SUPREME COURT OF QUEENSLAND

CITATION:	*Govier v Unitingcare Community* [2017] QCA 12
PARTIES:	**TONI MAREE GOVIER** (appellant) **v** **UNITINGCARE COMMUNITY** ABN 28 728 322 186 (respondent)
FILE NO/S:	Appeal No 3825 of 2016 DC No 950 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 56
DELIVERED ON:	10 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2016
JUDGES:	Fraser and Gotterson JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the appeal with costs.**
CATCHWORDS:	EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY – CAUSATION AND FORESEEABILITY – FORESEEABILITY – where the appellant was an employee of the respondent – where the appellant was attacked by a co-worker – where the appellant claims damages for personal injuries arising from the respondent's negligence – whether two letters were sent from the respondent to the appellant in connection with the investigation aggravating the psychiatric injury – whether the respondent owed a duty of care in respect of the content and timing of the letters – whether the contents of the letter implied that the appellant was at risk – whether the risk of the appellant sustaining physical or psychiatric injuries was reasonably foreseeable *Govier v Unitingcare Community* [2016] QDC 56, related *Hayes & Ors v State of Queensland* [2016] QCA 191, cited *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; [2005] HCA 15, cited *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20, cited *Purkess v Crittenden* (1965) 114 CLR 164; [1964] HCA 34 cited *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208, cited

State of New South Wales v Paige (2002) 60 NSWLR 371; [2002] NSWCA 235, cited
Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59, cited
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, cited
Watts v Rake (1960) 108 CLR 158; [1960] HCA 58, cited
Wolters v The University of the Sunshine Coast [2014] 1 Qd R 571, [2013] QCA 228, cited
Woolworths Ltd v Perrins [2016] 2 Qd R 276; [2015] QCA 207, cited

COUNSEL: W Campbell for the appellant
R C Morton for the respondent

SOLICITORS: Kevin Bradley Solicitor for the appellant
McInnes Wilson Lawyers for the respondent

[1] **FRASER JA:** A judge in the District Court gave judgment in favour of the respondent employer upon the appellant's claim for damages for psychiatric injuries resulting from the conduct of a co-worker of the appellant or subsequent conduct of the respondent or from a combination of those alleged causes.

[2] The appellant was employed by the respondent as a disability worker based at the respondent's Ipswich office and from about August 2009 was charged with the care of the respondent's client, Tara, at Tara's premises (the client was identified by that name to seek to maintain her anonymity). At the same time the respondent employed "MD" as a disability worker who also provided care to Tara at Tara's premises. (That co-worker was described at trial as MD in an attempt to maintain her anonymity because of the nature of the allegations made against her by the appellant.) Tara required full-time care. Other co-workers also cared for Tara. Mr Blackett, an employee of the respondent, was the supervisor of the appellant, MD, and Tara's other carers.

[3] After the appellant had worked for the respondent for about 10 months, on 3 December 2009 MD violently attacked the appellant during a crossover of their shifts at Tara's house. The primary judge accepted that the appellant's evidence of that event was generally accurate and found that the appellant feared during the attack that she would die, she suffered physical and psychiatric injuries as a result of the attack, and she escaped by car and was hospitalised.

[4] Because the appellant claimed damages for negligently inflicted psychiatric injury, a central enquiry at trial about liability was "whether, in all the circumstances, the risk of [the appellant] sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful."[1] Whilst any sufficiently vulnerable employee might suffer injury as a result of emotionally challenging conduct of a co-worker it does not necessarily follow that it would be reasonably foreseeable for the employer to conclude that such conduct by the co-worker created a reasonably foreseeable risk that the co-worker's conduct would result "in mental anguish of a kind that could give rise to a recognised psychiatric illness."[2]

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1 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33] (McHugh, Gummow, Hayne and Heydon JJ).

2 *Tame v New South Wales* (2002) 211 CLR 317 at [41], quoted and applied by McMeekin J (with whose reasons Gotterson JA and I agreed) in *Woolworths Ltd v Perrins* [2016] 2 Qd R 276 at [67]-[68].

[5] The appellant's claim against the respondent for damages for the appellant's psychiatric injuries arising out of that event was based primarily upon an alleged breach by the respondent of its duty to the appellant to provide a safe system of work. The appellant alleged that the respondent breached that duty by rostering the appellant and MD in a way which required them to meet at the change of shift. This argument raised the first of the three main issues at the trial. The primary judge succinctly summarised the factual issues upon this first issue and his Honour's resolution of them in the following paragraph:

> "The first issue is whether the employer breached its duty to the plaintiff by rostering the plaintiff and the co-worker so that they met at change of shift. Resolution of that issue raised factual issues: whether the plaintiff had told her supervisor of four specific incidents during which the co-worker had arguably assaulted and physically obstructed the plaintiff; (She had not told her supervisor.) whether the plaintiff had given her supervisor a letter[3] expressing her concerns about the co-worker and asking that she and the co-worker be kept apart, or whether a copy of the letter in the plaintiff's possession is a fraudulent concoction; (She had given a copy to her supervisor.) whether from that letter and oral complaints to the employer the risk of either a physical assault or a psychiatric injury was reasonably foreseeable before the assault; (They were not.) on the alternate hypothesis that a risk of psychiatric injury was foreseeable before the assault, did the defendant breach its duty to take reasonable care by failing to counsel or reprimand the co-worker; (No.) or by failing to ensure that the co-worker did not meet at changes of shift; (No) on the hypotheses that the employer had a duty of care to prevent psychiatric injury and breached its duty, was there a break in the chain of causation because the co-worker finished her shift, departed and returned before assaulting the plaintiff? (No)"[4]

[6] The second main issue in litigation was whether the sending of two letters by the respondent to the appellant after she was injured amounted to a breach of a duty of care owed by the respondent to the appellant. Shortly after MD attacked the appellant, the appellant telephoned Mr Blackett. The appellant told him that she had been attacked by MD, she had called the police, and she was going to the hospital. Mr Blackett went to the hospital and stayed with the appellant until she was seen by hospital staff. Mr Blackett heard the appellant explain to hospital staff that after MD had wrongfully accused the appellant of having stolen MD's bag, MD sat in the appellant's car (with Tara in the car) and subsequently attacked the appellant. Mr Blackett returned Tara to her home and Tara told Mr Blackett during the journey that MD had hit the appellant.

[7] On the same day the respondent's regional manager, aware that the respondent's human resources department had a policy to resolve matters quickly, prepared and had hand-delivered to the appellant's home a letter ("the first letter") which the appellant's flatmate delivered to the hospital in the afternoon. By the first letter the respondent: required the appellant to attend an investigative interview at 11.00 am the following day to discuss "a physical and verbal altercation between yourself and another staff member", noted that an investigation into the appellant's conduct was

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3 The '20 October 2009 letter'.

4 *Govier v Unitingcare Community* [2016] QDC 56 at [3].

being undertaken, directed the appellant not to discuss the incident with any other employee, and informed the appellant that during the investigation she was stood down on full pay. The appellant did not attend the interview because she was too ill; a medical certificate stated that she was totally incapacitated for work on that day. She was urged to attend a re-scheduled meeting a few days later. The appellant was too sick to attend that meeting and was required by an employee of the respondent to supply a doctor's certificate. She obtained a medical certificate which certified that she was not able to work from 7 to 21 December 2009. At a meeting on 9 December 2009, MD told employees of the respondent that the appellant had assaulted MD and made a false complaint to police, the appellant had praised Tara for trying to hold MD, and the appellant had shouted at MD at work in the past.

[8] On Friday 18 December 2009 the appellant received another letter ("the second letter") from an employee of the respondent (Ms Evans) dated 11 December 2009. The second letter stated that: the appellant had refused to attend at the respondent's office on 3 and 8 December 2009; Ms Evans made preliminary findings based on information provided by Tara and MD that the incident had involved kicking, hitting and pushing by the appellant; the appellant had breached a code of conduct; the appellant had made "unnecessary and unwelcome physical contact upon" MD which was inconsistent with her obligations under the code and not appropriate; the appellant had "engaged in behaviour of a violent and inappropriate nature". The second letter made other significant criticisms of the appellant's conduct, and gave the appellant until 23 December 2009 to give written information or an explanation about the incident with reasons why her employment should not be terminated before a final determination was made.

[9] The primary judge found that the suggestion in the second letter that the plaintiff had refused to attend proposed meetings on 3 and 8 December 2009 was inconsistent with the facts and a false and misleading oversimplification of which the respondent knew or ought to have known; by the time this letter was written the respondent knew or should have known that the appellant had asserted that she was too ill to attend the two meetings, and she was in fact too ill to do so. The appellant was too ill to attend the meeting proposed for 23 December 2009. She did not return to work and her employment was formally terminated by the respondent on 28 March 2012.

