SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane Youth Service Inc v Beven* [2017] QCA 211
PARTIES:	**BRISBANE YOUTH SERVICE INC** **ABN 83 967 756 338** **(appellant)** **v** **LINDSEY CALVERT BEVEN** (respondent)
FILE NO/S:	Appeal No 8547 of 2016 SC No 6170 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 163 (Atkinson J)
DELIVERED ON:	22 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2017
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where the appellant is an organisation that provides counselling and other support services to homeless and drug affected young people – where the respondent was hired by the appellant to work as a family support worker – where one of the appellant's clients was a young woman, T, with a history of making sexual advances towards staff of the appellant – where the respondent was assigned to work with T – where the respondent's role was to act as an advocate for T and to deliver an educative program to T – where senior staff members of the appellant questioned whether T was an appropriate client – where T eventually indecently touched the respondent at a meeting at government offices that had been organised by the appellant – where the respondent developed a major depressive disorder as a result of the assault – where the respondent had a pre-existing vulnerability due to childhood sexual abuse and this increased the severity of her impairment – whether the risk of harm to the respondent was

reasonably foreseeable

EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – VOLUNTARY ASSUMPTION OF RISK – where the respondent was aware of T's behavioural history but agreed to work with T – whether the respondent accepted the risk of suffering an injury of the kind she suffered – whether the risk of this kind of injury is inherent in the nature of social work

EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – INJURY OCCURRING IN COURSE OF EMPLOYMENT – where the respondent was required to provide support services to homeless and at-risk youth – whether the respondent's injury resulted from the performance of duties as envisaged by the employment contract

EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – PARTICULAR CASES – PRECAUTIONS TO PREVENT INJURY – where s 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) provides that a person does not breach a duty to take precautions against a risk of injury unless the risk was foreseeable, the risk was not insignificant and a reasonable person would have taken precautions – where T had a history of making sexual advances towards staff of the appellant – where senior staff members of the appellant questioned whether T was an appropriate client for the appellant – whether the risk of injury to the respondent was not insignificant – whether the appellant should have taken precautions – whether it would have been reasonable for the appellant to have taken precautions by discontinuing its provision of services to T

Child Protection Act 1999 (Qld)
Employers' Liability Act 1880 (43 & 44 Vict c 42) (UK)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305D

Beven v Brisbane Youth Service Inc [2016] QSC 163, affirmed
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33, cited
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15, distinguished
New South Wales v Fahy (2007) 232 CLR 486; [2007] HCA 20, applied
Perkovic v McDonnell Industries Pty Ltd (1987) 45 SASR 544, applied
Rands v McNeil [1955] 1 QB 253, applied
Smith v Broken Hill Pty Co Ltd (1957) 97 CLR 337; [1957] HCA 34, applied
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, applied

Thomas v Quartermaine (1887) 18 QBD 685, distinguished
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, applied
Yarmouth v France (1887) 19 QBD 653, distinguished

COUNSEL: R J Douglas QC, with R Morton, for the appellant
S C Williams QC, with J P Kimmins, for the respondent

SOLICITORS: McInnes Wilson for the appellant
Maurice Blackburn for the respondent

[1] **SOFRONOFF P:** A young Aboriginal woman, referred to at the trial as "T", came to the attention of authorities in August 2008. T was born on 24 December 1990. She had been the subject of a Child Protection Order under s 59 of the *Child Protection Act* 1999. T was a methamphetamine user and she was pregnant. While she was still subject to the Child Protection order, child safety officers found her unconscious in her home, affected by drugs, with her infant daughter in a pram nearby with a blanket over her head. Her daughter was placed in care. T came of age in December of the same year.

[2] T and her daughter became the subject of investigation by child safety officials in order to determine how best to ensure the welfare and safety of both the mother and her child. Although it was not a matter explored in detail at the trial or on appeal, it is relevant to observe that the taking of T's children into care was effected under the *Child Protection Act* 1999. Section 14 authorises the chief executive to cause an authorised officer to investigate allegations of harm or risk of harm to children who are reasonably suspected of needing protection.

[3] Section 51C of the Act obliges the Chief Executive to prepare a case plan for a child in need of protection. Section 51H obliges the Chief Executive to convene a "family group meeting" to develop a plan and this family group meeting is to review such a plan once it has been made and implemented. Pursuant to s 51L the child's parents are entitled to attend such meetings as are persons who "give help or support to the child or parent". The statutory examples given include a "youth worker" and "a legal representative". A "relevant service provider" may attend all such meetings.

[4] A report about T by the Department was admitted as evidence at the trial. The report said that T had "a history of violence, self-harm, suicide attempts, instability and sexualised behaviours". Having regard to the imperatives expressed in the *Child Protection Act*, the Department's officers determined that the primary goal of their efforts would be to "develop and strengthen [T's daughter's] family functioning to ensure she remains safely in the care of her mother, and to provide ongoing support to the family to ensure a successful outcome". Three "parent's needs" were identified. These were alcohol and drug use, parenting skills and household resources and basic care.

[5] In respect of "parental substance abuse", they decided upon a target as follows:

> "T to demonstrate an ability to appropriately manage her substance use.
>
> **How will we know it is different?**
> T will demonstrate and provide evidence of the following:

- that she is managing her substance use and a reduction of her use will be observed through her engagement with services and monitoring through urine screenings;
- that she is consistently ensuring drug/alcohol use does not impact on her ability to provide appropriate care to her child;
- that she will ensure budgeting for household resources is always prioritised over alcohol or drugs;
- that she will attend and undertake a drug and alcohol counselling/program and consistently comply with attendance requirements and engage positively;
- it will be observed that T will begin to develop the ability to articulate insight into her own drug/alcohol use, triggers to use, the cycle of use and the detrimental effects of parental drug and alcohol use on children; and
- will report feeling confident in her ability to manage their substance/alcohol use."

ACTIONS (What has to be done?) *Include frequency*	Who will do it?	Date to be completed or reviewed?
T has self referred to Brisbane Youth Service (BYS) drug and alcohol rehabilitation program. Save the Children has assisted T in referral process.	T and Save the Children	28/10/2009
T to undertake random regular urine drug testing. T must undertake the urine test within twenty four [24] hours of being requested to do so by CSO, and is to comply with all necessary guidelines for urine testing.	T, CSO	28/10/2009
CSO is to arrange for random urine testing, provide relevant forms and to notify parent of the required test dates. The Department are to receive the results.	CSO	28/10/2009
CSO to submit CRC memo requesting funding support and approval to cover fees associated with screenings.	CSO	28/10/2009

[6] In respect of "parental counselling", the following was resolved as the aim of the Department's intervention:

"[T's daughter] has a parent who is able to provide her appropriate care, supervision and protection. T has reported during the FGM that she has engaged with Logan Adult Mental Health 3-4 times.

T will be refer to other Mental Health Service located on the North side of Brisbane as it may be extremely difficult for T to comply with this requirement in advanced state of pregnancy and [T's daughter] in her care

T has self refer to BYS in general counselling.

How will we know it is different?

T will demonstrate her ability to recognise and respond to [T's daughter]'s needs (physical, medical, developmental, emotional), by developing and implementing a consistent routine for [T's daughter] when [T's daughter] is in her care, and by placing appropriate and consistent limits and boundary in place and implementing appropriate and consistent disciplining strategies.

T will develop appropriate coping mechanisms in place and demonstrating ability to deal with adversity, crises, and long-term problem in a constructive manner.

ACTIONS (What has to be done?) *Include frequency*	Who will do it?	Date to be completed or reviewed
T is to engage with an appropriate service and secure counselling to address the impact of multiple boundary violations, poor attachment and ongoing childhood sexual abuse. T has self referred to BYS and Save the Children has assisted T in the referral process.	T, Save the Children	28/10/2009
Save the Children to assist T in providing support to T	T, Save the Children	28/10/2009
Save the Children has referred T to Red Cross to get additional support.	T, Save the Children	28/10/2009"

[7] In respect of "Parenting Skills", the resolution was as follows:

"**PARENTING SKILLS and ACCOMMODATION**

[T's daughter] has a parent who is able to provide her appropriate care, supervision and protection.

[T's daughter] has a parent who meets her emotional and behavioural need through knowledge of [T's daughter]'s developmental level and effective parenting strategies.

[T's daughter] has a parent who consistently provides her safe and stable housing, hygienic home environment, nutritional food, clothing and meets [T's daughter]'s basic care needs.

T has recently found a house through Department of Housing in Gaythorne.

How will we know it is different?

T will be demonstrating ability to recognise and respond to [T's daughter]'s needs (physical, medical, developmental, emotional).

T developing and implementing a consistent routine for [T's daughter].

T placing appropriate and consistent limits and boundaries in place and implementing appropriate and consistent disciplining strategies.

T having appropriate coping mechanisms in place and demonstrating ability to deal with adversity, crises, and long-term problem in a constructive manner.

T will manage her financial and household resource effectively to enable them to provide for [T's daughter]'s basic care needs.

Home environment consistently observed to be hygienic, safe and tidy.

ACTIONS (What has to be done?) *Include frequency*	Who will do it?	Date to be completed or reviewed
T has referred herself to BYS in a parenting program.	T	28/10/2009
CSO to support T in ensuring her home is child safe. Save the Children to assist T in ensuring the house is child friendly and child safe.	CSO and Department, Save the Children and T	28/10/2009
T is to maintain the household at an organised, safe, hygienic and functional level.	T	28/10/2009
CSO and the department will monitor and supervise the home environment through scheduled and unscheduled home visits	CSO and Department	28/10/2009"

[8] T's daughter's immediate fate, however, was that she was immediately returned to the care of her mother.

[9] On 14 May 2009, the Department referred T to the appellant's "Drug Team". The referral document identified that the reason for the referral was T's "previous/current [drug use] compromising the long term care of her child". Her identified "needs" were said to be "use of speed" (which was written next to a downward pointing arrow signifying a decrease of use), "safe using when [T's daughter] is not in her care" and "pregnancy effect on unborn". At the time of referral, T was pregnant with the birth due in July.

[10] On 6 November 2009, an officer of Child Safety Services informed Ms Laura Christie, an employee of the appellant, about the following matters:

> "• Concerns T's mental health has been deteriorating over a period of months and she is regularly self-harming by cutting herself. They are aware that the children are in the home when the mother is self-harming.
>
> • Concerns T is substance misusing and is using ice and speed about twice a week. When T is withdrawing she is observed to be more irritable, disengaged and depressed in her responses to the children. As she is less affectionate at these time with [T's daughter], the child has been seen to become upset at times when the mother does not respond to her.
>
> • Track marks have been observed on mother's arms.
>
> • Notifier stated it is unknown where mother is getting the drugs and or how safe the [T's daughter] is in mother's care given she is using drugs intravenously and depressed.
>
> …
>
> • The mother admitted that she had been using hard substances (such as heroin, cocaine and speed) in recent weeks and that she uses 2-3 times a fortnight.
>
> …
>
> • They are concerned that the mother can become quite volatile when confronted and if she has been using ice that she may be quite violent.
>
> …
>
> Through direct observations from CSO, CSSO, Carer, T, service providers and support, the following will be assessed;
>
> • [Her son] will have regular positive contact with his mother.
>
> • [T's daughter] and T will build an appropriate bond and have a positive relationship.
>
> • Contact will increase with positive reports.
>
> • Supervise will have positive reports from contact.
>
> …
>
> **OUTCOME (What has to be different?)**
>
> **Alcohol and Drug**

T to remain drug and alcohol free. T to have an understanding how her drug/alcohol use impacts her parenting of [her children].

T to have a drug and alcohol plan established with BYS.

T to engage with Quinn or another appropriate service for drug and alcohol counselling.

…

OUTCOME (What has to be different?)

Mental and Emotional Health

T to maintain emotional and mental health wellness and stability. T to demonstrate her ability to manage her emotional responses with in her family environment so that the children are safely parented and free from emotional harm.

T has a history of self harming as a child in care. T appears to self harm without intentional suicide as a way of managing stress and pain and has expressed it is better she harms herself than her children. T is very immature in her emotional reasoning and forms immature relationships with people.

T to engage with Brisbane Youth Service (BYS) to establish a mental health plan. The doctor at BYS have referred T to a psychologist for ongoing personal counselling.

…

OUTCOME (What has to be different?)

Parenting

T to develop a positive relationship with her children to enhance their relationship and demonstrate parenting strategies that will enable her to understand and meet her children's needs. T will provide a safe environment for her children.

T has difficulty in parenting [T's daughter] and managing her behaviours and that of a busy, wilful, and demanding toddler. T has difficulty in coping with the demands of [her children] and as a young sole parent with limited resources and family support to help her she does find it difficult. T has used amphetamines to assist her when she is stressed and self harms in this manner she does not act protectively of the children.

