Seeing into the Mind: Liability for Psychiatric Injury at Common Law

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This paper will consider the tortious liability of an employer at common law for psychological injury. Unlike other situations in which liability for psychological injury may arise, there is no doubt that the proximity of the relationship between employer and employee will give rise to a duty of care, but the nature and scope of such duty and its breach can give rise to difficulties in determining the circumstances in which liability should be found to exist.
For many years the common law was reluctant to embrace the notion of liability for psychological injury, largely by reason of the intangible nature of such injuries and the human psyche itself, this giving rise to a concern that the ubiquitous “flood gates” may be opened. The first restraint placed upon cases of this type was to demand that it be established that a recognisable psychiatric injury had been suffered as distinct from a mere emotional response of upset, distress or anger. This paper is not concerned with that issue and proceeds on the assumption that the worker has suffered injury in the relevant sense.

Given the now widespread public awareness that the incidents and events of employment can and do cause a large amount of psychological stress and injury, as is evidenced for example by the detailed policies regarding bullying and victimisation implemented by many employers and the provision of protocols for reporting and seeking counselling in relation to psychological problems, it may come as a surprise that it was only in 1971 that the High Court confirmed that an employer’s duty of care does in fact extend to cases of psychiatric injury: Mount Isa Mines Limited v Pusey [1971] 125 CLR 383.

In the intervening years, a number of conceptual difficulties have arisen as a result of the very nature of psychological injuries when compared to the obvious and foreseeable risk of physical injury arising out of employment activities. That distinction lies mainly in the difficulty in determining what effect various incidents and events of employment will have on the psyche of an employee and the extent to which an employer should be responsible for the differing ways in which particular individuals will react to those incidents and events.

One further restraint on the scope of the duty of care owed in respect of psychological injury was the notion that it was necessary to establish that the conduct in question could cause psychological injury to a person of “normal fortitude”, this being an attempt to avoid the extension of liability to persons who were unusually pre-disposed or vulnerable to injury of that type. In Tame v NSW; Annetts v Australian Stations Pty Limited [2002] 211 CLR 317 the High Court by narrow majority rejected the “normal fortitude” test as a precondition to establishing liability in cases of psychological injury but nevertheless emphasised that a duty of care once arising requires the person under such duty only to take reasonable steps to avoid or reduce a foreseeable risk of injury.

The application of the common law test of foreseeability arising in the context of the existence and scope of a duty of care as established in Tame (and the long line of authority which preceded it) to the duty of care owed by an employer to an employee in relation to psychological injury was considered by the High Court in Koehler v Cerebos (Australia) Limited [2005] 222 CLR 44.

In that case, the worker was employed on a part time basis and established, as a question of fact, that she was “overworked” in the sense that she had too little time to complete the tasks expected of her. The worker complained to the employer that she was having difficulty undertaking the work expected of her but, significantly, did not bring to the employer’s attention that attempting to complete the work expected of her was affecting her health. Nor was there any evidence that the worker exhibited any outward signs that her health was deteriorating or being adversely affected. The employer did not act on the worker’s complaints or suggestions as to how to improve her workload in any way. Ultimately, the worker was diagnosed as suffering from anxiety and depression. She brought proceedings against the employer in the District Court of WA alleging that her psychological injury had been caused by a failure to provide a safe system of work in that the workload was excessive.

The worker succeeded at first instance, the trial having proceeded only on an alleged breach of the duty of care in tort notwithstanding that the pleadings had in fact raised allegations of breach of contract. The Commission found that the employer had breached its duty of care because the appellant’s workload was excessive and no particular expertise was required to foresee that there was a risk of injury to the worker of the kind that ensued, meaning that the employer had failed to take all reasonable steps to provide a safe system of work. The employer succeeded on appeal and the worker appealed to the High Court.

The worker’s appeal failed, notwithstanding that it was accepted as a question of fact that her workload was excessive and, less certainly, that the employer should have been aware of that
In fact, in reaching this conclusion, the Court focused on the issue of foreseeability in the context of the content and scope of the duty of care, the starting point being that it had been necessary for the worker to establish that a reasonable person in the position of the employer would have foreseen the risk of her suffering psychiatric injury in the circumstances. Emphasis was placed upon two matters.