[10] The primary judge concisely summarised the factual and legal issues, and his Honour's resolution of those issues, concerning the second main issue in litigation, which was whether the respondent's "insensitive first letter and critical second letter to the plaintiff after her injury involved a breach of duty":

> "Resolution of that issue raised factual and legal issues. The factual issues were whether the letters caused injury; (They did.) whether the injury was reasonably foreseeable (It was.) whether by the timing and content of the two letters the employer failed to take reasonable care for the plaintiff; (It did.) The legal issue is whether, in spite of that failure to take reasonable care by the timing and content of the two letters, no employer's duty arose to take reasonable care for the plaintiff's psychiatric health in the timing of and the content of those two letters. (No duty arose.)"[5]

[11] The third main issue at the trial concerned the determination of the amount of loss suffered by the appellant where it had two causes, the assault, and the timing and

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5 [2016] QDC 56 at [4].

content of the first and second letters. The primary judge found that the appellant suffered a chronic post-traumatic stress disorder and a major depressive disorder, and that the respondent's letters caused her a sense of injustice and betrayal, and aggravated her psychiatric injuries. The primary judge assessed quantum against the possibility that his Honour's findings on liability were erroneous. After first assessing quantum upon the hypothesis that the appellant succeeded entirely on liability and that the respondent was responsible both for the injuries caused by MD and for the aggravation of the appellant's condition caused by the respondent's two letters, the primary judge assessed quantum of the appellant's loss caused by the receipt of the two letters upon the different hypothesis that she could not recover the loss caused by MD's assault. Upon that hypothesis, the primary judge held that the proportion of the appellant's total loss which was attributable to the two letters was 15 per cent.

The primary judge's assessment of the evidence of the critical witnesses

[12] Because the appeal involves challenges to findings of fact made by the primary judge it is useful to summarise the primary judge's findings about the reliability of the evidence given by the most important witnesses, the appellant and Mr Blackett.

[13] It was not in issue at the trial that the appellant suffered serious psychiatric injuries as a result of the conduct of which she complained in her claim. A psychiatrist who had interviewed the appellant on many occasions between mid-2000 and 2011, and in early January 2015 observed that she was "extremely anxious and low in mood", at times she "disassociates", she appeared to be in a "trance-like state" and had to be brought back to the interview, as a result she often lost the thread of the conversation and appeared frequently distracted and preoccupied, but there was no apparent evidence of psychotic symptoms and she had reasonable insight and judgment.[6] The primary judge recorded his Honour's impressions of the appellant when she gave evidence over four days, in terms which are consistent with the psychiatrist's evidence. The primary judge referred to occasional inconsistencies within the appellant's evidence, and between her evidence and particulars of her claim, and observed that drawing inferences about honesty or reliability because of those matters was complicated by the appellant's condition. The primary judge was "less inclined to find that inconsistency was caused by lack of honesty and more inclined to attribute it to innocent unreliability", but pointed out that the appellant retained the forensic disadvantage of having the onus of proof.[7]

[14] The primary judge accepted some of the evidence given by Mr Blackett but found that, "[a]s flawed as the plaintiff's memory appeared to be, so too did Mr Blackett's appear."[8] The primary judge referred to Mr Blackett having admitted in evidence that he had little memory of a meeting on 14 October 2009 at the respondent's premises and of another meeting the same day at Tara's place, and stated that he had formed an impression during Mr Blackett's evidence that his memory of the events of relevance in this litigation before the appellant was assaulted on 3 December 2009 was unreliable, and accepted a submission by counsel for the respondent that, "it is clear that Mr Blackett was not a good historian". In accepting the appellant's evidence that the appellant had made several verbal complaints to Mr Blackett about MD's behaviour, the trial judge took into account his Honour's unexceptionable finding that the events before the assault would have had much less significance for Mr Blackett.[9]

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6 Report of Dr Curson, exhibit 8, 11.12.14.
7 [2016] QDC 56 at [7].
8 [2016] QDC 56 at [83].
9 [2016] QDC 56 at [83].

[15] The appellant argued that the primary judge "was somewhat polite…by not using the words he didn't believe him [Mr Blackett] or that "he did not tell the truth", but…that must be what he found."[10] That argument seemed to be based mainly upon the fact that the primary judge accepted the appellant's evidence in preference to evidence given by Mr Blackett on many, but not all, of the significant issues at the trial. The argument is irreconcilable with the careful and detailed reasons given by the primary judge for his Honour's resolution of those issues. There is no basis for this Court to hold that the primary judge in this respect misused his advantage of seeing and hearing the evidence unfold at the trial.

The issues in the appeal

[16] In an amended outline of argument, the appellant concisely described the questions which she sought to agitate in the appeal:

> "1. Whether the trial judge erred in finding that the Appellant had not told her supervisor, Blackett, about the four incidents during which the co-worker, MD, had assaulted and physically obstructed the Appellant.
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> 2. Whether the trial judge erred in finding that the contents of the 20 October 2009 letter did not imply there was a risk that MD may physically assault the Appellant, or that the Appellant feared for her own mental health, if the Respondent did not change their shifts to prevent them crossing over.
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> 3. Whether the trial judge erred in finding that the Respondent ought not reasonably to have foreseen that the Appellant was at risk of suffering a physical assault, or at least a psychiatric injury, if the Appellant continued to have contact with MD in the workplace.
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> 4. Whether the trial judge erred in finding that by failing to reprimand or counsel MD, the Respondent had not breached its duty of care to the Appellant.
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> 5. Whether the trial judge erred in finding that it was too inconvenient or difficult for the Respondent to enforce the separation of MD and the Appellant such that, by failing to do so, the Respondent had not breached its duty of care to the Appellant.
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> 6. Whether the trial judge erred in finding that, in spite of the Respondent's failure to take reasonable care for the Appellant's psychiatric health by sending the letters, the Respondent owed no duty of care to the Appellant.
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> 7. Whether the trial judge erred in finding that the proportion of the Appellant's assessed damages attributable to her receipt of the two letters was 15%."

[17] Because the content of the 20 October 2009 letter was significant for the primary judge's finding challenged in Question 1 it is convenient first to consider Question 2.

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10 Transcript 16 August 2016 at 1-7.

Question 2: error in finding that the contents of the 20 October 2009 letter did not imply that there was a risk that MD may physically assault the appellant, or that the appellant feared for her own mental health, if the respondent did not change their shifts to prevent them crossing over?

[18] The appellant alleged in her amended statement of claim that at all material times the respondent knew that MD had behaved in the workplace in an erratic, unpredictable, hostile, aggressive and confrontational manner towards employees including the appellant. The specific particulars initially provided of that allegation referred to a letter the appellant said was handed to Mr Blackett on 20 October 2009. The primary judge accepted the appellant's evidence that the appellant drafted that letter between 14 and 20 October 2009 and handed it to Mr Blackett on 20 October 2009, asking that she and MD be kept apart from each other at their work. The primary judge extracted the significant passages in the 20 October 2009 letter:

> "…
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> - "As I have already explained to you previously, I do not wish to work with or near the staff member known as (MD). I do not wish to have any contact with this person. I do not wish to be placed in a position where I may cross paths with her during a shift changeover…";
> - "As I told you previously I am struggling to understand (MD's) behaviour toward me";
> - "I wish to request not to work with or near her because her behaviour frightens me";
> - "I feel my presence antagonises (MD) and I feel she looks for fault in everything I do … She has a problem with me";
> - "As you are aware whilst working with (MD) on numerous occasions she has made personal comments in the staff communication book about my character and work performance";
> - "She has taken action to belittle me, made physical changes to my work and misrepresent (sic) me to other staff";
> - "Over the past few months I have been … harassed by (MD) in my workplace";
> - "I have tried to communicate my concerns about her behaviour with you";
> - "I requested information regarding the correct procedure I should follow to make a formal complaint and 10/12/09 you emailed a copy of 'complaints management procedure policy' form";
> - "I requested to have a meeting with (MD) in your presence to try and resolve any issues she had with me";
> - "At the first meeting held at the office on 14/10/09 I tried to communicate with her and attempt to discuss and/or

resolve any issues she had with me or my work. I did this by asking about her remarks in the staff communication book. As you observed during this meeting she became hostile toward me, twisted my words and made false accusations about me";

- "At one point you suggested to (MD) there may be a communication problem due to language barriers. I then tried to explain that I was born and raised in a foreign country and was aware of the barriers that could arise between varying cultures and differing languages and that if this was … the problem … I was open to finding ways we could overcome this … suddenly (MD) became angry, raised her voice, started pointing her finger at me and then said, 'You have a problem with people who are born in another country,' and accused me of being prejudice"(sic);
- "I … felt incredibly disturbed by the way (MD) twisted the meaning of my words and quickly flew into a rage";
- "I felt so frightened and shocked I stood up and walked out of the room without saying a word";
- At the following meeting at the client's premises "you stated in front of another staff member (Toni Crepin) 'I believe (MD) has a very serious mental health problem' I found your words quite alarming. After stating this you put both hands over your face and moaned and said 'oh, I don't know how we're going to deal with this', 'this is a big problem'. The other staff member present asked what had happened and you gave a brief explanation and then you said you didn't know what could be done about it";
- The plaintiff wrote that she brought to Blackett's attention (MD's) written comments;
- "It is glaringly obvious to the me that (MD) has a problem with me and simply does not like me";
- "I perceive (MD's) behaviour toward me as aggressive, unpredictable and even narcissistic";
- "I find (MD's behaviour) puzzling, frustrating, I'm second guessing my every move at work wondering if she will have a problem with it";
- (MD) "scares the hell out of me and I just don't want to be around her";
- "A staff member disclosed to me that (MD) had been creating tension among staff in another client home … (and said) 'it looks like you have become (MD's) new victim'; and
- "It is because of my experiences with (MD), your comments regarding (MD's) level of mental health and