How will we know it is different?

Through direct observations from CSO, T, BYS, Susie, Georgia and parenting group, the following will be assess;

- There will be no further notification in relation to T's parenting of [her children].
- T will engage in a parenting program.
- T will demonstrate positive coping strategies.

- T will develop and implement positive parenting strategies.
- T will provide a safe environment for [her children].
- T will engage in Triple P Parenting Program.
- T to establish a routine and boundaries in their home and implement it."

[11] The appellant describes itself as a provider of support services to homeless and at-risk young parents and their children. The services were intended by the appellant to move such parents "from a position of vulnerability and isolation towards community and personal strength".

[12] The position that the respondent came to occupy as an employee of the appellant was described in a document that advertised that position. Relevantly, it stated:

"**KEY RESPONSIBILITIES:**

The Family Support Worker has the following key responsibilities:

1. Planned, On-going Parent/Family Support

- Provide planned support to pregnant and parenting young people. That is, within a plan for the individual that has clearly articulated goals, which have been developed collaboratively with the young parent/s.
- Provide counselling, information, support and advocacy, focussing on issues of housing, safety, harm reduction, and amplifying strengths to provide opportunities for greater self-control and inter-dependence in the community.
- Provide appropriate support to access emergency assistance, accommodation, housing, legal assistance, mental health, employment, education, training, social and other activities that promote growth and development.
- Maintain client files and records, including computer records and daily entries of all activities with clients.
- Participate in relevant networks, interagency meetings, reference groups, peak bodies and lobby groups.

2. Team Work and Organisational Tasks

- Provide general support to colleagues and team members.
- Meet regularly with the Program Manager and raise all work/performance concerns in a timely manner.
- Participate in staff, supervision, debriefing, case planning and other meetings as required.
- Arrange external supervision and identify and address ongoing professional needs by attending relevant training and skill development opportunities.
- Participate in team planning and performance appraisal.

– Participate in the organisation's strategic planning process.

3. Rostered Centre-based Duties

– Participate on the weekly roster that manages the Drop-In Centre at BYS.

– Respond to requests for assistance such as income, accommodation, emergency relief, food, clothing, showers, laundry and court representation especially in relation to young families who present.

– Crisis intervention and risk assessment to keep people safe during and following incidents in the drop-in centre involving overdose, self-harm, threatening behaviour and violence."

[13] The same document stated the criteria that would be applied in selecting a person to fill the advertised position:

"**SELECTION CRITERIA:**

IMPORTANT! Please note: Selection for an interview is based on your response to the selection criteria below.

SC1: A demonstrated understanding of the issues facing young homeless or at risk parents and young pregnant women and the ability to clearly articulate a practice framework for working effectively with the target group.

SC2: A demonstrated capacity to provide planned support to homeless and at risk young parents so that they may live independently, improve their well being, engage community support, increase their participation in activities and achieve greater self-reliance.

SC3: Knowledge of or the ability to acquire knowledge of Child Protection Legislation, the Child Protection System and contemporary approaches to supporting young parents to protect their children from harm.

SC4: A thorough knowledge of community resources specifically for young parents and the ability to work with other community agencies and statutory bodies when appropriate.

SC5: A high level of written and interpersonal skills including the documentation of work, and the ability to work as an effective member of a multi-disciplinary team.

SC6: A proven ability to work without direct supervision, exercising a high degree of initiative, judgement and decision making within the broad parameters of the organisation.

Required:

- **Relevant experience and/or a degree in Social Work, Psychology, or the Social Sciences with specific training in family support interventions.**
- Experience working with homeless or at risk young parents.
- A commitment to harm reduction and social justice.
- Current drivers license."

[14] A further description of the services provided by the appellant was contained in a document that became part of the respondent's contract of employment:

"**BYS Current Services**

BYS offers a holistic range of services that move from immediate needs through to planned support (refer Model of Service Delivery). The current range of services provided includes:

- Drop in services including access to:
  - showers, laundry, food, mail, storage of belongings, computers and phones
  - Program of activities for participation.
- Specialist youth medical clinic including a doctor and nurse
- Access to drug intervention workers for intervention, education and support.
- Needle and Syringe Exchange program
- Access to emergency assistance for housing and fares
- On-site assistance from Centrelink with income support
- On-site Mental Health Outreach Clinic
- Legal and Court Support including weekly clinic at the Diversion Court
- Street/park based Outreach services
- Activities, arts and life-skills programs (www.brisbii.com)
- Community cultural development projects and resource development
- Transitional housing options
- Housing support and education
- Health education and promotion activities and intervention
- A range of Parent support services for young families including intensive support (www. parentsyes.org)
- Parenting Groups
- Peer education programs

- Support for promoting young peoples access to genuine participation opportunities
- Systemic information, advice, support and advocacy across a range of issues.
- Case management
- Intensive personal support and counselling"

[15] A flow chart set out in more detail how the management of the provision of these services was undertaken. After describing how persons needing support of the kind offered might become clients of the service, the document described three distinct areas within which services could be offered. These were:

CRISIS SUPPORT
(up to 12 contacts p.a.)

- Immediate assistance (meals, laundry; storage; showers; personal hygiene; clothing; mail collection, computers)
- Financial Assistance – ER
- Information and Referral
- Medical services
- Crisis counselling
- Referral to emergency accommodation, legal assistance etc

BRIEF INTERVENTION
(up to 12 contacts p.a.)

- Medical and health services
- Drug and alcohol services
- Life skills program (planned activities & day program)
- Parenting group program
- Accommodation and support services
- Peer education services

* ACTION LEARNING & STAGES OF CHANGE

PLANNED SUPPORT
(more than 12 visits p.a.)

Referrals in for Parents YES and some Drug intervention

- Needs assessment & planned support/care coordination provided by a Key Worker
- Joint casework with other agencies
- Referral and advocacy
- Group work

* ACTION LEARNING & STAGES OF CHANGE

N.B. A person can be in receipt of services at more than one level at any point in time

[16] A chart that described the reporting structure described the complement of three "teams" that each provide distinct services. These teams were:

Health Team Drug Intervention Worker x 2 Nurse (30 hrs) Dr's (p/t) Arts Health Educator (f/t) Youth Health Engagement Worker (p/t) Complimentary Therapies Project Worker (p/t)
Young Families Team Young Families Housing Worker (.5) Family Support Worker (f/t) **Parents YES Program** Young families Team Coordinator/Family Support Worker (f/t) Family Support Worker (f/t hrs) Family Support Worker (22 hrs) Community Linking Worker (30 hrs)
Homelessness/Housing Team Coordinator (f/t) ↕ Casual Staff Pool (approx 3 workers) Youth Development/Activities Worker (f/t) Indigenous Youth Development (p/t)

[17] According to the evidence of Ms Andrea Edwards, an "intensive support social worker" employed by the appellant at the relevant time, the appellant attracted the more "complex type of young people" as clients. These included victims of sexual abuse and "some of the most traumatised young people out there".

[18] Ms Susie Turner was the first employee of the appellant to meet T. She was described as a "Supported Accommodation Assistance Program" worker. What this actually meant was not explained in evidence and Ms Turner was not a witness at the trial. She made notes of her first meeting with T on 11 May 2009. All further meetings between T and employees of the appellant were also recorded in a case file that was tendered as an exhibit. Ms Turner noted that at the first meeting T had informed her that the issues that T wanted to address were "Mental Health (Dep and Anx – PTSD), Drug Use (Speed), Sexual Abuse (Father incarcerated for this – due to be released Sept), Attachment". About a week later, Ms Turner informed T that the appellant proposed to provide a "drug intervention worker". Ms Turner began to visit T regularly, to discuss T's problems with her - from lack of housekeeping skills to drug use - and in order to apply some structured tactics to deal with these problems. Ms Turner would transport T to appointments with a midwife and to do grocery shopping. T read poetry she had written. Together they arranged the delivery of a cot for the baby that would soon be born.

[19] T began to confide in Ms Turner about the sexual abuse that she had suffered in the past and about her life in and out of foster care. In the case file Ms Turner noted that many conversations that she had with T were "very sexualised".

[20] At the same time, T began to receive services from Ms Laura Christie who was described in the case notes as representing "National Illicit Drug Strategy". Presumably, she was the "drug intervention worker" that Ms Turner had foreshadowed would be provided. Ms Christie's first contact with T was by phone. She informed T that she would visit her and together they would discuss what the appellant could offer in the way of support "around her drug use". They met soon afterwards and T informed Ms Christie that she had not used drugs since her daughter had been returned to her care but that her long term goal was not to cease using drugs but to moderate her use.

[21] Ms Turner visited T every few days. Ms Christie visited her a little less frequently. According to the case notes, as the birth of T's baby approached, and after her son was born in July 2009, T had episodes of depression, anxiety, inability to cope with child care and temptation to self-harm, which in her case involved cutting herself.

[22] Throughout the second half of 2009, the main concerns that were recorded as confronting Ms Turner, in her role of offering the "Supported Accommodation Assistance Program" and Ms Christie, in relation to addressing the issues arising from T's use of drugs, were T's mental state, her desire to use drugs as a way of alleviating her mental agony, her inability to care for her two children and her occasional expressions of desire to buy sharp knives which she wanted to use to cut herself.

[23] In addition, in August 2009 Ms Turner noted that T had been making frequent attempts to "make physical contact" with her and that she had had to ask her "not to touch me". T had become angry. There was no evidence led that T had actually touched Ms Turner in a sexual way at this point. A few days later, during a visit with T to her psychiatrist, Ms Turner, with T's consent, related to the psychiatrist the difficulties that T was experiencing with "sexual boundaries".

[24] On 28 August 2009 Ms Turner noted that T "has been messaging me with confused feelings about our working relationship. I have been very clear and straight forward about boundaries and that our relationship is a working relationship". A week later, during a visit to T's home on 4 September, and while Ms Turner was attempting to "reinforce boundaries with her and my role as having a working/professional relationship with her", T began to cut herself with a Stanley knife. Ms Turner noted that T said "a couple of concerning things that have made me feel unsafe and concerned for the children".

[25] On 8 September 2009, Ms Turner noted on the case file that "During the time I was at T's I should document that she had written threats towards my safety in her home. Deb was also able to read this. T later reported that this was not true and she onlt [sic] wrote it because she was angry! I have informed T that such comments and threats are not ok and that I cannot ignore them. I will no longer be proving [sic] intensive support in T's home. I wil [sic] discuss a new model with her in the future". Informed of this decision on the same day, T reacted in Ms Turner's presence with anger, "[slamming] her blade on the table".

[26] On the same day, according to a case note made by Ms Turner, "Team decision made to notify DoChs due to [T's] increasing drug use, mental health and

selfharming behaviours … Team discussed ceasing support however Ange (Manager) and I decided to offer limited support to [T] in the event that she wishes to take me up on it". Ms Turner and another employee, Ms Debra Driscoll, attended at T's home to inform her of the notification having been made.

[27] On 11 September, Ms Turner, with three other workers, attended at T's house so that Ms Turner could introduce T's new Supported Accommodation Assistance Program deliverer. Ms Turner noted that she discussed with T "changes to the way we work together due to the threats to my safety". According to the notes, T "ended up in her room potentially self harming and yelling at workers". The interview was terminated. On the following Monday, T's daughter and son were removed from her care and placed in care of the Department.

[28] Ms Christie continued to visit T at her home and to take her to various appointments and, for her part, Ms Turner remained willing to consult with T but only at the offices of the appellant.

[29] On 5 October 2009, Ms Turner noted that T had sent text messages to her "outlining that she wished to commence an inappropriate relationship and was having feelings for me". T also sent her a message that Ms Turner said was "pornographic". Ms Turner noted that she had told T that such messages were not acceptable.

[30] Ms Turner was a psychologist. On the same day, 5 October, she discussed with T commencing psychological therapy with T instead of continuing their previous form of interaction. On 15 October 2009 T and Ms Turner began to meet alone together so that T could engage in "counselling with Susie [Ms Turner] in a psychology practice setting to work on her own stuff as opposed to parenting issues".

[31] T now began to make sexual comments to Ms Christie as Ms Christie noted on 11 November 2009. T's drug use and acute depressive episodes and attempts at self-harm continued. Her sexual text messages to Ms Turner also continued. In a phone call on 1 December, T told Ms Turner that she had been prostituting herself to pay for drugs and that she had been stalking somebody.

[32] T's condition worsened or, at least, it did not improve. During December, she sent text messages to Ms Turner threatening self-harm and, during a home visit by Ms Christie on 8 December 2009, T spoke about wanting to do "bad things" and wanting to "stalk, rape and drug". She had blades nearby her as she said this, as well as pornographic material.