First, it was found that the employer had no reason to suspect that the worker was at risk of psychiatric injury in the absence of any complaint by the worker expressly to the effect that her workload was adversely affecting her health, or any external indication which ought to have alerted the employer that this was the case, and the absence of any reason to suspect that the worker was pre-disposed, susceptible or vulnerable to suffering such injury.

In the course of so concluding, the majority said (at paras.33 to 35):

“The central enquiry remains whether, in all the circumstances, the risk of a Plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful. It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. Yet it is that proposition, or one very like it, which must lie behind the Commissioner's conclusion that it required no particular expertise to foresee the risk of psychiatric injury to the Appellant. The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable. ... That invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned”.

Thus, whether psychiatric injury is reasonably foreseeable in the relevant sense in a case where the worker is undertaking the work they are employed to do is to be determined by reference to the question of whether there was any basis upon which an employer ought reasonably to have identified a risk of psychiatric injury (as distinct from "stress") and also the nature and extent of the work being performed.

The second matter which the Court emphasised was that there are particular problems in relation to considering the nature and extent of the work being done by the particular employee and, for this reason, it was also considered relevant to the question of foreseeability that the worker had agreed to perform the duties which were a cause of her injury. The court noted that it would be a dangerous extension of an employer's liability if it were responsible in tort for expecting a worker to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the Appellant’s psychiatric health. It runs contrary to that contention because agreement to undertake the work not only evinced a willingness to try but also was not consistent with harbouring, let alone expressing, a fear of danger to health. That is why the protests the Appellant made (that performance of the work within the time available seemed impossible) did not at the time bear the significance which hindsight may now attribute to them. What was said did not convey at that time any reason to suspect the possibility of future psychiatric injury. Although in this case the agreement to perform the work has only the limited
significance we have indicated, that is not to say that, in another case, an employees agreement to perform duties whose performance is later found to be the cause of psychiatric injury may not have greater significance. An employer may not be liable for psychiatric injury to an employee brought about by the employee’s performance of the duties originally stipulated in the contract of employment. In such a case, notions of “overwork”, “excessive work”, or the like have meaning only if they appeal to some external standard. (The industry evidence adduced by the Appellant was, no doubt, intended to provide the basis for such a comparison and, as noted earlier, the Commissioner drew a comparison of that kind by concluding that the Appellant’s workload was excessive.) Yet the parties have made a contract of employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care”.

It is clear from the foregoing, that questions of degree could arise in other cases, for example where the demands of the employer have exceeded or altered the terms of the contract of employment and where the employee may be in an unequal bargaining position in the sense that the worker does not wish to lose their job.

Ultimately, the question will always be whether, having due regard to the contract of employment, it was reasonably foreseeable that a particular worker would develop a psychiatric injury as distinct from merely feeling “stress” associated with their work. Generally speaking, a worker will have difficulty establishing that necessary element of foreseeability unless they can establish that some overt indication of an adverse effect on health is present.

While the same general principles are applicable, it is far more likely that a worker will establish the necessary foreseeability in cases of bullying, harassment, victimisation or ostracism, not least because no contract of employment would be interpreted or viewed as including a worker’s acquiescence in being subjected to such treatment. Further, the potential for such behaviour to result in psychiatric injury must be acknowledged as a matter of common sense as being foreseeable to a prudent employer. This is manifested in the prevalence of anti-bullying policies and protocols and the provision of procedures to report, investigate and address such behaviour enthroned in contracts of employment and the industrial agreements and statues which govern them. It is further significant to note that an employer will generally be vicariously liable for the conduct of its employees committing acts which may be broadly described as bullying and victimisation and may also be liable on the basis of a breach of the duty to provide a safe place of work.

Nevertheless, it does remain necessary for a worker to establish that their injury was foreseeable in the sense discussed in Tame and Koehler. The application of those principles to a case involving bullying and victimisation resulting in psychiatric injury was considered by the Court of Appeal in Nationwide News Pty Limited v Naidu & Anor; ISS Security Pty Limited v Naidu & Anor [2007] 71 NSWLR 471. That case was to some extent complicated by the fact that the worker was employed by a security company and his work was performed at the premises of another company to whom the employer had contracted to provide security services and the bullying and harassment visited upon the worker over a prolonged period was by a manager of the “host” employer. The worker had made complaints regarding his treatment and had been observed to be distressed (crying) and undergoing a change in personality, but these overt indications of a potential for psychiatric injury were apparent to the host employer rather than the employer.