> feedback from other staff that I am frightened of her and do not wish to come in contact with her.""[11]

[19] There are many descriptions in the letter of conduct by MD which harassed, disturbed, or frightened the appellant, but the appellant also characterised MD's conduct as "petty and unprofessional". Contrary to the appellant's argument that the letter suggested that the appellant foresaw a risk, or even predicted, that she would suffer a physical assault or a psychiatric injury if she continued to have contact with MD in the workplace, the primary judge accurately described the letter as making accusations almost exclusively of emotional aggression. Putting aside the benefit of hindsight, and notwithstanding the strength and number of the appellant's concerns expressed in the letter, the letter does not convey anything which should reasonably have put the respondent on notice that the appellant's own mental health was at risk from interactions with MD. As the primary judge observed, the only physical aggression expressly mentioned in that letter was finger pointing, accompanied by a raised, angry voice, during a meeting where Mr Blackett was present; the letter is "full of detail about fear and concern felt by the plaintiff" but contains "almost no allegation of physical, as opposed to emotional, aggression by MD"; the letter does not allege past violence, that the appellant feared violence, that MD had a propensity for violence, that the appellant's mental health was "even remotely in jeopardy as a result of MD's aggression", or that the appellant herself thought that MD had mental health issues (instead quoting what Mr Blackett said about that).[12] I accept the respondent's submission that the respondent was not fixed with liability merely upon proof that the respondent should have appreciated that the appellant was annoyed or distressed by MD's conduct towards her, or even that the appellant was in fear of MD: *Tame v New South Wales*.[13] That would be a relevant, but not determinative finding, which would need to be considered in the context of the other relevant findings.

[20] One of the relevant findings was that the letter made the appellant seem to be forceful and determined to have her demands to changes of the roster or client changes met to her benefit; the letter "was consistent with the letter from the kind of employee she was before the assault: one who confidently believed she was valued by her employer", whereas after the assault the appellant "lost her confidence and any belief that she was valued by the defendant."[14]

[21] The primary judge accepted the appellant's evidence that on or by 20 October 2009 she gave the letter to Mr Blackett, but concluded that it was not a reasonable inference from the letter that the appellant had fears for her own mental health and that the delivery of the letter did not strengthen the appellant's case that violence or a psychiatric injury to the appellant was reasonably foreseeable by the respondent. The primary judge explained in detail why his Honour did not infer from the letter that the appellant was afraid for her own mental health or that the respondent should have inferred as much from the letter,[15] and found that the attitude of the appellant as expressed in the letter was relevant to the question whether injury to the appellant's mental health was reasonably foreseeable by the respondent when MD assaulted the appellant about six weeks later.

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11 [2016] QDC 56 at [11].
12 [2016] QDC 56 at [56], [70].
13 (2002) 211 CLR 317 at 329 [7] (Gleeson CJ).
14 [2016] QDC 56 at [71].
15 [2016] QDC 56 at [77]-[78].

[22] The appellant argued that the primary judge erred by inferring from the 20 October 2009 letter that the appellant did not fear for her mental health or safety if she were to continue to cross paths in the workplace with MD. That argument does not accurately reflect the primary judge's findings, which reflected the fact that the onus of proof lay upon the appellant. The primary judge concluded that the finding that the appellant gave the letter to Mr Blackett "does not add strength" to the appellant's case that violence or psychiatric injury to the appellant was reasonably foreseeable by the respondent.[16] Otherwise, the primary judge found in this respect only that the attitude of the appellant as expressed in the letter was relevant to the question whether injury to the appellant's mental health was reasonably foreseeable by the respondent. It was relevant, in so far as the letter conveyed the impression that the appellant confidently believed she was valued by her employer.

[23] The appellant also argued that, when the letter was read in the context of, and in combination with, the evidence of events before and after the letter, error was disclosed in the primary judge's conclusion that the appellant had failed to prove that the respondent ought reasonably to have foreseen that the appellant was at risk of suffering a physical assault, and a psychiatric injury, if MD and the appellant continued to have contact in their workplace.

[24] Some of the evidence of those events comprised notes, and the appellant's complaints relating to notes, made by MD in books kept at Tara's place for the purpose of recording medication given to her, information for the benefit of other staff members about Tara's conduct or appointments, and other matters. Again putting aside the benefit of hindsight, the evidence of the appellant's complaints about those notes was consistent with evidence given by Mr Blackett that the dispute between the appellant and MD which was discussed at a meeting on 14 October 2009 was, as the primary judge recorded, about "petty stuff".[17] The appellant's initial evidence of the complaints she made suggested the same conclusion:

> "They weren't so much complaints…in the beginning, I was just disclosing things to him and I told him I didn't understand where she was coming from…like, what's going on…he listened…I asked David if we could have a meeting and talk to her and get to the bottom of why she didn't like me…I told him that I wanted to make a formal complaint at that stage and I didn't know how to go…about it, so I asked if he had the proper procedure and he emailed it to me…I think it was just a guide on what…to do to make a formal [complaint]…".[18]

(The appellant subsequently gave evidence that MD had been physically aggressive towards her on four occasions and she had complained of that to Mr Blackett: that topic is discussed under the heading "Question 1".)

[25] The primary judge accepted the appellant's evidence that she made several oral complaints to Mr Blackett about MD's behaviour. The primary judge considered that those complaints might have concerned these matters: after the appellant had sensibly relocated Tara's chair to avoid the risk of injury to her by her banging her head into a wall while seated in the chair, MD made a note and suggested that, during her subsequent shift, she photographed the chair in its different position and moved it

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16 [2016] QDC 56 at [74].

17 [2016] QDC 56 at [53], [83]. ("…MD's criticisms appeared as symptoms of MD's pettiness and her dislike of the plaintiff".)

18 Evidence of the appellant quoted at [2016] QDC 56 at [45].

back closer to the wall, implying criticism of the appellant as a carer; and some other notes criticised the competence and tidiness of the appellant (including an incorrect suggestion that the appellant had not administered medication to Tara and had not signed the relevant book).[19] The appellant has not demonstrated any error in the primary judge's conclusion that:

> "Individually and cumulatively, MD's criticisms appeared as symptoms of MD's pettiness and her dislike of the plaintiff. The notes and conduct did not reasonably lead to the inference that MD was violent or disposed to be violent towards the plaintiff."[20]

[26] The appellant relied upon other events encompassed by the 20 October 2009 letter. As the appellant submitted, the primary judge accepted the evidence of the appellant that she made several oral complaints to Mr Blackett about MD's behaviour (rather than only one complaint that MD had reorganised items on the desk in the staff room at Tara's house).[21] The primary judge also accepted the appellant's evidence (in preference to inconsistent evidence by Mr Blackett) that, at the appellant's request, on 12 October 2009 Mr Blackett emailed the respondent's "complaints management procedure policy" form to the appellant, that at about the same date Mr Blackett organised a meeting at the appellant's request, and that Mr Blackett asked the appellant not to submit a formal complaint until after the meeting had occurred.[22]

[27] Those findings are relevant but the appellant's argument attributed more significance to the primary judge's finding that at the meeting in the respondent's office on 14 October MD behaved aggressively towards the appellant rather than (as the respondent had alleged) the appellant becoming angry, raising her voice aggressively, and abusing and accusing MD, and storming out of the meeting: the primary judge considered that, "[a]t best for Mr Blackett, the allegation was based on his flawed recollection" and it was "unproved".[23] The appellant gave evidence that she could not remember the words used by Mr Blackett at the meeting but he said something about a possible communication barrier "because you're not from Australia". The appellant gave evidence that she said to MD that she (the appellant) was born in a foreign country and that when two people tried to communicate and got their messages mixed up you had to be patient and try to work things out; MD then became really angry, raised her voice, and pointed a finger at the appellant, saying that the appellant was "prejudiced" "or racist, or something". At that point Mr Blackett intervened and stopped the meeting. The appellant went on to give evidence about leaving the room and her recollection of her own thoughts at that time, including that she thought that MD was going to hit her, but the directly relevant evidence was about MD's conduct during the meeting.

[28] The appellant particularly emphasised the primary judge's acceptance of the appellant's evidence that at a subsequent meeting on the same day at Tara's house, Mr Blackett asserted that MD had a "mental health problem".[24] The primary judge accepted that Mr Blackett reacted to MD's behaviour later at Tara's house by "putting his hands over his head and proclaiming that MD has a mental illness". Mr Blackett gave evidence that "the mental health thing was a discussion we had, but I don't agree

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19 [2016] QDC 56 at [41]-[42], [83].
20 [2016] QDC 56 at [83].
21 [2016] QDC 56 at [82]-[83].
22 [2016] QDC 56 at [45]-[49].
23 [2016] QDC 56 at [50].
24 [2016] QDC 56 at [63].

with it."[25] The primary judge was not satisfied that Mr Blackett necessarily believed that MD had a mental health problem or illness in circumstances in which Mr Blackett must have appreciated that this statement would have appeased the appellant and where he must have known that he did not have the skill or evidence to justify such a diagnosis. It does not follow from Mr Blackett's assertion that MD had a mental health problem or illness that the primary judge erred in failing to find that as at 14 October 2009 the respondent appreciated or reasonably should have appreciated that there was a risk that MD would assault the appellant or that the appellant might suffer a psychiatric injury.