[33] As to these matters, Ms Christie said in oral evidence:

> "And again, due to knowledge of her sort of diagnosis, this is something that I wouldn't go too far into with T. That wasn't something that I had the skills to talk around with a young woman with the complexity of her mental health. So I would have talked around that with her at the time, because part of this exercise is around listening to what the young person's responses are, and in their own words, writing exactly what they tell you. It's a motivational interviewing technique. So we don't focus on the negatives. We're looking at the positives in this activity."

[34] T informed her that she had followed Ms Christie to some destination and had seen her out walking and had seen the number plates on her car. Ms Christie said:

> "I called her on it, and I said, I don't believe you; I don't believe that to be true. And I questioned her on it and she said it's not true. She said it was something that she would fantasise around, but it was something that she wouldn't act on. It was something that we kind of had spoken about on and off, because it was a theme for T that would come up, this theme of stalking."

[35] She added the following:

> "It was something that came up in her – in – so, of course, we would address it at the time, but I didn't give it too much weight, because it wasn't what I wanted to focus on with her. We're a strength-based organisation. I'm not going to focus on these negatives."

[36] Ms Christie informed her superior, Angela Barnes, about these matters.

[37] On 23 December, T showed Ms Christie a suicide note she had written as well as a poem she had written about how Ms Turner had "hurt her". On 5 January 2010, T told Ms Christie that she wanted to "stalk workers", evidently referring to the appellant's employees and officers of the Department, and her desire to "[hire] a PI". Her affect was confused. On 7 January 2010 she confided in Ms Christie her fears that she, T, might sexually abuse her own children. On 19 January, in a fit of irrational anger, she called Ms Christie "a slut and hoar [sic]" and "spoke again about stalking and again mentioned that she had Susie and myself followed one day".

[38] On 5 February 2010, after learning that an order had been made to take her children into care for two years, Ms Christie noted that T "was not doing well". She produced a suicide note and had a knife behind her back. Ms Christie called an ambulance and T was admitted to hospital.

[39] After T's discharge from hospital, Ms Christie continued to visit her and to take her to appointments and grocery shopping. T was agitated at times when she had not been using methamphetamine. By April, she was using drugs again and exhibiting depressive behaviour and threatening to self-harm. In May, Ms Christie discussed with T the possibility of admitting her to a rehabilitation clinic and what that experience might be like. At a meeting at T's home five days later, T told Ms Christie about "inappropriate dreams she had had about" Ms Christie while at the same time running a pair of scissors along her own neck and then stabbing them into a table.

[40] On 2 June 2010, Ms Turner and Ms Christie discussed T's case. Ms Turner spoke about "the severity and complexities of T's mental health issues and from her perspective noted a number of overlapping conditions ie BPD, PTSD, depression, anxiety, compulsive behaviours". Ms Turner "suggested getting T to see a psychiatrist to get properly medicated to stabilise her moods". As a psychologist, Ms Turner could not prescribe medication. Ms Christie made attempts to secure the services of a psychiatrist. On 20 July, Ms Christie was informed that a psychiatrist would not see T unless T stopped using drugs. This, of course, was not likely, as Ms Christie knew and Ms Christie's earnest and persistent attempts to place T with a psychiatrist met with no early success and her drug use and volatility continued.

[41] According to the case notes, from July until September 2010, and despite the earnest efforts of Ms Turner and Ms Christie, nothing had changed in T's condition or circumstances.

[42] As has been said, on 8 September 2009 the appellant had made a decision to "notify" the Department and this notification resulted in the removal of T's children into the care of the Chief Executive.

[43] As a result, a series of meetings under the aegis of the Department then took place over the course of the next 19 months. Some of these were at the offices of the Department. Others were at the Childrens Court or the Family Court. Initially, Ms Turner or Ms Christie attended such meetings to "support" T.

[44] According to a file note made by Ms Christie, she supported T in this way at the Childrens Court on 3 December 2009. On 18 February 2010 Ms Christie again attended with T at a proceeding the Childrens Court. On that occasion, according to the case note, there was a case conference attended by three Departmental officers, a lawyer acting for T, a friend of T's, Ms Christie and an unidentified convenor. It was resolved that the order placing T's children in care would continue for at least another year.

[45] A case review meeting was held at the Department's offices at Chermside on 29 April 2010. Ms Christie again attended to support T. This involvement by Ms Christie as a support to T in her dealings with the Department continued over the course of 2010.

[46] It was at this point that the respondent entered into the picture.

[47] The appellant had first employed the respondent in 2007. Her curriculum vitae showed that she had earned a degree of Bachelor of Behavioural Science from La Trobe University with a major in Psychology. In 2000 she also earned the degree of Bachelor of Arts from Charles Sturt University with a major in psychology and minors in Law and Sociology. She described her areas of specialty as conflict resolution management, youth homelessness and issues affecting homelessness, depression, suicide prevention, sexual abuse and "strength based social justice framework".

[48] She described her practical experience since leaving university, relevantly, as follows:

> "**Jan 2003 – present**
>
> **Chameleon House**
>
> Redcliffe, Queensland
>
> ***Youth Worker***
>
> - Working with young people aged 13 – 18 yrs, and their families in a crisis shelter and long term properties
> - Working with young parenting families in transitional properties – budgeting, parenting advice, engaging in community activities, liaising with DOCS, Dept of Housing, Community Housing, Dept of Education and other significant agencies
> - Acting coordinator duties
> - On call duties

- Facilitation of networking meetings with various community organizations
- Facilitation of Graffiti Art workshop for young people
- Working with young people on conditional bail programs through joint programs with YBASS and Youth Justice
- Supporting and facilitating young people to gain access to community organizations to assist needs such as homelessness, or at risk of homelessness
- Supporting young people who have drug dependence issues
- Providing crisis management
- Facilitating access to young people to community bodies to gain assistance i.e. medical, financial, educational, job opportunities/training, mental health assistance or counseling [sic].

Dec 1999-Jun 2003

Anglicare TRACC (Tufnell Residential and Community Care) Logan, Queensland Dec

Residential Care Youth Worker/Behavioural Therapist

- Care, guidance, role modeling, [sic] and counseling [sic] for youth aged 6 - 12 years effected [sic] by homelessness; multiple placement breakdown, abuse and neglect
- Providing young people with a therapeutic and safe living environment
- Behavioural modification to equip the young person to reach their full potential
- Case management
- Implementation of charts, databases, spreadsheets, petty cash management, shift reviews, monthly reviews
- Liaison with Dept of Child Safety, Dept of Communities, Dept of Education, Anglicare management and significant others in the young person's life
- Providing Crisis management
- Working in a team environment
- Mediation and reunification if as per case plan"

[49] This information about the respondent's practical experience was not explored during the trial.

[50] The respondent's post-graduate training was as follows:

"QPAST Torture and Trauma Workshop 2007

Post Traumatic Stress Disorder Workshop 2007
Triple P Course 2007
Cultural Workshop 2007
Child Protection 2007
Strength Based Training/Strength in teams 2007
Suicide Prevention Chermside 2006
Senior First Aide Course 2006, 2005, 2004, 2003, 2002, 2001
Strength to Strength Kyabra 2006, 2004
Strategies for Challenging Youth 2003
Physical Restraint Course 2001/2002/2003
Therapeutic Crisis Intervention 2003
Sexual Assault SACS 2002
Caring Crisis Management 2002
Domestic Violence, Effect on Children and Families Logan Women's Centre 2001
Children, What to do when they come your way? Relationships Aust 2001"

[51] The respondent had suffered cruel and pitiless sexual and violent abuse as a child. She and her family had socialised with the family of her uncle. His son, C, was seventeen when the respondent was five years old. C would babysit the respondent and her young siblings. From when she was five until she was thirteen, the respondent was sexually assaulted by C. He raped her frequently. He threatened to kill her if she complained. He once held her hanging by her feet over the edge of a cliff and told her that he had already killed her parents and buried them. There was evidence at the trial that C's abuse was known or, at least, suspected, by responsible adults in the respondent's family who did not act to protect her. Years later, C was found guilty of manslaughter and sentenced to a term of imprisonment. The respondent finally made a complaint to police and C was tried some time later. He was acquitted.

[52] The respondent had also been the victim of abuse as a child at the hands of her paternal grandfather and two other men.

[53] The respondent's family has never spoken openly about these matters and, according to the respondent, each of her siblings had been the victim of abuse in some way or another.

[54] This awful chain of experiences had its effect upon the respondent. While pursuing her second degree at Charles Sturt University, the respondent was obliged to complete an assignment about sexual abuse and repeated offending by perpetrators of sexual abuse. Her own experiences led her to "decompensate". She was admitted to Wagga Mental Health Unit where she spent some time after what was referred to as "an attempt at deliberate self-harm".

[55] The respondent did not reveal any of this history to the appellant.

[56] After leaving Wagga Mental Health Unit, the respondent moved to Brisbane at the suggestion of her sister. Here she met her husband to whom she remained married for over ten years. They have three children.

[57] The respondent continued to undergo counselling for some years and, for a time, took anti-depressant medication. However, from the time she moved to Brisbane and until the event that led to this litigation, the respondent said in evidence, she

was coping extremely well, was good at her job and was in a very happy marriage. That evidence was not challenged.

[58] When the respondent began to work for the appellant in 2007 she became a Family Support Worker as part of the Young Families Team. In oral evidence the respondent said that her role was to "support and advocate for young homeless, or at risk of homelessness, young parents". The form that such support might take, in the case of the appellant's work, was not much explored at the trial. The significant point, however, is that the work for which the respondent was responsible was distinct from the work done by members of the Health Team, as will appear. The two teams were also based in different premises.

[59] Ms Christie approached the respondent about T for the first time in September 2010. The case file note Ms Christie made read as follows:

> "Chat with Lindsey (Family worker) re support for [T]. Lindsey can support [T] during her contact time at Child Safety and assist with Child Safety advocacy as well. Also able to look at attachment and play (YMTD)."

[60] Ms Christie had told her that she herself was not equipped by her own knowledge or expertise to "navigate" the child support system. It was for this reason that the respondent was being asked to become T's advocate with the Department.

[61] In her evidence, the respondent expressed her awareness of the nature of the client that she had agreed to take on. She had already attended team meetings at which Ms Turner and Ms Christie had described the behaviour of T that had given them each cause of concern. In Ms Turner's case, this behaviour included statements expressing a desire for a sexual relationship. Ms Turner disclosed the content of letters that T had written to her. The respondent said that these letters were presented at a meeting and their contents were discussed. She herself "didn't look at them in great detail, but they were discussed". The respondent witnessed Ms Turner weeping while being comforted by Ms Kaphle after having been the subject of "a particular advance from Miss T, and she had a letter in her hand". The letter "had made some quite suggestive sexualised advances". The respondent could remember seeing "some pictures on that letter, I recall some blood". She said that she had "only glanced at the letter" and that it "made advances, quite sexualised explicit advances towards" Ms Turner.

[62] At a point in time after Ms Turner had ceased making home visits, the respondent recalled seeing T outside the appellant's premises. She was hiding behind a pole and the respondent thought that she was self-harming. She phoned her colleagues to alert them and police and an ambulance arrived and removed T to a hospital.

[63] Ms Christie had informed her that Jenny Kaighen, Ms Christie's supervisor, had informed her that "no worker should be working with this client" and that "the young person should not have a case worker due to the worker's safety".

[64] The respondent said that she had not read the case file before embarking on her work with T. No criticism of her was made at the trial for this omission.

[65] On 4 October 2010 the respondent made her first contact with the Department to inform the relevant officer of her new role as T's advocate.

[66] On 14 October 2010 the respondent attended a team meeting. She recalled that Ms Kaphle raised the question whether T was an appropriate client for the appellant having regard to her various intense problems and her history of interaction with Ms Turner. According to the respondent, Ms Kaphle told the meeting that "we needed to be aware of the risks involved with this client". She also recalled Ms Edwards expressing the view that she did not feel comfortable in working with T and that Ms Kaphle was "quite forthright with her – her concerns regarding working with this client". Ms Kaphle said that "extreme boundaries" were necessary with this client and "her mental health was a concern, and her drug and alcohol use".

[67] The respondent said that, notwithstanding these matters and Ms Kaphle's expressed concerns, there had been a "direction" that this client had to be accommodated. The respondent said that Ms Kaphle had said that this direction had come from Ms Angela Barnes. In evidence Ms Barnes denied giving such a direction. It may be noticed that on 8 September 2009 Ms Barnes had decided to continue the provision of services to T after the issue of T's suitability had been raised for consideration for the first time. Further, according to the respondent's evidence, Ms Kaphle said that "we needed to provide support for her children and that we were the Young Families Program. That was our particular forte, and we needed – someone needed to take her on".

