decision in *Barber*. See *Vahidi v Fairstead House School* [2004] EWHC 2102; *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6 ('*Hartman*'). The English Court of Appeal in *Hartman* stated that there are 'other cases in the pipeline': [1]. However, such perceived concerns with indeterminate liability arising from *Barber* may not be entirely justified, considering that the House did not change the law but, in fact, endorsed the Court of Appeal's decision in *Hatton* on the legal criteria for determining negligence in work stress related cases. Moreover, it should be noted that the decision to allow the employee's claim in *Barber* was, admittedly, fairly close to the 'borderline': [2004] 1 WLR 1089, [67].

44 See Peter Hendy, 'High Court Sends Timely Message on OHS Laws to Regulators' (Press Release, 14 April 2005) <http://www.acci.asn.au/text_files/media_releases/2005/36-05.pdf> at 30 August 2005. See also Peter Hendy, 'Occupational Health and Safety System in Dire Need of Reform: Launch of OHS Reform Blueprint Modern Workplace: Safer Workplace 2005–2015' (Press Release, 28 April 2005) <http://www.acci.asn.au/text_files/media_releases/2005/46-05.pdf> at 30 August 2005; Peter Hendy 'Industry Blueprint Calls for Employee Engagement on Health And Safety' (Press Release, 18 May 2005) <http://www.acci.asn.au/text_files/media_releases/2005/56-05.pdf> at 30 August 2005.

45 *Hatton* [2002] 2 All ER 1, [16].

above, particularly in relation to the impact of the employment contract on the employer's duty of care, it is not advisable to make that leap to 'cast' the judicial rules in statutory form. Further, the state of medical knowledge concerning the connection between work stress and psychiatric illnesses is still developing. Given these circumstances, we may have no alternative but to contend with this uncertainty in the common law of negligence until the above issues are more fully ironed out.