[29] My conclusion is that the primary judge did not err in finding that the 20 October 2009 letter, whether considered alone or in the context of previous events of which the respondent was aware, did not imply that there was a risk that MD might physically assault the appellant or that the appellant feared for her own mental health if the respondent did not change their shifts to prevent them crossing over.

Question 1: error in the finding that the appellant had not told Mr Blackett about four incidents during which MD assaulted and physically obstructed the appellant?

[30] After lunch on the first day of the trial, the appellant alleged for the first time in the litigation that before 14 October 2009 she had alerted the respondent, via Mr Blackett, to an additional four matters which supported her case that the respondent knew that MD had behaved in the workplace in an erratic, unpredictable, hostile, aggressive and confrontational manner towards other employees including the appellant. The primary judge rejected this new aspect of the case in the following terms:

> "I am not persuaded that the plaintiff raised any of those four incidents with Mr Blackett. I accept that the four fresh incidents recalled by the plaintiff were based upon events which had occurred. The plaintiff's failure to mention them until such a late stage means that I am not satisfied that any of the incidents caused the plaintiff to infer a risk of violence to her or a need to alert Mr Blackett that there was cause to fear violence. I am not satisfied that the plaintiff drew any of the four fresh incidents to the attention of Mr Blackett."[26]

[31] The appellant's description of the incidents was as follows:

(a) On one occasion when she was walking down a hallway MD jumped in front of her and blocked her progress and did so again after the appellant said "Hi" and tried to walk around MD.

(b) On another occasion MD poked the plaintiff in her back with a broom and told her to "watch your back".

(c) On another occasion MD pushed the appellant in her breast whilst the two were in a hallway near staff toilets.

(d) The fourth occasion was when MD "roused on me…grabbed my wrists…she sort of twisted…she just grabbed my wrist and was going off about the car. …it was about my use of the car."[27]

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25 RB 604, accepted by the primary judge at [2016] QDC 56 at [63].
26 [2016] QDC 56 at [84].
27 [2016] QDC 56 at [79].

[32] The first alleged incident might have been passed off as merely annoying behaviour, but the last three involved both physical contact and some, albeit slight, force. The primary judge referred to "the wrist grabbing episode", an expression which arguably assumed that this had occurred, but the primary judge had earlier noted that the appellant gave evidence that she did not suggest a "Chinese burn" or anything violent and that "she was just, I guess, grabbing my attention and – I don't know".[28] The primary judge did not find that any of the other incidents occurred as they were described by the appellant or made her fear violence from MD. Instead, the primary judge stated that the appellant "left the impression as she gave her evidence that even she did not know how to interpret the four episodes she so sketchily recalled in her evidence",[29] and "[w]hether or not MD did the things which the plaintiff described in the four fresh complaints" the appellant omitted to mention them subsequently.[30]

[33] The primary judge noted that the appellant did not mention any of the incidents in her 20 October 2009 letter despite drafting that letter over six days, she did not mention them in her recorded telephone conversation of 26 February 2010, she must have omitted to draw them to the attention of her lawyers during preparation for trial, she did not mention them to medical experts who saw her, and she did not mention them in her evidence before lunch on the first day of the trial.

[34] The appellant argued that it was unsurprising that none of the four incidents was specifically mentioned in the 20 October 2009 letter because the appellant's evidence was that she had previously told Mr Blackett about them, they were comprehended within the general expressions in the letter referring to previous complaints and communications of her concerns, and the letter focussed upon what occurred at the two meetings on 14 October 2009. These arguments do not supply a sound basis for an appellate court to set aside a finding about the reliability of oral evidence. The 20 October 2009 letter refers both to the conduct of MD in the first meeting and to her conduct outside the meeting, but although it refers to comments made in the staff communication book about the appellant's character and work performance and other actions, it does not refer at all to the apparently more significant incidents involving physical harassment of which the appellant gave evidence. The appellant argued that the episode at the first meeting which was a focus of the letter was much more significant than any of the four incidents, but the appellant's evidence of the meeting did not suggest that MD made any threat accompanied by physical contact with the appellant, such as the appellant implied occurred in her evidence that MD poked her in the back with a broom and said "watch your back".

[35] There also seems no basis for doubting the inference that the appellant must not have reported any of these four incidents to her lawyers at any time before the trial commenced. And there is the further point made by the respondent that, in response to a request by the respondent for information about what complaints were made when and to whom, and the words used in making the complaints, the appellant made a statutory declaration in which she referred in general terms to complaints of "aggressive behaviour towards me by [MD] and that "the words used in making the complaints … were consistent with the language used by me in the 20 October 2009 letter…".[31] As already indicated, the letter does not refer to any physical contact or use of force by MD.

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28 [2016] QDC 56 at [80].
29 [2016] QDC 56 at [80].
30 [2016] QDC 56 at [84].
31 RB 725.

[36] The appellant argued that it was easy to understand why she appeared not to have considered the incidents as terribly important in a legal context, having regard to the strength of the appellant's argument that the 20 October 2009 letter communicated to the respondent a sound basis for it to appreciate the risk of violent or psychiatric injury to the appellant. That does not explain the appellant's failure to mention any of the four incidents in the particulars of her claim, her statutory declaration, or until after lunch on the first day of the trial. As the respondent argued, the absence of any reference to these fresh incidents seems all the more surprising in the context that two and a half years before the trial, in January 2013, the respondent's solicitor wrote to the appellant's solicitor denying liability on four grounds, the first of which was that, "[t]here was nothing to put the Employer on notice that the Claimant was at risk of physical assault by [MD]. There had been no prior physical altercations between the two women."[32] The appellant's further submission that the four fresh incidents were not significant in the context of ultimately what happened to her may possibly explain why she did not mention any of them to her treating psychiatrist, but it is incapable of explaining why, with the assistance of her solicitor, none of the fresh incidents were mentioned in her particulars or her statutory declaration or until the afternoon of the first day of the trial.

[37] The main thesis of the appellant's challenge was that, because the primary judge found that the four fresh incidents had occurred, it was incongruous for his Honour to find that the appellant had not reported them to Mr Blackett. That argument was premised upon a misreading of the primary judge's reasons. The primary judge did not find that the incidents occurred as they were described by the appellant (which might more readily have led to an inference that she feared a risk of violence from MD). Rather, the primary judge found that those incidents "were based upon events which had occurred" and the primary judge was not satisfied that any of the incidents caused the appellant to infer a risk of violence or a need to alert Mr Blackett.[33] There was no incongruity between the finding that the incidents were based upon events which had occurred and the primary judge's non-satisfaction that any of them caused the appellant to infer a risk of violence to her or a need to alert Mr Blackett.

[38] There was no error such as might justify this Court in setting aside the primary judge's finding that the appellant had not told Mr Blackett about four incidents during which MD was said by the appellant to have assaulted and physically obstructed her.

Question 3: error in finding that the respondent ought not reasonably to have foreseen that the appellant was at risk of suffering physical assault, or at least a psychiatric injury, if the appellant continued to have contact with MD in the workplace?

[39] The primary judge identified the relevant question as being whether, in all the circumstances, the risk of the appellant sustaining a recognisable psychiatric illness was reasonable foreseeable, in the sense that the risk was not far-fetched or fanciful.[34] The appellant argued that, despite the primary judge correctly identifying the question, his Honour erred in law by proceeding on the basis that it was necessary to find that the respondent ought reasonably to have foreseen the risk that MD might physically assault the appellant, rather than the risk that the appellant might suffer psychiatric injury as a result of continuing her workplace contact with MD. That is not correct. The primary judge expressed the relevant finding in the following terms:

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32 RB 714.
33 [2016] QDC 56 at [84].
34 [2016] QDC 56 at [162].

"…by 3 December 2009 it was not reasonably foreseeable that anticipated contact between the plaintiff and MD was likely to result in mental anguish of a kind that could give rise to a recognised psychiatric illness in the plaintiff."[35]

[40] The appellant contended that the primary judge was "side-tracked" by the respondent's argument that, even if a risk of psychiatric injury was reasonably foreseeable by 20 October 2009, it was not reasonably foreseeable by 3 December 2009 because, in the interim, the appellant and MD had crossed over at the end of eight shifts without MD having assaulted the appellant.