[68] Sometime after the meeting of 14 October 2010, Ms Edwards prepared a note of her recollections of that meeting. It was not a contemporaneous note but the accuracy of its contents was not challenged in cross-examination. Ms Edwards had written:

> "I can recall Lindsey [the respondent] discussing the referral and her ideas around working with T including helping her improve the quality of her Child Safety access with the children. Lindsey wanted to accomplish this by engaging T in two programs: You Make the difference Parent/Child interaction program and The Circle of Security Parenting Program. The team leader [Ms Kaphle] disagreed with Lindsey and communicated that T was not an appropriate referral due to her complicated mental health status. The team leader also spoke around the impact T's mental health would have on her capacity to parent her children or to engage productively parenting interventions.
>
> I remember that Lindsey asserted her thoughts around working with T and specifically that she felt that if BYS did not work with her then "who will". I recall the team leader became quite firm in the manner she reiterated that the Centre for young Families was not a suitable organisation in terms of meeting the complex needs of T. Lindsey also remained firm in her stance that she should work with T. The matter was not resolved during the meeting and the team leader and Lindsey were going to discuss the matter further outside of the meeting."

[69] In oral evidence Ms Edwards said:

> "Kal was more concerned around taking T on, because of her complex mental health status. So she – and it was more around the type of work that we do is around parenting and supporting contact

> and access with kids who are in care in the less intensive role. So it wasn't – it was more can we do good work with her and her children together. So no, Kal wasn't pushing it. Kal was, in fact, doing the opposite, and saying I don't think we should be taking this case on, so …".

[70] Ms Edwards was asked whether Ms Kaphle expressed concern about whether T presented a safety risk to the appellant's employees. Ms Edwards responded:

> "… it was more around can we actually do a good piece of work? Is T in a place where she can do good work with her children and learn parenting skills? Was it an appropriate use of, you know, parenting, work support resources, to work with her, or would another service be more beneficial?"

[71] According to Ms McFadyen, Ms Kaphle was regarded as the team's supervisor. According to Ms McFadyen, if a final decision had to be made about an issue then Ms Kaphle would make it. However, she said that decisions rarely had to be made in that way; rather, a consensus was usually reached. This also emerges from other oral evidence about those meetings, particularly that of Ms Edwards and the respondent herself.

[72] Ms McFadyen also prepared a written note of the meeting of 14 October 2010, and like Ms Edwards she did so some time later. The contents of the note were not challenged. Ms McFadyen wrote:

> "Kal also felt that there were some un-safe [sic] aspects to working with [T] and that we should reconsider working with her. Lindsey then stated that she felt confident to be able to support [T] in advocating child safety and to work with her and her children. There was more conversation about the issues but I cannot recollect exactly what was said, the decision was then made that Lindsey would work with [T]."

[73] In answer to a question in cross-examination, Ms McFadyen agreed that the decision that the respondent would work with T was made by Ms Kaphle.

[74] The respondent's recollection of the October meeting, which had been the subject of Ms Edward's record, was largely consistent with that record and, indeed, the substance of what Ms Edwards said was said at the meeting was pleaded by the respondent in her Statement of Claim. Her oral evidence about this meeting was as follows:

> "Did Kal say – Miss Kaphle say anything else? --- Kal was very verbal about this particular referral. She did bring up concerns about working with Miss T. She discussed issues with mental health. She discussed the issues with her – drug and alcohol use. It was an open discussion which Kal was quite verbal about in regard to whether this particular client should be taken on or who should be actually taking on this particular client because we had the direction that someone needed to.
>
> Did she say what her concerns were in relation to taking on Miss T? --- Kal said in regards to this – to T's boundaries – and she referred to the previous case manager – so the – I – she – she addressed

concerns in regard to – to working with this young person and the boundaries, and they needed to have strong boundaries.

What do you mean she referred to previous case management? --- She brought up that there was previous situation with Susie Turner and that we needed to be aware of the risks involved with this client.

Do you recall any other – who was at this meeting? --- The – the Young Families Team were at this meeting. There was Bettina McFadyen. There was Andrea Edwards. There was Getano Bann, who was a Young Dads worker, so all these are – sorry – Andrea Edwards, Bettina McFadyen, Renee Valentine – they were all part of the Parents' YES Program, so they were the intensive support. Then there was the Young Dads' Program, and then there was the Family Support Program, so this particular client fit within my – my funding.

Do you recall any other member of that meeting saying anything specifically about taking on Ms T? --- Andrea Edwards actually said that she didn't feel comfortable in working with this particular client.

Anything else? --- It was an open discussion, and Kal was quite forthright with her – her concerns regarding working with this client.

HER HONOUR: What do you mean by that? --- She – your Honour, she was – as I said, she was the natural leader ---

Sure, but what did she say? --- Sorry. She – she said that we needed to have extreme boundaries put in place wrapped around this – this client. She did say that her mental health was a concern, and her drug and alcohol use, but we needed to provide support for her children and that we were the Young Families Program. That was our particular forte, and we needed – someone needed to take her on.

MR KIMMINS: So what was the end decision at the meeting? --- So I said I would take this particular client on. I said that I would provide Circle of Security. We actually discussed that – what options did we have in working with this client, so initially it was we needed to do the court support around this person and the support through Child Safety because her children were taken into care, and there was a further order coming, so she needed support around this, and I – I said that I was – I would take this client on. Of course, she was part of my funding, and I would provide Circle of Security program which is a short sharp 10 week intervention, so it would just be 10 weeks, and I felt comfortable doing that because I wasn't a [sic] intensive support worker; I provided the program."

[75] The respondent said that at the October meeting she agreed to "take on" T as a client. She said that T was "part of my funding" and that she would provide a "short sharp 10 week intervention" by way of providing the Circle of Security program. She said that she was "happy to take the client on". She "did fit into my funding criteria". She acknowledged that at the meeting she said words to the effect, "If BYS won't help her then who will?"

[76] Ms Barnes denied that any direction had been communicated that T had to be retained as a client. She said in evidence that it would be unethical to ask somebody to do this work if that person felt a lack of competence to do it. Not only would it be unethical, in her opinion it would also be unprofessional and dangerous. That is undoubtedly a sound opinion.

[77] Notwithstanding the respondent's evidence that Ms Kaphle had communicated to the team a direction to take T on as a client, the respondent herself did not say, or even suggest, that she had agreed to work with T as a result of such a direction or as a result of any pressure. Nor did she say that she actually felt under any pressure to do so.

[78] If it matters, according to the evidence of all witnesses in the case who spoke about these issues, including the respondent, the appellant and Ms Kaphle had supported Ms Turner and Ms Christie in their respective refusals to continue to work with T and it therefore seems unlikely that the appellant would have positively directed anyone to work with T if that person was unwilling to do so.

[79] The respondent explained how a person might become a client of the appellant. She said that a written referral, like the one that had been received by the appellant in respect of T, would be considered at a meeting of the Young Families Team of which the respondent was a member. Those present at the meeting would make an assessment whether the referred client was "appropriate and whether they could fit into our individual funding". There would be a discussion of "the pros and cons of actually being able to work with clients". The case of T was discussed in this fashion.

[80] In addition, staff working with particular clients of the appellant would discuss the progress of the case. In this way Ms Turner reported to a meeting her interactions with T. According to the respondent, Ms Turner:

> "… [E]xpressed that her case plan wasn't going according to plan, that she did have difficulties with Miss T and her mental health and her drug and alcohol abuse, and also the issues regarding the pregnancy and her drug use, and she would discuss these at the meeting, and her difficulty in working with the client.
>
> … She discussed the – making sexual advances."

[81] During such meetings, Ms Turner produced letters that had been written by T in which she expressed her desire for a sexual relationship with Ms Turner.

[82] Outside of these meetings, the respondent recalled that she and Ms Turner had had a discussion about T:

> "She – there was a particular time in the kitchen after one of the home visits, that Susie was being comforted by Kal. She was crying. She was extremely upset. She recalled – she was saying about a particular advance from Miss T, and she had a letter in her hand.
>
> She had a what in her hand? --- A letter
>
> Right? --- that had made some quite suggestive sexualised advances. I recall some pictures on that letter, and I recall some

> blood. But she was extremely upset. She was being comforted by Kal. The rest of the Young Families Team were there as well.
>
> You mentioned some pictures. What sort of pictures? --- There was – as I recall it, a love heart. I think a bow and arrow. It had Susie's name. That she loved her. It was in Texta colour pen, but it was a – quite a – Susie was clutching it in her hands. So Kal was directing her that she shouldn't – she should not work with this client. She was very upset. She made – Kal was like a nominated leader, I think, because she was older than us, and her experience, and Kal said you – you can't work with this client anymore.
>
> Do you – was anybody else present during that discussion? --- Yes, the rest of the Young Families Team.
>
> You mentioned that there was something else on the letter. Do you recall what that was? --- Some blood. Sorry, I'm very nervous.
>
> Sorry? --- As I said, I didn't glance – I only glanced at the letter. It made advances, quite sexualised explicit advances towards Susie."

[83] This evidence is consistent with the content of the case file entry for 8 September 2009 discussed above.

[84] Ms Christie also reported upon T's behaviour to a meeting at which the respondent was present. In oral evidence the respondent described what Ms Christie had said:

> "So call a spade a spade? --- Thank you. This particular client was very loose with her behaviour. She would regularly make sexualised talk and advances. You know, have you been laid tonight? She would be even more explicit and ask if – excuse me, your Honour – you've been fucked lately. She would be within your own personal space. She would – there was a particular time that I was with this client with her daughter and she opened her daughter's legs and said, do you think my daughter's being sexually abused? This client was very loose in her behaviour and what she would actually come out with, and you were very uncomfortable with these particular comments towards yourself. It made you feel very uncomfortable, and she was difficult to work with because of this. She would discuss her own sexual conquests for the week. She would – she would be quite explicit with her drug and alcohol use. She would be even under the influence when I came around, so I did other – you know, I'd been to see how she was first. She was a very hard young person to work with because of her looseness with her behaviour."

[85] The respondent also gave evidence of an incident when she herself witnessed T's behaviour:

> "Do you recall any incident when Miss T attended outside of the Young Families premises and there was an incident? --- I do. I was walking out of the Young Families Team and out of the centre at Newstead, and I saw Miss T behind a pole in the corner. She appeared to be hiding behind the pole. I could see that she had something in her hand, and that she was – I thought she was self

> harming. I called inside and Helen Wright answered the phone. Susie Turner was inside. I waited until Miss T had support from the other workers before I left. I recall – you know, sorry, the police arrived and the ambulance arrived. There was a bit of an issue in regard to Miss T becoming scared, and I think she went into a neighbour's yard, but she was very unwell, and Susie Turner assisted her in going to hospital."

[86] According to the respondent this incident occurred after Ms Turner had ceased working as T's Young Families support worker but evidently it was before the respondent came to fill that role.

[87] The respondent also gave evidence about an incident she had observed at a McDonald's Restaurant where she was present with T, Ms Christie and one Jody Cowie. Ms Cowie was an employee who assisted in day-to-day support for T. The respondent observed that, when Ms Christie began to stand up, T slid her hand down the back of Ms Christie's pants. She said that she saw Ms Christie react in a startled fashion and move away. The respondent said that she had reported the matter to Ms Kaphle and that she had also recorded the incident in her case notes. The case notes contain no such entry. Ms Kaphle was not called as a witness but in oral evidence Ms Christie denied that the incident had ever occurred. She said that, had it occurred, she would have noted it. The learned trial judge made no finding about this matter.

[88] At a meeting with officers of Child Safety on 9 November 2010 Ms Christie said that the respondent would now be addressing T's "attachment, parenting assistance". The "attachment" was a reference to a dysfunctional element of T's relationship with her baby son. On 25 November the respondent met T for the first time in company with Ms Christie. The respondent's own case note of the meeting said:

> "Meeting with T and Laura to introduce myself and the service that I am going to provide. 10 weeks of the Circle of Security program prior to the children arriving for contact. Let T know that I would come initially to meet the children and to observe the attachment as T is concerned that there is no attachment with 1yr old [T's son]."

[89] In her evidence, the respondent explained that the Circle of Security Program in this case required her to attend at T's home and together they would watch a DVD. The DVD was not tendered or shown and its content was not explained in evidence. However, it can be inferred from the respondent's evidence that it showed parents interacting in an appropriate way with their children. According to the respondent the DVD would be stopped during its showing and the respondent would "get [T's] reflective capacity about what she could see and how she could actually put that into place with her own children". After they had watched the DVD, T's children would be brought to the home by a Children Services officer and T would then engage with them under supervision while the respondent observed.