The three Judges of Appeal gave separate judgments.

Spigelman CJ referred to Koehler and noted that it was well recognised in any organisation relationships and situations likely to cause stress would arise and further that many of the normal stressors of life have been “medicalised” in recent decades. His Honour observed (at para.20) that “the law of tort does not require every employer to have procedures to ensure that such relationships do not lead to psychological distress of its employees” and that “there is no breach of duty unless a situation can be seen to arise which requires intervention on a test of reasonableness”. He emphasised that the mere fact that it is well recognised and established that workplace stress, particularly bullying, can lead to recognised psychological injury does not necessarily “lead to the conclusion that the risk of such injury always
requires a response for the purposes of attributing legal responsibility” because “predictability is not enough”. Ultimately, his Honour concluded that although there were signs of “some form of mental disturbance” which were suggestive of “an effect on (the worker’s) mind of an adverse character”, that (at para.58):

“What is required is foreseeability of a recognised psychiatric illness. The signs suggestive of a psychiatric illness, rather than “psychological disturbance”, satisfy the not far fetched and fanciful test of foreseeability. However, they do not, in my opinion, reach the level of possibility which would require the employer or surrogate employer to intervene”.

Thus, in his Honour’s view both the employer and the host employer escaped liability for the claim based in negligence, although it is not entirely clear whether the ultimate conclusion expressed by his Honour related to the issue of foreseeability as informing the scope of the duty of care or in relation to the breach of such duty.

Beazley JA came to a different conclusion in relation to the liability of the host employer, not so much on the basis of any difference in principle from the views expressed by the Chief Justice, but rather on the basis that there was ample evidence that the host employer, including the person committing the bullying and victimisation who was a manager, was well aware of complaints made and the presence of signs of upset, distress and indeed depression. In relation to the employer, however, her Honour noted the submission put on its behalf that “the whole tenor of the decision in Koehler is to make knowledge, through complaints or obvious signs, the touchstone of liability in this area” and its contention that it had no knowledge of the misconduct of an employee of the host employer. Once again, her Honour concentrated on the facts as found, and concluded that psychiatric injury to the worker was foreseeable on the part of the employer, but only on the basis that the employer was vicariously liable for the misconduct of the manager employed by the host employer. This finding may be regarded as somewhat controversial but does not fall within the ambit of this paper. Her Honour, however, go on to find that the knowledge held by employees of the employer itself were not sufficient to” make it reasonably foreseeable ... that (the misconduct of the employee of the host employer) gave rise to a risk of harm”.

Basten JA essentially agreed with the views adopted by the Chief Justice, concluding (at para.424) that:

“It should be accepted that (the employer) had a duty at all times in respect of the safety of its employees, even if it did no more than supply the services of those employees to its principal. ... However, once it was established on the facts that, through its relevant officer, ... (the employer) did not have, nor ought to have had, knowledge of the circumstances which would give rise to a reasonably foreseeable risk of cognisable psychiatric harm to the Plaintiff, its failure to take steps in relation to his safety did not constitute negligence”.

In summary, Koehler established that knowledge of a risk of psychiatric injury, as distinct from an emotional response of “stress” or upset, through complaints directly referring to an adverse effect on health or obvious signs that this was the case, now represents the touchstone of liability in the area of negligence law relating to psychiatric injury arising out of employment. In placing such emphasis on the need for a worker to establish that an employer could have reasonably foreseen psychiatric injury, as distinct from “stress”, by reason of specific complaints or overt signs indicating an adverse effect on mental health, Koehler has placed workers in a difficult position in that it is likely that such complaints or overt signs will only be present after the injury has been suffered or during the suffering of such injury, meaning that there may be little an employer could do to avoid or reduce the risk of injury and therefore could not be regarded as having breached its duty to do so. Further, the necessary causal nexus between the breach of duty and the damage suffered may not be established.

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