[41] The primary judge accepted evidence given by Mr Blackett that, in the appellant's absence from the meeting of 14 October 2009, MD agreed to try to "get along" with the appellant, after the meeting he made a similar arrangement with the appellant during a discussion at the respondent's office, and Mr Blackett then hoped that the problem would be solved by changes of the roster.[36] The primary judge found that, although after the 20 October 2009 meeting the appellant and MD crossed over at shift changes on eight separate occasions (the last of which was on 27 November 2009), there were no further complaints or incidents which put the respondent on notice of a risk of assault or any other injury arising from the rostering of the appellant and MD in that way.[37] The primary judge concluded that: the appellant must have been aware in 2009 of those crossovers, even though she had forgotten them by the time of the trial; she also must have known that the respondent had not reassigned MD or the appellant but had instead only made some roster changes to reduce the number of crossovers; despite the respondent's limited efforts to accommodate the appellant's written demands the appellant had not complained further; and it was a reasonable inference for the respondent to draw that the appellant's concerns had abated to some extent.

[42] No ground of appeal challenged those findings. In my respectful opinion, they support the primary judge's ultimate conclusion that by 3 December 2009 it was not reasonably foreseeable that anticipated contact with MD would likely result in the appellant sustaining a psychiatric injury.

[43] The appellant referred to the history that: until the respondent disclosed the rosters for Tara on the first day of the trial, Mr Blackett and the appellant had wrongly recollected that after 20 October 2009 until 3 December 2009, Mr Blackett had maintained the rosters for the appellant and MD in a way which ensured that they did not cross paths during the shift changes (as was originally pleaded by the appellant and deemed to have been admitted by the respondent in a pre-proceeding statement by Mr Blackett which conveyed that he maintained the shifts in a way which ensured MD and the appellant did not work together or cross paths until 3 December 2009); the rosters showed that the appellant and MD had in fact crossed over after the 20 October 2009 meeting on separate occasions; after the trial was adjourned for a different reason the respondent disclosed further timesheet documents and successfully applied to withdraw the deemed admission; thereafter the appellant did not dispute that the crossovers occurred; the appellant gave evidence that she was aware that Mr Blackett might take time to alter the rosters, and she was able to prepare in advance for the crossovers to ensure that she could quickly direct MD to the books

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35 [2016] QDC 56 at [164].
36 [2016] QDC 56 at [51].
37 [2016] QDC 56 at [92].

and leave without interaction, but her conduct nevertheless irritated and angered MD who complained about the appellant's rudeness in the staff books.

[44] The appellant argued that the primary judge ignored that evidence by the appellant. The evidence was of no real significance. The appellant did not contend that she informed the respondent of the way in which she said that she had ensured that her contact with MD and crossovers would be minimal or that she had complained to the respondent about MD having nevertheless been irritated and angered. Furthermore, in the appellant's evidence-in-chief she said that after 20 October 2009 she did not have any sort of aggressive confrontation with MD and MD "just wrote things in the book that I think were niggly little things that I let go."[38] The appellant referred to the crossovers with MD. Although the appellant said that on those occasions MD got angry, she explained that she could tell MD was angry because she wrote it in the book. The respondent submitted that reference to the typed record of the relevant entries demonstrated that since the meeting of 14 October 2009 there were in fact no entries by MD critical of the appellant. Reference to the record bears out that submission.[39] Indeed, one entry by the appellant is critical of MD: in it the appellant wrote that every time she moved the lounge away from the wall MD moved it again on her shift, and that "I don't know what your problem is… This is a health and safety risk isn't it?".[40] An entry on the following day by MD stated that she did not mind anyone moving the furniture around the house or moving it away from the wall, she had no problems with it, and that "I assure you I will support you on that especially if that's for the client".[41]

[45] The evidence upon which the appellant now relies does not support a conclusion that the primary judge erred in the way described in Question 3.

[46] The appellant argued that the primary judge erred in not drawing an inference adverse to the respondent about the foreseeability of psychiatric injury from the evidence of a telephone conversation between Mr Blackett and the appellant's daughter Ms Rhani Govier on the date of the assault. Ms Govier was called to the hospital after her mother was attacked and went to the emergency department where the appellant was waiting to see a doctor. Ms Govier gave evidence that she rang Mr Blackett after she left the hospital that afternoon. She was a bit angry with Mr Blackett and asked how something like this could happen where people were employed to care for other people. When asked what Mr Blackett answered, Ms Govier said:

> "He just – he said I'm sorry. I just – I don't know. I don't know what the answers are, like – and I asked him what was going to be done in regards to the person who had assaulted my mum, and he said to me at that time that investigations will need to take place. He then said to me on the phone – his words were, to me, like, oh… I just feel terrible. Your mum had said things to me about this sort of behaviour and I feel like if I had done something about it, this wouldn't have happened."[42]

[47] Ms Govier added that Mr Blackett kept saying that he felt bad. In cross-examination Ms Govier said that the first time she was asked to relate the conversation with Mr Blackett, apart from when she spoke about it with the appellant, or one of the first

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38 RB 163.
39 RB 743-747 (entries from 16 October 2009 – 1 December 2009).
40 RB 744 (20 October 2009).
41 RB 744 (21 October 2009).
42 RB 375.

times, was when she met counsel for the appellant for the first time. She agreed that whilst in the hospital she was concerned, emotional, and somewhat angry. She agreed that she could not remember the conversation word for word but said that she remembered various specific parts of it. She agreed that she and her mother had discussed the case numerous times, including what they had remembered. She did not make a note of her conversation with Mr Blackett. The primary judge inferred that, as the proceeding commenced in 2014, Ms Govier's meeting with counsel must have been no less than three years after her conversation with Mr Blackett. The primary judge was not satisfied that Ms Govier could reliably recall the conversation and declined the appellant's invitation to draw an inference adverse to the respondent upon the issue whether a physical assault by MD upon the appellant was foreseeable by Mr Blackett before 3 December 2009.

[48] There was no error susceptible of appellate correction in that reasoning. I did not understand it to be submitted for the appellant that there was. The appellant's argument was that the primary judge found that the evidence of Ms Govier was a recent fabrication and that the primary judge should have taken into account a statement by a psychiatrist, Dr Kar, that the appellant reported to the psychiatrist that, after the assault, the appellant's daughter rang the supervisor, who was "extremely apologetic for what had happened and had admitted his failure to move [the appellant] from the woman who had attacked her."

[49] The primary judge did not find that the evidence of Ms Govier was a recent fabrication. Rather her evidence was found to be unreliable. It was not submitted for the appellant that the statement which Dr Kar attributed to the appellant was verified by the appellant in her evidence. Accordingly, the primary judge was not obliged to give it any weight. In any event, Dr Kar did not attribute to the appellant any suggestion that Mr Blackett had said that the appellant told him something about "this sort of behaviour". That was the critical part of the evidence given by Ms Govier. It suggested that the appellant had said something to Mr Blackett before the assault concerning (actual or potential) physical violence by MD against the appellant. That evidence could not gain support from the statement which Dr Kar attributed to the appellant, which suggested only that Ms Govier had told the appellant that Mr Blackett had been extremely apologetic and admitted that he had failed to move the appellant away from MD. Those statements contain no indication that, before the assault, Mr Blackett understood that there was a risk of the occurrence of the attack which occurred. In the result, if the hearsay-upon-hearsay evidence in Dr Kar's report were admissible, that evidence would not strengthen the relevant part of Ms Govier's evidence.

[50] There was no error in the primary judge's finding that by 3 December 2009 it was not reasonably foreseeable that anticipated contact between the appellant and MD was likely to result in the appellant sustaining any recognised psychiatric illness. For that reason the appellant's claim for damages for the consequences of MD's assault upon her was correctly rejected.

Question 4: error in the finding that by failing to reprimand or counsel MD the respondent had not breached its duty of care to the appellant?

[51] The primary judge rejected that part of the appellant's claim on the further ground that, if the appellant did owe a duty of care to protect the appellant against a risk of her sustaining a recognisable psychiatric illness as a result of the conduct by MD, that duty was not breached by the respondent's failure to counsel or reprimand MD. In

so concluding the primary judge relied upon these circumstances: after 14 October 2009 the respondent, by Mr Blackett, changed the rosters to lessen the number of crossovers at shift changes; the respondent did not receive any further complaint from the appellant after 20 October 2009; that is so although the appellant had earlier demonstrated that she was competent to complain about any concern in the roster changes; in the circumstances as they were known to the respondent, including the absence of any further complaint by the appellant, it was not unreasonable for the respondent not to have further reprimanded or counselled MD after she agreed on 14 October 2009 to try to "get along" with the appellant.

[52] The appellant argued that the respondent should have reprimanded MD in mid-October 2009 and that it was illogical to take into account the absence of complaint about MD's conduct at that time.

[53] I accept the respondent's argument that there is no basis for thinking that a reprimand or counselling, even if it included a threat of dismissal if MD did not improve her behaviour towards the appellant, would have prevented MD from assaulting the appellant as she did. If MD gave any rational thought to her conduct on 3 December 2009, she must have known that discovery of it by the respondent would lead to summary dismissal. If her conduct was instead impulsive and irrational (as it appeared to be), it is difficult to see how a reprimand, or counselling, given a month and a half earlier could have had any impact upon her. The appellant relied upon the decision in *Wolters v The University of the Sunshine Coast*[43] that, upon the facts of that case an appropriate reprimand and counselling likely would have prevented an employee from acting in the aggressive way he did to a co-employee, thereby causing psychiatric injury. That was not a case involving an employee who irrationally assaulted another employee, as apparently occurred here. The trial judge in that case found that the employee would have tried to follow any counselling. There is no such finding, nor any sensible basis for such a finding, in this case.