[90] The respondent went to T's home on 25 November 2010 so that Ms Christie could introduce her as the intended provider of The Circle of Security Program. Between that date and 13 April 2011, when the incident occurred that led to this litigation, the respondent engaged with T either at her home or at other places 17 times. On 3, 10 and 17 December and on 21 January 2011 the respondent attended at T's home to be present while T had access to her children under the supervision of a Child

Safety officer. On 3 February 2011 the respondent attended at T's home and, according to the case file note which she later made, she explained to T the program that she was to administer. The administration of the program itself began on 10 February 2011 and the respondent returned to T's home for that purpose on 25 February, 25 March, 7 April and finally, on 13 April 2011. During that period she also attended to "support T" at meetings with Child Safety officers at the offices of the Department of Child Safety at Chermside. These attendances took place on 14 December 2010, 7 February 2011 and during the final interaction on 13 April 2011. In addition, the respondent attended with T at the Childrens Court and the Family Court on two occasions.

[91] According to the respondent's case notes, none of these meetings apart from the last one involved any remarkable behaviour on the part of T.

[92] The respondent made a case note of the meeting held on 7 February 2011. Ms Christie also attended that meeting. The note read:

> "Support for T at FGM Docs Chermside. Spoke about Docs taking out an additional 1 yr order. DOCS stated that the reason for this is that T has not progressed to the point of having the two children back. Order expires 18th Feb. Contacts are now both in the home. Lindsey to do 10 week program COS in the home on Fridays. Lindsey will also support [T] with advocacy re DOCS and family court, but NOT as an intensive support worker. [T] to continue to work with Jodie Othilas [sic] day to day needs and Laura re D & A [Drug and Alcohol]."

[93] The reference to "Jodie Othilas" was in fact to Jodie Cowie who worked for an organisation named "Othilis" which dealt with drug and alcohol issues.

[94] In the meantime, Ms Christie was still having difficulties. T was drug affected during a number of Ms Christie's visits to her during the same period and was candid to Ms Christie about her inability to stop using drugs. On 3 March 2011 Ms Christie informed Ms Kaighen about T's verbal abuse, her intoxication by drugs during visits, and that Ms Christie had "started to feel unsafe both physically and emotionally and have had T heavily slamming doors and punching walls". According to Ms Christie's case note, Ms Kaighen recommended that she cease home visits because she "should not be going out there by [herself] as [she] could potentially be unsafe especially considering [T's] escalated drug use and mental health concerns".

[95] Ms Christie immediately informed T that she would no longer be visiting her. She said that she was prepared to continue to see her at the offices of the appellant but only in order to effect her transition to Biala, an entity that provides services for persons with acute drug and alcohol problems. Ms Christie formalised that position in a letter that she wrote and sent to T.

[96] In oral evidence Ms Christie said that it was her recollection that in the "last couple of months" T's behaviour had become more "challenging". Ms Christie had the feeling that T's drug use had increased and that she was feeling hopeless because she was not getting her children back. She decided that she would no longer attend at T's home but would be prepared to interview her at the appellant's offices.

[97] On 11 March 2011, the respondent recorded on the case file:

> "Called [T] numerous times and left messages about contact today. Waited for a long period of time. No communication. Spoke to Laura re her decision to cease case management and the impact on [T]."

[98] The respondent attended further meetings convened by the Department or at court on 14 and 28 March, 11 April and, finally, on 13 April 2011.

[99] Although in her evidence, the respondent said that she had only furnished "three information sessions" with [T], as discussed earlier the respondent attended at T's house to begin her Circle of Security work on 25 November 2010. She attended for that purpose again on 3, 10 and 17 December and 21 January, 3, 10 and 25 February, 18 and 25 March and 7 April 2011.

[100] According to the case notes, a s 51H Family Group Meeting was scheduled to be held on 7 April 2011. On that day T had called to say that she was sick. The meeting was postponed until "Tuesday next week". That Tuesday was 12 April 2011. In fact, a meeting took place attended by the same people on 13 April 2011; it was, seemingly, the Family Group Meeting that had been postponed from the previous week.

[101] The respondent was there to advocate T's interests. In addition, T's mother was present with T's infant nephew in a pram. T's solicitor from Legal Aid, Ms Fiona Fairbrother, was also present. Two representatives of the Department attended. They all sat at a rectangular table. According to the respondent's evidence, T asked the respondent to sit on the first seat at the corner of the table, and she did so. T herself sat at the end of the table next to the respondent. As they sat there, according to the respondent, she felt T's leg caressing her own leg slowly. T then brought her leg up between the respondent's legs to fondle her genitalia.

[102] The effect upon the respondent was pronounced. This assault brought back the sense of her early child abuse. She said she was "frozen with fear". She regained sufficient control to move her chair in order to be able to continue with the meeting. T then moved her own chair and repeated her assault with greater force and speed and otherwise in the same manner. The respondent then told T to stop. T replied "you just need a good fucking lay". The meeting was adjourned. T was openly angry at the respondent. She said "next time I see you can you make sure your husband's fucked you".

[103] The respondent was too distraught to drive herself home. She was instructed to cease working with T. She then took time off work but never regained her health sufficiently to return.

[104] Apart from some differences in emphasis, the psychiatrists called respectively by the appellant and the respondent each agreed that the respondent had been severely affected by these assaults. She now suffers from a major depressive disorder, an aggravation of post-traumatic disorder (which had previously been in remission), Cluster B personality traits (primarily borderline), hypertension, reflux, possible sleep disorder, occupational, social and recreational difficulties and poor functioning. Her prognosis is poor. She had a pre-existing vulnerability because of her history of sexual abuse but any prior psychiatric disturbance due to these historical events had "well and truly settled" prior to the assault. The respondent's

psychiatrist, Dr de Leacy, concluded that hers was a most serious case with serious impairment.

[105] Dr de Leacy also expressed the opinion, which the learned trial judge accepted, and which has not been challenged, that the average person would have reacted to these assaults with a sense of revulsion and abandonment and would be likely to develop a psychiatric condition as a result of the incident. In his opinion, the average person would have developed a disorder and the seriousness of the reaction would vary from person to person. The respondent's past history and pre-existing vulnerability meant that her deterioration had been more serious and had led to a serious permanent impairment.

[106] In paragraph 18 of her Statement of Claim, the respondent alleged that the appellant "should not have permitted its employees to have any form of contact with the subject client and in particular contact involving the Circle of Security Program". She alleged that her injuries had been caused by the negligence or breach of contract of the appellant in, *inter alia*, "allowing, permitting or requiring the respondent to undertake support of the subject client". She also alleged that "a reasonable person in the [appellant's] position would not have allowed its employees and in particular the [respondent] to be engaged in the Circle of Security Program with the subject client" and that the appellant "was at risk of suffering serious injury if she was engaged in the Circle of Security Program with the subject client".

[107] Section 305B of the *Workers' Compensation and Rehabilitation Act* 2003 provides:

> "(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury."

[108] Section 305D of that Act provided, relevantly:

> "(1) A decision that a breach of duty caused particular injury comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).

> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection(1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.
>
> (3) …
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty."

[109] The appellant alleged that the risk of psychiatric injury to the respondent was insignificant and also that:

> "The burden of taking precautions to avoid the risk of harm was not low because the [appellant's] reason for being was to work with clients of the [appellant] who had complex issues with drugs, alcohol and mental health and were often disadvantaged and homeless with young families."

[110] Finally, the appellant also pleaded:

> "17.(i) It is not appropriate for the scope of liability to the [appellant] to extend to the harm suffered by the [respondent] because:
>
> …
>
> (ii) the [respondent] agreed to work with the subject client despite knowing all of the things alleged in paragraphs 6, 7, 10, 11, 14, 16, 15A, 15B and 15C of the Statement of Claim;
>
> (iii) The [respondent] did not suggest to the [appellant] that the [respondent] was not capable of working with the subject client;
>
> …
>
> (vi) Any risk from physical contact between the subject client and the [appellant] was a risk which was insignificant…"

[111] The paragraphs referred to in paragraph 17(i)(ii) of the Statement of Claim were those which recited the contents of the case notes, an affidavit of Lynette Isaac, a Child Safety Officer with the Department made in February 2010 in relation to the child protection order proceedings, and the two letters written by T and which have been referred to above.

[112] In her Reply, the respondent alleged, in part of her response to paragraph 17 of the Defence, that she "should not have been directed to assist the subject client in the Circle of Security Program".

[113] One point should be dealt with immediately. The Statement of Claim is capable of being read as though the central allegation of breach contained in it was that the respondent had been allowed, permitted or required to deliver the Circle of Security Program to T. In my view, it would be reading the Statement of Claim too narrowly to regard this case as one based solely upon the proposition that the appellant's negligence lay in permitting the respondent to offer that particular service. That was not how the trial or the appeal were actually conducted. The sexual assaults occurred while the respondent was fulfilling her advocacy role and I proceed upon the footing that the respondent's case was that the appellant was negligent in allowing, permitting or requiring her to provide any services at all to T. This is also consistent with how the learned trial judge understood the case because her Honour concluded that what the appellant should have done was to decline to offer *any* further services to T. Her Honour also accepted a submission that the provision of the Circle of Security Program at the respondent's meetings with T at her home created the relationship between them which led to the assaults which were committed in the course of the respondent's provision of advocacy services.

[114] The appellant has appealed on the ground, among others, that the learned trial judge failed to address the right issues, namely whether:

(a) There was a foreseeable and not insignificant risk;

(b) That a particular employee, the respondent;

(c) In providing court advocacy services, away from T's home and a 10 week home education program of 1 to 1.5 hours duration per week in T's home;

(d) May suffer a purely psychiatric injury;

(e) In consequence of T's sexually assaulting her.

[115] In aid of this ground, the appellant also submits that there was an error on the part of her Honour in failing to have regard to:

(a) The fact that the services that the respondent provided to T were not services provided as an intensive support worker;

(b) The absence of any prior history of physical assaults by T;

(c) The respondent's extensive background and experience as a social worker;

(d) The respondent's access to resources of, and advice from, the appellant;

(e) The respondent's prior knowledge of the sexualised behaviour of T towards other employees.

[116] The learned trial judge dealt with the respondent's qualifications, experience and the duties that she undertook when she accepted her position as follows:

> "Lindsay [sic] Beven commenced working with the defendant in 2007. She was then aged 30. She had studied a Bachelor of Arts (Psychology) at Charles Sturt University. From 1999 to 2003 she worked as a residential care youth worker for Anglicare. She worked as a youth worker with Chameleon Youth Housing between 2003 and 2007. Ms Beven's first role at BYS was a family support worker in the Family Support Program. She was in fact the only person working

> in that program. She was, according to the evidence given by the psychiatrist Dr Chalk, who examined Ms Beven for the defendant, particularly suited to that work."

[117] Upon the basis of her university education, she had worked in the field of social work to the point that, when she applied for the position advertised by the appellant, she was able to hold herself out as having areas of specialty in the areas of youth homelessness and issues affecting homelessness, depression and sexual abuse. Part of her immediate past experience included supporting young people who had drug dependence issues and providing crisis management to such people. She claimed to have experience in dealing with the Department and other government agencies and non-government organisations in the same field. She had experience in case management and advocacy on behalf of troubled young people.

[118] Upon the basis of these qualifications as well as others, she applied for a position with an organisation which she knew offered support services to young people who needed such support because of mental illness or drug addiction, because of having been the victims of sexual abuse and because of legal problems in which they were enmeshed. According to Bettina McFadyen, a family support worker employed by the appellant, about 95 per cent of young parents with whom the appellant's employees work have been affected by sexual abuse.

[119] Moreover, in the course of doing that work, the applicant was expected to "operate autonomously within agreed boundaries, and exercise professional judgment within the parameters of the organisation's vision, philosophy, policy and practice". The qualifications required to do this work, which by accepting the position the respondent held herself out as having, included a "proven ability to work without direct supervision, exercising a high degree of initiative, judgement and decision making within the broad parameters of the organisation". She undertook to "[p]articipate in staff supervision, debriefing, case planning and other meetings as required" and to "[p]articipate in team planning and performance appraisal".

[120] The history of the appellant's dealings with T, as evidenced by the case notes and the oral evidence of the witnesses, is consistent with the scope of employment described.

[121] In the view of Dr Chalk, a psychiatrist who examined the respondent, and whose evidence in this particular respect was accepted by the learned trial judge, she was particularly suited to this work.

[122] The respondent said in her evidence that, as part of the Young Families Team, acting in the position of a Family Support Worker, she was "my own individual team" because she was "the only person in my Family Support Program" as a result of which she "ran my position and my budgeting". In that role, the respondent would "have to assess whether [a potential client who had been referred was] appropriate and whether they could fit into our individual funding, but part of that we would also discuss the issues that the young person had, and the pros and cons of actually being able to work with clients". T was one such client who, the respondent said, was the subject of such an assessment.

[123] The respondent became aware of T as a client of the appellant's before she herself became directly involved. As has been related Ms Turner would relate the issues

emerging from her management of T's case at weekly meetings of colleagues, including the respondent. Evidently, these meetings were part of the process described in the position description of "debriefing, case planning" and "performance appraisal". According to the respondent, Ms Turner would relate the problems presented by T's "boundary violations and her advances" towards Ms Turner. On one such occasion, the respondent observed that Ms Turner "was quite upset after a particular incident". The tenor of the respondent's evidence in this respect was that Ms Turner's reports at these meetings were candid and comprehensive. In particular, she informed the respondent and her other colleagues that T had made sexual advances to her some of which were "quite suggestive sexualised advances". This included showing to those attending such meetings letters that T had written to Ms Turner expressing a desire for a sexual relationship and which, as related earlier, contained "some pictures" and "some blood" which had made Ms Turner "extremely upset".

[124] As a result, Ms Turner ceased her role and Ms Christie became involved. She too disclosed the problems and issues of T's case at meetings that the respondent attended. These included, of course, instances of sexual advances and Ms Christie's "struggles with this particular client in regard to boundaries".

[125] The history of Ms Turner's and Ms Christie's dealings with T as recorded by them in the case notes shows that each of them persisted in their work with T for a long time against continuing obstacles. In the case of Ms Turner, her work with T began on 11 May 2009 and continued, in the role of a psychologist having one-on-one private meetings with T, even beyond the point at which she was no longer prepared to attend at T's home because of her fears. In the case of Ms Christie, she continued her work at T's home from 29 May 2009 until 24 February 2011, a period of 21 months, and was still prepared to meet T at the appellant's offices and offered to do so in June 2011 even after the assaults upon the respondent had occurred. Each of Ms Turner and Ms Christie's involvement with T led to their distress and ultimate refusal to work with her further.

[126] The respondent herself made a judgment that she would work with T although she knew, by her attendance at meetings, the substance of the problems faced by Ms Turner in her interactions with T and that Ms Turner had decided not to work with her any longer insofar as that work required private home visits. After beginning to work with T, and after attending upon her at her home for that purpose, she was still prepared to continue to work with T, including making private home visits, although she came to know of Ms Christie's decision to retire from her role and the reasons for it. Indeed, on her own case, she was prepared to continue to work with T although she had witnessed T's sexual assault upon Ms Christie at McDonalds.

[127] The respondent's intended and actual role with respect to T was different from that of either Ms Turner or Ms Christie. The work of the latter involved frequent interactions which were personal and which required T to share intimate details of her life. These meetings with T were not fixed according to a schedule based upon the delivery of a limited program of tuition. They were irregular and frequent and involved the sharing of personal tasks and attendance together at physician's offices and other such places where private affairs are conducted. The occasions for a client or patient of the character of T to become fixated or infatuated with a professional in such circumstances is notorious.

[128] The role of the respondent was different. She was to deliver an educative program to T at fixed sessions in anticipation of the arrival of departmental officers bringing T's children to her for access. She was also to attend with T at formal meetings with several other people. It was no part of her role to "support" T in relation to her acute mental and drug-induced problems nor to anticipate that her own limited role would expose her to the risk of actual sexual assault.

[129] One matter emerged clearly from the evidence of all of the witnesses in this case. It is the courage, patience and resoluteness of all of the social workers who worked with T over the course of two years. Ms Turner carried on working with T up to the point of her own distress and even, in a different role, beyond it. Ms Christie stuck with T through insult, verbal abuse, T's wielding of sharp instruments and T's assertions of desire to stalk and rape (which Ms Christie did not accept as true) and only ceased playing her part when the safety of her unborn child entered into consideration. The respondent's own insistence upon working with T were made solely in the client's interests and was demonstrative of the same attitude of selflessness and of self-sacrifice.

[130] This is to be expected of people who work in exacting and dangerous occupations. Social work is one of these.

[131] In *Koehler v Cerebos (Australia) Ltd*[1] the plurality judgment[2] emphasised the necessity to have regard to the terms of a relevant employment contract when considering the content of an employer's duty to take reasonable care to avoid causing psychiatric injury to an employee. In referring to the significance of the contract of employment in such an analysis, the plurality observed that the employee's acceptance of the position permits the employer to assume, in the absence of evident signs warning of a possibility of psychiatric injury, that the employee considers that he or she is able to do the job.[3]

[132] It must be remembered however, when considering and applying *dicta* in *Koehler*, that that case was concerned with psychiatric injury that had been suffered by the plaintiff while doing *precisely* the work that she had contracted to do, namely to travel as a sales representative by car to a defined number of stores within a marked territory and within a stated period. Her efforts to do so led to her illness. It was in the context of such a case that it was said:

> "… it is sufficient to notice that her agreement to undertake the tasks stipulated (hesitant as that agreement was) runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed risks to the appellant's psychiatric health."[4]

[133] Part of the appellant's response to the respondent's claim was that the risks attendant upon working with T were inherent in the respondent's occupation as a social worker. The appellant alleged that the respondent, by taking on the job and, in particular, by offering to work with T, had asserted her competence to do this skilled work with such people, and with T in particular, and had thereby accepted a professional risk of the kind that eventuated.

---

1 (2005) 222 CLR 44.
2 McHugh, Gummow, Hayne and Heydon JJ.
3 *supra* at [36].
4 *supra* at [40].

[134] In times past, such cases were decided very simply. In England, prior to the enactment of the *Employers' Liability Act* 1880, an employee was taken to have entered into the contract of employment upon the basis of an implied term that he or she had accepted the burden of the "ordinary risks incident to" the employer's business.[5] A defendant employer did not need to rely upon the doctrine of *volenti non fit injuria* as a defence. The *Employers' Liability Act* then abolished the concept of such an implied term by providing that an employee was to be treated "as if the workman had not been a workman", that is to say, as if there were no contract.[6] However, a plaintiff employee, like any other plaintiff, still had to confront the defence of *volenti non fit injuria* in appropriate cases. The doctrine was used to deny recovery for injuries caused by dangers that were known to the worker and the risks associated with which, it was presumed, had been undertaken voluntarily by that worker. Thus, in *Thomas v Quartermaine*,[7] a case decided after the enactment of the *Employers' Liability Act* 1880, a workman fell into an unfenced vat and was scalded. In dismissing an appeal by the plaintiff worker, Bowen LJ reasoned thus:

> "For many months the plaintiff, a man of full intelligence, had seen this vat – known all about it – appreciated its danger – elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk."[8]

[135] The application of the defence of *volens* in such a case meant that the plaintiff failed at the first stage, that of proving negligence.[9]

[136] However, when relying upon this defence it was not enough for a defendant employer to prove only that the employee knew of the danger. It was said that the defence was not one of *scienti non fit injuria* but one of *volenti non fit injuria*.[10] As a result, the presumption that the assumption of risk was voluntary, an essential element of the defence, could be rebutted by, for example, leading evidence that the plaintiff continued to work despite making a complaint about the danger to the employer that had been disregarded. Such evidence could rebut the presumption of voluntariness by raising an inference that the risk was assumed only in order not to be dismissed.[11]

[137] This kind of approach to determinations of employers' liability has long since been discarded, not least because of the emergence of statutory duties of care that have been imposed upon employers to ensure the safety of the workplace, such as one of the duties that the respondent alleged the appellant breached.[12] The appellant rightly did not rely upon the defence of *volens* and no part of its case raised, as an answer to the respondent's claims, an allegation that she had knowingly accepted

---

5 *Thomas v Quartermaine* (1887) 18 QBD 685 at 691-692 per Bowen LJ; *Yarmouth v France* (1887) 19 QBD 653.

6 *ibid*.

7 *supra*.

8 *ibid.* at 699.

9 *ibid.* at 702.

10 *Yarmouth v France (supra)* at 661 per Lindley LJ; *Thomas v Quartermaine (supra)* at 696 per Bowen LJ.

11 *Yarmouth v France (supra)* at 661 per Lindley LJ; and see the discussion in *Beven on Negligence*, Volume 1, 4th ed, (1928) at 790 *et seq*.

12 see paragraph 4 of the Further Amended Statement of Claim relying upon s 28(1) of the *Workplace Health and Safety Act* 1995.

the risk. Nor did the appellant rely upon the closely associated defence of contributory negligence.

[138] However, parts of the appellant's pleaded case raises allegations which are alluringly close to a plea of *volens.*

[139] Thus, in paragraph 14(f) and (h) of its Further Amended Defence, the appellant pleaded:

> "(f) The [appellant] could not have permitted its employees not to have any form of contact with the subject client; the [respondent] at all relevant times knew, and agreed to work in circumstances where, many clients of the [appellant] had complex issues with drugs, alcohol and mental health, and were often disadvantaged and homeless with young families. As the [respondent] knew, the subject client here had issues with drugs and alcohol and her mental health which manifested itself as overtly inappropriate sexual verbalisation but she had never been physically sexual towards any person;
>
> (h) Further the [appellant] says that the [respondent] knew these matters and agreed to have contact with the subject client in the course of the [respondent's] employment with the [appellant] and in those circumstances the [appellant] was entitled to assume that the [respondent] was capable of doing so and considered herself capable of doing so."[13]

[140] However, I do not read any part of the Court's reasons in *Koehler* as invoking a return to the common law position in England before 1880. The plurality said expressly that they had not decided the case upon the footing that the plaintiff's express agreement to perform the duties which were the cause of her injuries was conclusive against her claim.[14] The decision was based, ultimately, upon the point that, by the plaintiff's express agreement to do the actual work which caused her injury, she made it impossible to conclude that the employer should have foreseen that the doing of that work might result in her injury.

[141] The reasons of the plurality emphasise that aspect of the case:

> "Two caveats should be entered. First, hitherto we have referred only to the employer's performance of duties *originally* stipulated in a contract of employment. It may be that different considerations could be said to intrude when an employer is entitled to vary the duties to be performed by an employee and does so. The exercise of powers under a contract of employment may more readily be understood as subject to a qualification on their exercise than would the insistence upon performance of the work for which the parties stipulated when making the contract of employment.
>
> Secondly, we are not to be understood as foreclosing questions about construction of the contract of employment. Identifying the duties to be performed under a contract of employment and, in particular, identifying whether performance of those duties is subject to some

---

13 see also paragraphs 7, (16(i), 16(ii), 17(a), 17(i)(ii) of the Further Amended Defence; and see paragraph 89(a) of the appellant's trial submissions and paragraph 30 of its appeal submissions.

14 *supra* at [40].

> implied qualification or limitation, necessarily requires that full exploration of the contractual position … against the relevant statutory framework in which the contract was made."[15]

[142] In my opinion it is not possible to read *Koehler* as standing for the proposition that the appellant would not be in breach of a duty of care by allowing or permitting the respondent to work with T because, as the appellant pleads, "the [respondent] agreed to do so"[16] or because she "knew, and agreed to work in circumstances where, many clients of the [appellant] had complex issues with drugs, alcohol and mental health".[17] Such a reading of *Koehler* would be inconsistent with the first two sentences of paragraph [40] of the reasons. It would be consistent, however, with the reasoning of Bowen LJ in *Thomas v Quartermaine*.[18]

[143] Rather, *Koehler* requires an examination to be made of the whole content of the contractual relationship between the appellant and the respondent. It requires a determination to be made of the scope of the duties undertaken and whether those duties involved an acceptance by her of any risk of the kind of injury which she suffered that could arise merely by performing those duties. It requires a determination to be made whether what caused the injury was no more than the performance by the employee of the duties under the contract and in the circumstances envisaged by the contract.

[144] The scope of the duties that the respondent undertook can be determined by reference to her contract and by reference to the description of the services provided by the appellant.

[145] The respondent's "Key Responsibilities" contained in the position statement when the job was advertised do not state or suggest that the employee who would fulfil the role would be attending upon persons who were likely to commit a sexual assault against which she had to guard. The description of the "Planned, On-going Parent/Family Support" responsibility involves the provision of "planned support to pregnant and parenting young people" and the provision of "counselling, information, support and advocacy" to them. The "Selection Criteria" required that the applicant would show a "demonstrated understanding of the issues facing young homeless or at risk parents and young pregnant women" and a "demonstrated capacity to provide planned support to homeless and at risk young parents so that they may live independently, improve their well-being, engage community support, increase their participation in activities and achieve greater self-reliance". A candidate required knowledge of the "Child Protection Legislation and the accompanying System".