[54] Even if it were found that the primary judge erred in finding that the respondent's failure to reprimand or counsel MD was not a breach of the respondent's alleged duty of care, that would not amount to a ground for setting aside the primary judge's decision.

Question 5: error in finding that it was too inconvenient or difficult for the respondent to enforce the separation of MD and the appellant such that, by failing to do so, the respondent had not breached its duty of care to the appellant?

[55] The primary judge found that it would have been inconvenient to remove MD or the appellant from caring for Tara; it would have required the introduction of the appellant or MD into the schedule of another client and introduction of a new carer into Tara's schedule. The primary judge also found that it was difficult to arrange rosters so that MD and the appellant would not crossover at any shift change, and gave as an example the fact that the crossover on 3 December 2009 resulted from MD filling in for a different carer who had failed to attend as rostered because of illness. To have enforced complete separation between MD and the appellant would have required the termination of the employment of one of them, or the shortening of the hours of employment of one of them, or removing one of them from Tara's roster and introducing that employee to a different client, which had the potential to distress Tara and the substitute client.

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43 [2014] 1 Qd R 571 at [50]-[52].

[56] The appellant argued that those findings were contrary to the evidence and had not been advocated by the respondent. The respondent acknowledged that it did not submit at the trial that it was not possible to prevent any crossovers at the beginning or end of shifts but argued that it would have been inconvenient.

[57] Ms Evans, who was the regional manager for the relevant region serviced by the respondent in 2009, gave evidence that in that year the respondent had about 120 to 150 staff members in the region, with about 70 per cent based in Ipswich and 30 per cent in Toowoomba. Generally speaking female clients preferred female carers, and the industry was more female dominated than male dominated. The appellant relied upon that evidence as showing that there was a very large number of carers and patients, so that it would not have been difficult for the respondent to remove MD or the appellant from caring for Tara.

[58] There was, however, evidence which supported the primary judge's findings. Ms Evans gave evidence that at times it can be difficult to take a carer away from a particular client and introduce that carer to a different client; there were periods of notification required to be provided to staff, it was necessary to meet with staff to explain why they were being moved (to avoid unnecessary staff discontent), and it was necessary to ensure that employees were given their committed hours.[44] If a particular worker was taken away from caring for Tara, there would be potential for a carer/client conflict either because of a preference by Tara or because of the required skill set of her carers.[45]

[59] That evidence was given in quite general terms. Whether or not removing the appellant or MD from the care of Tara might result in distress to Tara or the other client of sufficient seriousness to justify not making that substitution would depend upon the degree and significance of the risks associated with the continuing contact between the appellant and MD at shift changes. The primary judge's conclusion that it was not unreasonable for the respondent not to enforce a separation of the appellant and MD was informed by the primary judge's finding that, after MD agreed to try to get along with the plaintiff on 14 October 2009, the respondent received no further complaint from the appellant in the following six weeks. The absence of any such complaint was a reasonable basis for the respondent to conclude that the reduction in shift changes and changes in behaviour by MD were sufficient to resolve the conflict of which the appellant had complained. I am not persuaded that the primary judge erred in concluding that the appellant had not proved that the respondent's response was unreasonable such as to amount to a breach of its duty of care.

Question 6: error in finding that, in spite of the respondent's failure to take reasonable care for the appellant's psychiatric health by sending the letters, the respondent owed no duty of care to the appellant?

[60] The facts concerning the timing and content of the first letter and the second letter are set out in [6] – [9] of these reasons. As the primary judge noted, the claimed cause of the appellant's loss did not include any conduct of the respondent between the receipts of the letters or after the receipt of the second letter. The appellant alleged that her injuries and loss and damage were caused by the respondent's negligence, which was particularised as follows:

> "(m) in the aftermath of the said incident, preparing and causing to be delivered to the Plaintiff the 3 December 2009 letter, when

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44 RB 543.

45 RB 560-561.

the Defendant knew or ought to have known that the Plaintiff was in a fragile psychiatric state and was at risk of further decompensating by:

(ii) being summarily required to attend an "investigation interview" as early as the next morning to discuss the said incident;

(iii) being directed not to discuss the said incident with any other employee of the Defendant; and

(iv) being immediately stood down on full pay and directed not to enter any of the Defendant's workplaces;

(n) before having any further contact with the Plaintiff and adequately informing itself as to the Plaintiff's psychiatric state, preparing and causing to be delivered to the Plaintiff the 11 December 2009 letter when the Defendant knew or ought to have known that the Plaintiff was in a fragile psychiatric state and was at risk of further decompensating on reading the terms of the said letter;…"[46]

[61] Those sub-paragraphs appear to be further particulars of the more generally stated allegations of negligence in sub-paragraphs (a) – (c) of paragraph 6 of the amended statement of claim, comprising "failing to take any or any adequate precautions for the safety of the Plaintiff", "exposing the Plaintiff… to a risk of injury of which the Defendant knew or ought to have known", and "failing to provide and maintain a safe and proper system of work for the Plaintiff".

[62] The appellant's case at trial in her submissions to the trial judge was as follows:-

"…the Defendant breached its duty of care to the Plaintiff by serving the first letter on her, in the aftermath of the incident, which conduct amounted to a further "attack" on the Plaintiff, when it knew or ought to have known that the Plaintiff was in a fragile psychiatric state and at risk of further decompensating, by:

- being summarily required to attend an "investigation interview" as early as the next morning to discuss the said incidents;
- being directed not to discuss the said incident with any other employee of the Defendant; and
- being immediately stood down on full pay and directed not to enter into any of the Defendant's workplaces.

Further, before having any further contact with the Plaintiff, and without adequately informing itself as to the Plaintiff's medical condition, the Defendant prepared and caused to be delivered to the Plaintiff on (18 December 2009) the 11 December 2009 letter, when the Defendant then knew or ought to have known that the Plaintiff remained in a fragile physical and psychiatric state and was at risk of further decompensating on reading the terms of this letter.

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46 RB 817 – 818.

…

> … by the sudden service on the Plaintiff of those letters in such terms, the Defendant wrongly placed her in a position where she perceived she had no support from management, where baseless accusations were made against her of unprofessional conduct, and unjust threats were made against her to terminate her employment. The letters suggested that the Defendant had sided with MD, and the Plaintiff's sense of injustice and betrayal deepened her distress and depression, and aggravated her condition by adding to the trauma that she had already suffered.
>
> … in the light of what the Defendant then knew or ought to have known, the Defendant ought not to have served on the Plaintiff purely administrative type letters which purported to blame her for the assault, and accused her of unprofessional behaviour, in circumstances where the Plaintiff had not yet been afforded an opportunity to provide her version of events. It was wrong to have advised the Plaintiff that she had been found to have breached the Defendant's code of conduct by making unnecessary and unwelcome physical contact upon another employee, that she had engaged in behaviour of a violent and inappropriate nature which reflected poorly upon her professionalism; and that she had involved the client in the altercations. The Defendant and the Plaintiff knew all of these allegations to be wrong, and that the Plaintiff had not had an opportunity to present her case to the Defendant, and yet the Defendant proceeded to make such accusations and decisions in the Plaintiff's absence."[47]

[63] Dr Curson, a psychiatrist, reported that the unprovoked and irrational assault upon the appellant, during which she experienced a recurrence of angina and felt that she was at risk of dying, was of such severity that a person of ordinary fortitude would have been at risk of suffering a psychiatric injury. When the appellant received the first letter whilst in hospital she felt attacked by it and it caused further distress to her. The second letter caused yet further distress to her. Dr Curson opined that "the timing, manner and the content of the letters most likely aggravated the trauma of the assault", the letters made the appellant feel that her employer had sided with the assailant and her sense of injustice and betrayal "deepened her distress, depression, and aggravated her anger", "the provision of the letters and the incomplete investigation… aggravated her conditions by adding to the trauma she had suffered", and if the employer had handled the incident differently so that the appellant had felt supported by management, "she would most likely not have developed such severe disorders".[48]

[64] The primary judge found that the timing, manner and content of the employer's two letters caused a sense of injustice and betrayal in the appellant and aggravated her psychiatric injuries. The primary judge also found that psychiatric injury to the appellant was reasonably foreseeable as a result of the timing, manner and content of the respondent's letters. Consistently with the terms of Dr Curson's evidence, the primary judge found that it was reasonably foreseeable by the respondent that the appellant "would have been dismayed"[49] to read:

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47 RB 947 – 948.
48 RB 646 – 651.
49 [2016] QDC 56 at [175], [177].

(a) (The first letter) that the respondent was conducting an investigation into the appellant's conduct, and that she was not welcome at work and was unable to speak to work colleagues who might be a source of sympathy or support, and

(b) (The second letter) that the respondent regarded the appellant as having refused to attend two meetings she had been too sick to attend, the respondent's preliminary findings were that the appellant had instigated a violent attack on MD, as a result she was directed to have no contact with staff, and if she were not on leave she would be suspended until the matter was resolved.