[146] While the appellant offered "drug and alcohol services", this was no part of the respondent's responsibilities. Nor did the appellant hold itself out as having expertise in treating mental disorders or drug and alcohol addiction or their associated behaviours.

[147] The implicit assumption contained in the description of the respondent's position was that candidates to whom such services would be provided would be selected by

---

15 *supra* at [37], [38].
16 paragraph 16(j)(i) of the Further Amended Defence.
17 paragraph 14(f) of the Further Amended Defence.
18 *supra* at 699.

the appellant because they were suitable to receive them. There is no hint in the appellant's description of that job that such a client might present physical danger to the employee offering these services or that the relevant employee must be in a position to cope with such danger. Ms Edwards said in evidence that the appellant's clients included some young people who were "complex" and who had suffered from sexual abuse and were frequently "traumatised". It is obvious that some of them would be expected to have drug or alcohol addictions and mental health issues. But she did not suggest that the appellant's employees were expected to be equipped to face physical danger, that they were selected on the basis that they could treat the conditions that gave rise to such danger or that they were expected to cope with exposure to physical danger.

[148] The Department had noted that T had "self referred" to the appellant for a "drug and alcohol rehabilitation program". Yet, on the evidence, the appellant offered no such service. The Department also noted in its written plan that T had "self referred" to the appellant for "general counselling" which would include "counselling to address the impact of multiple boundary violations, poor attachment and ongoing sexual abuse". This was not a service that the respondent had any responsibility to provide. This was the service provided unsuccessfully by Ms Turner and Ms Christie. Their lack of success and T's continuing disturbances suggest strongly that she was not in any position to be able to accept or benefit from any of the respondent's services.

[149] In late 2009, as set out earlier in these reasons, the Department had warned Ms Christie that T's mental health had been deteriorating, that she was using "ice and speed about twice a week" and that she had been "using hard substances (such as heroin, cocaine and speed) in recent weeks and that she uses 2-3 times a fortnight". The Department warned Ms Christie that its officers were "concerned that [T] can become quite volatile when confronted and if she has been using ice that she may be quite violent".

[150] The "Outcome" envisaged by the Plan, or as the Plan also put it "What has to be different?", was that T was "to remain drug and alcohol free" and "to have an understanding how her drug/alcohol use impacts her parenting". Another "outcome" was that she was to have a "drug and alcohol plan established with" the appellant.

[151] On the evidence, the appellant lacked the competence to address these aims. The respondent had certainly not been engaged to address them or to cope with them. Indeed, the Plan expressly contemplated that it would be a psychologist and not the appellant that would provide counselling for mental health purposes.

[152] The Plan stated as another "Outcome" that T was "to develop a positive relationship with her children to enhance their relationship and demonstrate parenting strategies that will enable her to understand and meet her children's needs" and that T "will provide a safe environment for her children".

[153] Having regard to T's severe mental disorder and drug addiction, which never diminished in the two years with which the trial was concerned, it is difficult to see how these aims concerning T's relationship with her children could possibly have been addressed. The Plan did not foreshadow that this aspect of T's problems had to be addressed contemporaneously with work on her drug and mental health issues

rather than only after some progress had been made on the fundamental problems that had led her to the appellant.

[154] Ms Christie frankly admitted her own lack of competence to address these health issues and there was no evidence that the appellant had any employees with relevant competence. That is why Ms Christie endeavoured to secure the services of a psychiatrist who, as has been related, required T to undergo drug and alcohol treatment first before engaging with her. The appellant could not, on the evidence, offer that service either and that is why Ms Christie endeavoured to secure a place at Biala for T.

[155] From 2007, when the respondent began her employment, until 2011, the respondent provided the services that she had undertaken by her contract to provide to the appellant's clients without incident or exposure to risk of injury. There was no evidence that any of the appellant's other clients had the severe and dangerous disabilities suffered by T. There was no evidence that the appellant routinely undertook work with clients who demonstrated similar disabilities. There was no evidence that the appellant had worked with such people and had succeeded in stabilising them. There was no evidence that the respondent had ever been asked to work with such people. The inference is the other way. Ms Turner and Ms Christie could not work with T and Ms Kaphle doubted whether the appellant should be working with her at all. In 2009 a team meeting considered whether to cease the provision of services to T because of her "drug use, mental health and self-harming behaviours". The same issue was reconsidered in 2010.

[156] The respondent therefore worked unremarkably and safely in her role for four years. Despite her own previous history of mental illness, as Dr Chalk said, she was actually well suited for the employment for which she contracted.

[157] It is apparent that, by October 2010, at the latest, the appellant knew that working with T exposed its employees to risk of physical or mental injury. That is clear from the evidence of the experiences of Ms Turner and Ms Christie, each of whom feared for their personal safety and both of whom let their superiors know. Their sense of danger was induced by T's lability and propensity for violent language and action. Her use of methamphetamine alone could give rise to such fears in any rational person. Her proclivity to project sexual desires upon her attending social workers was well known. Her demonstrated desire for physical interaction was a concomitant of that.

[158] These fears led to Ms Kaphle's doubts about the wisdom of the appellant's continued provision of services to T by its employees. The asserted function of the appellant was not to cure drug addicts or to treat mental illness. Ms Kaphle was concerned about the continued utility of the appellant's provision of services where those services had not, on the evidence, resulted in any appreciable improvement in T's condition or personal circumstances and when both of the social workers who had tried to support her – for over a year – had resigned from that task on the ground of perceived danger to themselves. On the evidence, Ms Kaphle was right to be concerned.

[159] The question of the safety of social workers is no different from the question of the safety of any workers whose occupation exposes them to identifiable risks of injury and the duty of care of an employer of social workers in this respect is no different

in principle from the duty of care of any employer. An employer of workers on a building site would not be able to plead as a defence, as the appellant pleaded in paragraphs 14(f) and (h) of the Defence, that if the work did present risks of injury to the respondent then, knowing of those risks, the respondent agreed to do the work anyway "in the course of the [respondent's] employment" and, as alleged in paragraph 17(iii) of the Defence, that "the [respondent] did not suggest to the [appellant] that the [respondent] was not capable of" doing the work. What is implicit in these pleas, but never attempted to be proven, was that because the respondent, as a social worker, had assessed or should have assessed for herself any risk that T posed to her, the appellant employer was absolved from any duty to take reasonable care to protect her against those risks.

[160] A prominent feature of this case is that the respondent was injured in the course of the pursuit of a profession. A profession is much more than a mere occupation. As well as requiring the possession of a high level of special knowledge and skill in a recognised body of learning, a profession requires of its members an adherence to a code of ethics and a preparedness to apply the relevant knowledge and skill in the interests of clients and for the public good. For a long time the professions have not been limited, as they once were, to the traditional trinity of clergy, medicine and law. Within any properly comprehensive modern definition social work is a profession. One ramification of professing such skill and knowledge and of making it available is that occasions will arise when a professional feels impelled to sacrifice his or her self-interest in favour of a client's interests. In some professions, such as social work, this may involve considering whether to accept a risk of personal injury. While a particular employee must apply professional judgment to such questions when they arise, it will often be the case that it is the supervisor of such an employee who will be in a superior position to assess risks and to weigh them against the role and the duty of the institution of which the employee is a part and to determine whether to permit an employee to be exposed to a particular risk even if she has volunteered. This is no different in principle, to my mind, to the position of any employer who deals with a dedicated and skilled workforce that is prepared, on occasions, to undertake unusual risks in order to get the job done. An employer has a duty of care, in my opinion, to consider whether an employee should be permitted to undertake risks in such cases despite the employee's asserted willingness to do the work in the face of the risk and despite the employee's professional judgment that the risk is worth running. An employer is, or ought to be, in a better position to identify and to assess risks in the workplace and to determine the propriety of exposing its employees to them.

[161] The issue of the risk of physical violence to which social workers might be exposed has not emerged for the first time only in this litigation. It has been the subject of professional literature that also includes studies about how these risks can be prevented.[19] However, none of this was examined or put in issue by the parties at the trial. The appellant's attitude was simply to assert, without evidence, that the respondent was justifiably regarded by the appellant as capable of both judging the extent and of running the risk of physical assault from a client like T. However, it is not self-evident to me that social workers, unlike almost all other workers, implicitly accept the sole obligation of assessing, upon the information available to

---

19 see eg. *Security Risk: Preventing Client Violence Against Social Workers*, 2001, Susan Weinger, NASW Press; *Client Violence in Social Work Practice: Prevention, Intervention and Research*, 004, Christina Newhill, Guilford Press; *Lone Working Personal Safety: A guidebook for health and social care workers*, 2014, Gerard O'Dea, CreateSpace Independent Publishing.

them, the risk of injury when undertaking work with a client of the employer so as to absolve the employer from the usual duty to ensure the safety of the workplace. Nor is it self-evident to me that social workers, because they possess appropriate learning, skill and experience to gauge such risks, do so.

[162] This was a case in which the employer knew the risks that T presented to its staff. This was also a case in which the employer had an appreciation of its own limitations in dealing with some of the problems presented by T and knowledge of the existence of other services that were better suited. The employer also knew that its employees had a vocation which would impel them to make personal sacrifices if they believed that by doing so they might serve another human being. That is what Ms Turner and Ms Christie had actually done. The results of their efforts were plain. The judgment of supervising staff in October 2010 that T was unsuitable to be retained as a client was right. The appellant should have ignored the respondent's altruistic and natural offer to work with T and should have referred T to those with the expertise to deal with her acute problems. The respondent's rhetorical question "if BYS won't help her then who will?" was pregnant with the implicit answer "Nobody". But as the appellant knew, or ought to have known, although neither the appellant nor the respondent could help T, other institutions or professionals might have been able to do so.

[163] It follows that, unlike the plaintiff in *Koehler*, the respondent's agreement to do the contracted work and her offer to work with T were not inconsistent with either an appreciation on the part of the appellant that the performance of work with T exposed the respondent to a risk of injury or with the existence of a duty to prevent that risk from arising.

[164] The respondent's agreement to perform her duties under her contract of employment was not conclusive against her claim. It could not be said, and it is not said by the appellant, that she undertook to provide services to persons who might assault her. Her role was to engage with the appellant's clients in a limited role. It was to provide tuition on how to engage with children to parents who were unable effectively to do so. That work assumed that the persons selected for the provision of such services would be apt students for such tuition, or at least that they would not present foreseeable risks of injury to the worker selected to provide such services. The respondent's role in providing advocacy services to such clients was of the same kind. No part of it involved accepting the risk of personal injury.

[165] The work that the respondent contractually undertook to do was not inherently dangerous and in fact she encountered no problems for the four years before she was injured. However, even if the work which she undertook was inherently dangerous, that did not operate to reduce or to extinguish the appellant's duty of care. The presence of risk of injury in dangerous occupations does not work to throw the responsibility of avoiding such risks onto the shoulders of employees beyond the application of the law relating to contributory negligence and, in appropriate cases, the doctrine of *volenti non fit injuria.*

[166] The appellant's case was, in large part, that the respondent's expression of willingness to work with T and, indeed, her insistence that she should be permitted to do so despite her own knowledge of Ms Christie's and Ms Turner's experiences, should eliminate any responsibility in the appellant because the possible dangers of working with people who may be mentally ill or addicted should be obvious to

professionals in this field and should have been obvious, and were obvious, to the respondent. However, in my view, the fact that the dangers to which social workers might be exposed may be both obvious and expected does not operate to reduce an employer's duty to ensure an employee's safety. On the contrary, while the standard of the employer's duty of care remains the same, the occasion for action may become more evident by an employer's appreciation of the ubiquitous nature of such risks and the potential for such risks to carry severe consequences for employees.

[167] As von Doussa J said in *Perkovic v McDonnell Industries Pty Ltd*:[20]

> "Each case will turn on its facts. Generally speaking, the greater the degree of danger inherent in the work, the more likely will be the need for instruction and warning. Even the most skilled employees in their familiarity with the work, or because of the speed or the circumstances under which the work is performed, may be prone to take shortcuts, to disregard obvious precautions, or to be unmindful of dangers. The employer's duty to exercise reasonable care for the safety of his employees will often require that skilled employees be reminded periodically about the risks of their work and the need to guard against them."