[65] It was that timing and conduct of the two letters to which the primary judge referred in the further conclusions that:

(a) It was reasonably foreseeable that the timing and content of the two letters were such that the appellant's receipt of the letters would aggravate any psychiatric injury sustained by the appellant in MD's assault, the risk of which the primary judge found was reasonably foreseeable by the respondent.

(b) By the timing and content of the two letters, the respondent failed to take reasonable care for the psychiatric health of the appellant.

[66] The primary judge held that the appellant's case was based on the premise that the duty to provide a safe system of work extended beyond the conduct of the tasks an employee was engaged to perform and comprehended an obligation to supply a safe system of investigation and decision making in relation to matters concerning the contract of employment itself.[50] The primary judge accepted the respondent's argument, which was based upon *State of New South Wales v Paige*,[51] that the proposed duty of care should not be recognised. The appellant did not argue that this aspect of the decision in *Paige* was wrong. Rather, the appellant argued that *Paige* was distinguishable.

[67] In *Paige*, Spigelman CJ (with whose reasons, in these respects, Mason P and Giles JA agreed), held that a proposed duty owed by an employer to supply a safe system of work to an employee in relation to the incidents of the contract of employment, such as in the disciplinary procedures under consideration in *Paige*, was a novel category of duty which involved an extension beyond the duty established by case law to supply a safe system of work in relation to the conduct of tasks for which an employee was engaged.[52]

[68] The question then was whether or not a new category of duty of care should be recognised. A finding, such as the primary judge made in this case, that the injury suffered by an employee was a foreseeable consequence of a lack of reasonable care by an employer, is not sufficient to justify the creation of a new category of duty of care. In *Sullivan v Moody*[53] the joint judgment of the High Court stated that the tort of negligence "would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms" if foreseeability alone were sufficient to establish a duty of care.[54] The joint judgment referred to the

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50 [2016] QDC 56 at [180] – [181].
51 (2002) 60 NSWLR 371.
52 (2002) 60 NSWLR 371 at [78].
53 (2001) 207 CLR 562 at [54]-[62].
54 (2001) 207 CLR 562, 576 [42].

need to preserve the coherence of the law and stated that "if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists."

[69] *Paige* raised issues of compatibility and coherence between the law of tort and statutes, between the law of tort and administrative law, and between the law of tort and the law of contract, as modified by statute.[55] Spigelman CJ remarked that "conflict or tension between duties must be placed in the balance with the range of factors pertinent to duty to determine whether a duty of care existed."[56] Spigelman CJ referred to *Sullivan v Moody* and noted that a common law duty may be regarded as being inconsistent or incompatible with a statute even if there were no direct inconsistency, if the effect of imposing civil liability would be to "distort [the] focus" of a statutory decision-making process.[57] In relation to the need for coherence in the law applicable to termination of employment, being the law of contract as modified by statute, Spigelman CJ found that the possibility of incoherence was such that the proposed duty should not be recognised.[58]

[70] After analysing the applicable statutory regime for unfair dismissal claims in New South Wales, Spigelman CJ found that the New South Wales legislation evinced an intention "to limit the class of applicants and the quantum of compensation that may be awarded within reasonable parameters, in the interests of employers and the community generally."[59] Spigelman CJ also found that the same was true of the relevant Commonwealth legislation,[60] and that some form of special provision in this respect was found in the legislation of all of the States.[61] In relation to the legislation of the States and the Commonwealth, Spigelman CJ observed:

> "…[i]t represents a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth on the other hand. The arguments and factors accepted in *Johnson v Unisys*[62] are directly applicable to the legislation examined above and the same conclusion, namely a refusal to expand the duty of care in negligence to provide an alternative cause of action for unfair dismissals, should be the result. …
>
> The expansion of the law of tort to matters concerning the creation and termination of a contract of employment, as distinct from performance under the contract, may distort the balance of conflicting interests found to be appropriate as a matter of contract or by intervention of statute. Where, as here the courts are asked to create a novel duty of care, the courts should refrain from doing so where there is such a well developed alternative mechanism for adjusting the interests involved. Matters concerning the creation and termination of a contract of employment can, in my opinion, properly be left to the law of contract,

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55 (2002) 60 NSWLR 371 at [95].
56 (2002) 60 NSWLR 371 at [105].
57 (2002) 60 NSWLR 371 at [93], quoting from *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [292] per Hayne J.
58 (2002) 60 NSWLR 371 at [132].
59 (2002) 60 NSWLR 371 at [149].
60 (2002) 60 NSWLR 371 at [152].
61 (2002) 60 NSWLR 371 at [153].
62 [2003] 1 AC 518, in which the House of Lords rejected recovery in both negligence and contract for psychiatric injury arising from the manner of dismissal.

> subject to the extensive statutory modification that the parliaments have introduced into this specific area of contract law."[63]

[71] Spigelman CJ referred to matters that operated in favour of the recognition of the duty postulated in *Paige* (that the duty focused on the relationship of employer and employee in which a wide range of duties already existed, so that the novel duty might be described as "incremental", the vulnerability of the persons whom might be subjected to negligent conduct, and the element of control by the employer), but found nevertheless that "the issues of coherence with the law of employment and administrative law, which I have discussed above, together with the element of incompatibility of duties, are so significant as to outweigh these considerations."[64]

[72] The appellant argued that *Paige* was distinguishable on the ground that, whereas negligent conduct of the respondent aggravated the appellant's existing psychiatric injury caused by the respondent's earlier negligence, in *Paige* the claimant's psychiatric injury was caused entirely by the disciplinary process of investigation and dismissal. The relevance of this distinction should be considered in the context of the primary judge's findings that, at the time the respondent sent the two letters, the risk that the appellant had sustained psychiatric injury resulting from MD's assault was reasonably foreseeable,[65] and the respondent "knew or ought to have known that in [sic] a fragile physical and psychiatric state and was at risk of further decompensating on reading the terms of [the second letter]." The primary judge did not find that when the respondent sent the letters, the respondent knew that the appellant had already sustained psychiatric injury or that the appellant likely would suffer aggravation of any such injury.

[73] The facts found by the primary judge demonstrate that, if the respondent owed the proposed duty of care, the respondent breached that duty by its insensitive and careless conduct in sending the two letters. So far as the question whether the respondent owed that duty is concerned, the significance of those facts appears to be that the respondent should have known that the appellant might be particularly vulnerable to injury if the respondent did not take reasonable care in its investigation and decision. That is likely to be commonplace where an employer is investigating allegations of assault or other serious misconduct made by an employee (or a third party) against the employee under investigation. It is not a ground for distinguishing *Paige*.

[74] *Hayes & Ors v State of Queensland*,[66] upon which the appellant relied, also does not supply a ground for distinguishing *Paige*. In *Hayes* each member of the court (the President (dissenting), Mullins and Dalton JJ) referred with approval to the decision in *Paige* but distinguished it on the ground that the claim in *Hayes* was not based upon the conduct of the investigation of, or decision making in relation to, complaints against the employees but was instead based upon the employer's failure to provide and maintain a safe workplace for each employee in the course of their employment during the investigation and decision making process.[67]

[75] The essence of the relevant evidence of Dr Curson, was that the appellant suffered further distress which aggravated her existing psychiatric injury because she perceived the

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63 (2002) 60 NSWLR 371 at [154]-[155].
64 (2002) 60 NSWLR 371 at [182].
65 [2016] QDC 56 at [174].
66 [2016] QCA 191.
67 [2016] QCA 191 at [7] (McMurdo P), [99]-[101] (Mullins J), and [113]-[125] (Dalton J).

first letter as an attack upon her, whereas if the respondent had handled the incident in a way which made the appellant feel supported by the respondent's management, the severity of her disorders would not have been increased. Consistently with that evidence, the particulars of the alleged negligence and the appellant's submissions to the trial judge conveyed that the appellant perceived that she was not supported by management, baseless accusations were made against her of unprofessional conduct, and unjust threats were made to terminate her employment. Those allegations concerned only the respondent's exercise, allegedly in a careless way, of its contractual rights to investigate a workplace incident involving two employees and a client, and to make decisions about the appellant's contract of employment which it was contractually entitled to make. (The appellant did not contest the respondent's submission that the respondent was entitled under the contract of employment to require an account from its employee about the employee's conduct and that the respondent was entitled to stand the appellant down on full pay during the investigation, pending a decision about the appellant's employment.) This is not a case in which the claim was based upon a duty by the employer to supply a safe system of work in the workplace by providing support for an employee during the course of an investigation, as was the case in *Hayes*.

[76] The appellant argued that the respondent's delivery to the appellant of the two letters was not a discharge of the statutory duty in s 228(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) imposed upon the employer of a worker who has sustained injury to "take all reasonable steps to assist or provide the worker with rehabilitation for the period to which the worker is entitled to compensation". No such claim was made in the amended statement of claim or, so far as appears from the reasons for judgment, litigated at the trial. Whether there was any scope for the application of s 228(1) involves factual questions which should not be addressed for the first time on appeal. It is not necessary to decide whether a case in which s 228(1) is applicable would be distinguishable from *Paige*, but upon the face of it that provision concerns a different subject.

[77] The appellant sought to distinguish *Paige* on the ground that it involved a statutory process of investigation and asserted requirements by the employer which would have been inconsistent with the statutory procedures. That difference between this case and *Paige* has no bearing upon the New South Wales Court of Appeal's decision that the proposed duty by an employer to supply a safe system of investigation and decision-making in relation to the incidents of an employee's contract of employment, as opposed to a safe system of work in relation to the conduct of tasks for which an employee was engaged, would involve a novel category of duty of care. In relation to the question whether that novel category of duty should be established, the passages from *Paige* extracted in these reasons show that the New South Wales Court of Appeal dealt separately with the question whether the proposed duty of care would be incompatible or incoherent with the law of contract, as modified by statute, concerning termination of employment. I do not regard this suggested ground of distinguishing *Paige* as a sufficient basis for holding that the respondent owed the appellant the postulated novel duty of care in the course of the respondent's investigation in this case.

[78] For these reasons I would affirm the primary judge's finding that the respondent did not owe to the appellant a duty of care to avoid injury to the appellant by sending the letters.

Question 7: error in finding that the proportion of the appellant's assessed damages attributable to her receipt of the two letters was 15 per cent?

[79] It is strictly unnecessary to consider Question 7 because my answers to previous questions dictate the conclusion that the appeal should be dismissed. Nevertheless I will express my view about this question.

[80] The appellant argued that she was entitled to recover the full amount of damages assessed by the primary judge whether she succeeded on either or both grounds of liability. This argument was based upon the proposition that the primary judge erred by finding that the proportion of the appellant's assessed damages attributable to her receipt of the two letters was 15 per cent, because there was not "a scintilla of evidence" to justify that apportionment. The appellant argued that the primary judge might equally have found that, if the letters had not been sent, the appellant's psychiatric condition consequent upon the assault, and thus her assessed damages, would have been the same as they were if both the assault and the sending of the letters were taken into account; or, alternatively, that if the letters had not been sent, the appellant would have made a full recovery from her psychiatric condition consequent upon the assault within a short period, in which event the damages in respect of the assault alone would have been minimal.

[81] The expression "a scintilla of evidence" was taken from the judgment of Ipp JA (with whom Mason P agreed) in *Seltsam Pty Ltd v Ghaleb*.[68] In that case there were two causes which might have contributed to the respondent/plaintiff's illness, one of which, obesity, was unrelated to the negligence alleged against the defendant/appellant. The trial judge found that the appellant "failed to discharge its evidentiary onus to disentangle the obesity [condition] and to prove either that it is making a material contribution to the [respondent's] restrictive lung condition or with any precision to prove the extent of that contribution."[69] The reference to an "evidentiary onus to disentangle the obesity" was taken from Dixon CJ's judgment in *Watts v Rake*,[70] where the expression was used in relation to the defendant's contentions that part of the plaintiff's condition was traceable to causes other than the accident and that, if there had been no accident, the plaintiff would have been incapacitated by a pre-existing condition. The suggested requirement that the appellant was obliged to prove the extent of the contribution of obesity to the respondent's illness "with…precision" was derived from remarks of Barwick CJ, Kitto and Taylor JJ in *Purkess v Crittenden*[71] that in *Watts v Rake* "it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence…which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be…".

[82] In *Seltsam Pty Ltd v Ghaleb*, Ipp JA referred to those matters and to the facts in *Purkess v Crittenden*, and explained that the word "precision" used by Barwick CJ, Kitto and Taylor JJ "was intended…to contrast the evidence required to discharge the evidentiary onus on a defendant with the hopelessly inadequate evidence actually adduced; not to connote that more was required than "evidence sufficiently precise and definite to displace the inference that the disabling pain from which the plaintiff

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68 [2005] NSWCA 208 at [109].
69 [2005] NSWCA 208 at [95].
70 (1960) 108 CLR 158 at 160.
71 (1965) 114 CLR 164 at 168.

suffered after the accident was caused by the hurt she then received" (being the words used by Windeyer J at 171".[72]

[83] Furthermore, Ipp JA also held that what was said in *Watts v Rake* and *Purkess v Crittenden* now must be understood in the context of the principles expressed in *Malec v JC Hutton Pty Ltd*.[73] In summary, where a court is required to evaluate possibilities, such as is required when forming an estimate of the likelihood that an alleged hypothetical past situation would have occurred or of the possibility of an alleged future event occurring, the exercise of "disentanglement" discussed in *Watts v Rake* and *Purkess v Crittenden* is more easily achieved than in cases where a court is required to evaluate whether an event has or has not occurred.[74] Ipp JA stated:

> "[106] Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.
>
> [107] Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.
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> [108] As was pointed out in *Newell v Lucas* [1964-5] NSWR 1597 (at 1601 per Walsh J, with whose judgment Hardie and Asprey JJ agreed), the court must determine whether a comparison may be made between the plaintiff's condition prior to the injuries sustained by the defendant's negligence (including the plaintiff's economic and other prospects in that condition) and the plaintiff's condition and prospects after the injuries. Nothing in *Watts v Rake* and *Purkess v Crittenden* precludes the judge from carrying out this exercise.
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> [109] Of course, if the evidence does not adequately establish the pre-existing condition or its possible consequences (as was the case in *Purkess v Crittenden*), it would not be possible to carry out such a comparison and assessment. In regard to the possible consequences, a scintilla of evidence would not suffice. The evidence must be such that a reasonable person could draw from it the inference that the possible consequences contended for by

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72 [2005] NSWCA 208 at [100].
73 (1990) 169 CLR 638.
74 [2005] NSWCA 208 at [102]-[105].

the defendant existed (see McCormick, Evidence, 5th ed, para 338, p 511).

[110] I have noted that in the present case there was considerable evidence to the effect that obesity contributed to the respondent's breathing difficulties and was likely to continue to do so and the respondent did not seriously contend to the contrary. There was an obvious and real chance that the obesity would have reduced the appellant's enjoyment of life or ability to work in any event. That chance had to be assessed and allowed for in the calculation of future economic and non-economic loss. Without such an allowance, the appellant would be held responsible for loss that was not causally related to the ARPD brought about by it (cf *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 498–499.

[111] The trial judge made no attempt to assess the chance in question. His failure to do so was a significant error of law. To paraphrase Mason P in *Winston v Roach* [2003] NSWCA 310 (at 74), nothing in the judgment of the trial judge reveals that his Honour endeavoured to weigh how much of the respondent's woes would have continued and/or increased had it not been for the appellant's negligence. There was ample evidence to the effect that they would have done so to a significant degree, even allowing for the evidentiary onus resting on the appellant.

[112] In addition, as I have pointed out, his Honour stated that there was an onus on the appellant to prove that obesity made a material contribution to the respondent's restrictive lung condition. There is nothing in *Watts v Rake* and *Purkess v Crittenden* that imposes such an onus on a defendant. This was another significant error of law."[75]

[84] I do not accept the appellant's submission that there was insufficient evidence to enable the primary judge to find that the contribution made to the appellant's psychiatric conditions by the sending of the two letters amounted to 15 per cent and the effect of the previous assault amounted to 85 per cent. The evidence was at least as sufficient for that purpose as was the evidence mentioned by Ipp JA in the passage I have quoted. In contending for the contrary view, the appellant relied upon one sentence in the report of Dr Curson, in which she expressed the opinion that "if the incident had been handled differently and if Ms Govier had felt supported by management she would most likely not have developed such severe disorders." The appellant construed this as an opinion that the severe disorders from which she suffered were entirely attributable to the respondent's failure to handle the incident otherwise than by sending the two letters. Putting aside the difficulty that Dr Curson did not explain what would have been sufficient conduct for the respondent to have ensured that the appellant would have felt supported, the appellant's submission is in any event flawed for two reasons. First, it does not adopt the natural meaning of the sentence, which is that the severity of the appellant's disorder was increased by the alleged cause. Secondly, it takes the sentence out of context. In that respect it is sufficient to refer to [63] of these reasons, which makes it plain that Dr Curson's

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75 [2005] NSWCA 208 at [106]-[112].

evidence was that the severe and prolonged assault was the cause of the serious psychiatric conditions suffered by the appellant and that those conditions were aggravated by the sending of the letters.

[85] As the respondent submitted, the evidence also revealed that the appellant focused upon the serious assault upon her and did not mention the respondent's conduct in sending the letters as having any effect upon her when she first saw Dr Curson[76] and when she consulted Dr Chau.[77] Consistently with the evidence which treated the sending of the two letters as having an aggravating effect upon the appellant's psychiatric conditions, it cannot be said that the primary judge erred by concluding that the contribution made to the appellant's psychiatric conditions by the assault was far greater than the contribution made by the sending of the letters. There is no sufficient basis for an appellate court to find that the primary judge's translation of that conclusion into assessments that the sending of the letters caused 15 per cent of the appellant's loss and the assault caused 85 per cent of the appellant's loss was in error.

Proposed orders

[86] I would dismiss the appeal with costs.

[87] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[88] **NORTH J:** I agree with the reasons of Fraser JA and the orders proposed by his Honour.

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76 RB 655 (Dr Curson's report of 16 August 2012).
77 RB 664 (Dr Chau's report of 16 July 2012).