[168] This may be most acute in occupations in which it is the duty of workers to go to the aid of others in situations of peril, thereby endangering themselves, when it is to be expected that the character of the men and women who pursue such vocations will cause them to volunteer to go into situations of grave danger to themselves when an objective, informed and appropriately qualified person in a position of authority would, and should, stop them. This is unremarkable. The duty of an employer in such a case is no different in substance from that of an employer who must prevent a manual worker who has expressed a preparedness to accept a risk of injury posed by dangerously defective machinery because the worker has some personal and well-meaning motive to ignore the hazard. In *Smith v Broken Hill Pty Co Ltd*,[21] Taylor J said:

> "The general principles which define the responsibility of an employer in such cases are well settled and it is unnecessary to re-state them. But it is of some importance to notice that they operate to impose liability upon an employer whether the risk is consequent, solely, upon the physical operations which the performance of any particular task requires or whether, in the ultimate analysis, it is possible to see that the risk really results from the fact that the performance of those operations have been committed to a fallible human agent. This does not mean, of course, that where an injury has been caused to an employee by his own negligence he may seek to hold his employer liable but, rather, that the duty of the latter is not fully discharged unless, in the provision of safeguards, he has taken into account, not only that particular tasks necessarily involve particular risks, but also that inadvertence and inattention, short of positive negligence, are common concomitants of everyday work."

---

20 (1987) 45 SASR 544 at 554.

21 (1957) 97 CLR 337 at 342.

[169] As I have said, the appellant's managerial staff knew of the danger that T posed to the appellant's employees. The appellant had already relieved two employees from working with T because of the danger involved. The appellant also knew, or ought to have appreciated, that its employees were not in a position to bring about the "Outcomes" sought in the Department's Plan. Two employees had struggled for one and a half years to achieve those aims and had had to retire hurt. Now a third employee was insisting that she should have a go. As Lord Denning said in *Rands v McNeil*:[22]

> "It is trite knowledge that the greater the danger the greater the precautions that should be taken."

[170] It is difficult to see what factor, other than sheer altruism, could have compelled the appellant to permit a third employee to expose herself to the dangers posed by T.

[171] The issue then resolves to the question whether, as s 305B required the respondent to prove, the risk of psychiatric harm to the respondent was a reasonably foreseeable consequence of permitting her to continue to work with T. The risk of assault by T, including sexual assault was, in my opinion, reasonably foreseeable. This was the very reason why Ms Turner and Ms Christie ceased to be willing to work with her. That such an assault might be a sexual assault was equally foreseeable given T's particular tendency to sexualise her relationship with her support worker. It was the pattern that began with Ms Turner and continued with Ms Christie. It was reasonably foreseeable, in my view, that she would repeat her pattern of sexual fixation with any social worker assigned to work with her in my capacity.

[172] It is common experience in the courts that sexual assaults, even non-invasive ones committed upon adults, frequently result in psychiatric injury and it could not seriously be maintained that, if a sexual assault was reasonably foreseeable, its injurious *sequelae* would not be.

[173] The appellant argued that it could not reasonably have been foreseen that T would commit a sexual assault on the respondent at a formal meeting attended by a number of people. I am unable to accept that submission. Sexual assaults frequently occur in the most unlikely, and public, of situations. Those who are prone to commit them often do so on occasions that a normal person would regard as fraught with the risk of embarrassing discovery. But a normal person does not commit sexual assaults. Having regard in particular to T's frequent episodes of irrational sexual behaviour, including her serial sexual fixations, in my opinion it was foreseeable that an assault of the kind that actually happened could have happened and that it could have happened anywhere.

[174] It is therefore necessary to address s 305B(1)(b). The respondent had to prove that the risk of injury was not insignificant. Although the appellant pleaded that it was, it is difficult to see how that allegation could be sustained. Each of Ms Turner and Ms Christie, both knowledgeable and experienced professionals, were no longer willing to take the risk that T posed to themselves. Ms Kaphle agreed with their assessment of the significance of the risk in supporting their retirement from their respective roles. The relevant risk of injury was a risk that T would do something by way of a sexual assault, a proclivity that she had demonstrated by words and

---

22 [1955] 1 QB 253 at 257.

actions, if not by the commission of the actual assault described in evidence by the respondent. That such an assault could result in psychiatric injury was also foreseeable. Indeed, I did not understand the appellant to challenge that aspect of the matter on appeal. Nor was the respondent's particular vulnerability raised as an answer. In my view the risk of injury was not insignificant.

[175] That being the position, it remains to consider what the appellant should have done. The learned trial judge concluded that the appellant should have ceased exposing its employees to the foreseeable risk of physical and psychiatric harm that T presented and that it should, therefore, have ceased offering its services to her. This was no more than what Ms Kaphle had thought and said at the meeting of 14 October 2010 and what had been discussed earlier in September 2009. The appellant's breach was to continue to retain T as a client thereby exposing the respondent to the risk of sexual assault of the kind that was committed. It does not matter that the assault was committed at a meeting rather than in the privacy of T's home for the reasons that I have already explained.

[176] The step of dispensing with T as a client, as a necessary precaution to avoid the risk of harm to the respondent, was a reasonable one to take. T would not have been abandoned without succour of any kind. She would only have been left without the kind of services that were being provided by the appellant, but that were of no use to her anyway as two years of experience had already shown. There were others, psychiatrists, dedicated rehabilitation centres and the like, who could satisfy her real needs. No evidence was led to suggest otherwise. The appellant's failure to send T to another service was a breach of its duty of care to the respondent and caused her injuries.

[177] For these reasons I would dismiss the appeal.

[178] **GOTTERSON JA:** I have had the advantage of reading in draft the separate reasons of Sofronoff P and McMurdo JA. I agree in the result proposed by Sofronoff P for the reasons his Honour gives.

[179] I differ from McMurdo JA in respect of his Honour's characterisation of the risk of occurrence of the incident that did occur as low. I accept that for many, if not most people, a government office environment and the presence of others, including professional advisors and family members, would operate as constraints upon behaviour. Those circumstances might well be regarded as ones which in such people engender a sense of obligation to conform to socially acceptable behavioural norms.

[180] But T was not such a person. Her behaviour during the time the appellant provided services to her revealed her to be a person who was not constrained by conventionally accepted behavioural norms. In particular, her impulsive sexualised behaviour towards Ms Turner and the sexualised comments to Ms Christie, both of whom were attempting to assist her, transgressed such norms. Such behaviour and comments were made known to the appellant.

[181] To my mind, there was a significant risk that on any occasion when the respondent had contact with T, the latter would behave in an impulsive sexualised manner towards her. Given T's demonstrated behavioural traits, there was no reason to regard a meeting at a Departmental office as a place of apparent safety for the respondent.

[182] As well, as Sofronoff P explains, other government funded services suited to T's circumstances and needs were available to her. The appellant was not presented with a dilemma that if its services were withdrawn from T, she would have been rendered an outcast.

[183] **McMURDO JA:** The appellant provides a range of professional services to some of the most disadvantaged of young people in the city of Brisbane. They are people who have low incomes, family histories of abuse, experiences of detention and mental illness. They engage in high risk behaviours such as drug and alcohol use, and have poor access to health and other services.[23] They are often homeless, or likely to become homeless.

[184] The provision of these services brings its employees into contact with people who are irrational, volatile and unpredictable. The work of those who provide these services is inherently risky. There can be a risk of physical injury to the appellant's employee or, as occurred in the present case, a risk of a psychiatric injury. In this case there was a predictable risk that depending on the context, an employee who was in regular professional contact with this young person, might be assaulted by her and, in consequence, suffer a psychiatric illness.

[185] The trial judge posed this as the ultimate question: "What should the employer have done to avoid that risk?"[24] The answer, her Honour concluded, was to discontinue the provision of all services to this person. The judge reasoned that "[t]he work of [the appellant] is important and socially valuable but that social value does not displace its duty of care to its employees."[25]

[186] In my opinion, that reasoning was incorrect. I accept that there was a reasonably foreseeable risk of a psychiatric injury and that consequently, the appellant did owe to the respondent a duty in relation to that risk. That was not a duty to avoid the risk. It was a duty to act reasonably in response to it. In this context, a court must identify what a reasonable person would have done, rather than looking backward to identify what would have avoided the injury.[26] A finding of negligence does not inevitably follow from a failure to eliminate a risk that was reasonably foreseeable and preventable.[27] The trial judge did not consider the critical question, which was whether the only reasonable response to this risk was to discontinue the provision of services to this young woman.

[187] For the reasons that follow, I conclude that the discontinuance of all services to her was not the only reasonable response. The appellant should not have been found to have breached its duty to the respondent, and the respondent's claim should have been dismissed.

The primary facts

[188] The respondent began to provide services to this young person (whom I will call T, as the trial judge did) in October 2010. By then T had been a client of the appellant for about 18 months. T had "self-referred"[28] to the appellant in circumstances

---

23 Brisbane Youth Service Policy Manual ARB 384.
24 [2016] QSC 163 at [163].
25 *ibid*.
26 *New South Wales v Fahy* (2007) 232 CLR 486 at 505 [57] per Gummow and Hayne JJ.
27 *Tame v New South Wales* (2002) 211 CLR 317 at 353 [99] per McHugh J.
28 As the judge described it at [2016] QSC 163 at [29].

where the Department of Communities (Child Safety Services) (which I will call the Department) had decided that T was unfit to have the care of her young child. (T's second child was born in June 2009.) In April 2009, a Child Protection Order was made for that child by a magistrate. The Department's records referred to T as having "a history of violence, self-harm, suicide attempts, instability and sexualised behaviours".[29]

[189] Over the following 18 months, the appellant provided services to T, principally through two of its employees, Ms Turner and Ms Christie. Each experienced considerable difficulty in helping T, mainly because of T's drug use, poor mental health and, on occasions, threatening and sexualised behaviour. Each diarised her experiences with T in notes which were kept in the appellant's files and tendered at the trial.

[190] By August 2009, Ms Turner recorded that she had had to ask T not to touch her because T was "continuously trying to make physical contact," and that this had made T angry. Another employee of the appellant, Ms McFadyen, recalled that at a regular weekly meeting of what was called (within the appellant), the Young Families Team, Ms Turner reported that T had told her that she had fantasised about killing Ms Turner and performing a sexual act on her dead body.

[191] In September 2009, the Young Families Team saw fit to notify the Department about T's increasing drug use, deteriorating mental health and threats of self-harming. The Team discussed whether the appellant should withdraw its services, but it was decided that instead, some more limited support would continue to be provided. This was communicated to T by a letter, which Ms Turner and another employee took with them to T's home. T responded angrily. Ms Turner concluded that she could not ignore T's threats and that consequently, she would no longer provide support for T in T's home. This meant that T was excluded from the particular service which the appellant called its "Parents YES program".

[192] That was not the only service which T was then receiving from the appellant. Ms Christie, whose role was as a drug intervention worker, continued to work with T. Ms Christie testified that T had told her that she wanted a sexual relationship with Ms Turner. Although T had been removed from the program which was managed by Ms Turner, T continued to attempt to contact her, by telephone or text message, suggesting that they commence a sexual relationship. Ms Turner told T that her behaviour was unacceptable.

[193] T admitted to Ms Christie that she had been using heroin, cocaine and speed. When Ms Christie went with T to see a doctor in November 2009, T made what Ms Christie described as inappropriate comments to her of a sexual nature. When these were rejected by Ms Christie, T became angry. Ms Christie recorded her concerns for T's then "current mental health state and her escalating drug use."

[194] T continued to send inappropriate text messages, including picture messages, to Ms Turner. In December 2009, T telephoned Ms Turner, in a distressed state, saying that she had been prostituting herself to fund her drug use and that she was a "stalker", although, she added, she had not been stalking Ms Turner. At about the same time, T told Ms Christie that she wanted to "stalk, rape and drug".

---

[29] [2016] QSC 163 at [29].

[195] Nevertheless, the appellant continued to assist T. Ms Christie accompanied her to the Children's Court (where T was legally represented) so that T might obtain access to her children over the Christmas period of 2009. Ms Christie took her to a psychologist. She continued to visit T at her house, out of concerns for T's safety, especially because of T's suicidal messages. At the end of one day, when Ms Christie had taken T to a doctor's appointment and then to a psychologist's appointment, T verbally abused her and told her that she had had her and Ms Turner followed.

[196] T remained in need of assistance. The Department was looking to change the regime for the management of T's children. At the same time, the Department of Housing was considering evicting T from her house. T was still suicidal. At one point she had been taken to hospital by police because she was threatening suicide.

[197] In May 2010, during a visit to T's home, Ms Christie was told by T that she was having dreams of a sexual nature about her. As she said this, T was holding a pair of scissors and running the blade over her own neck.

[198] The first recorded involvement of the respondent in T's case was in September 2010, when Ms Christie asked her to provide support to T in her dealings with the Department. Ms Christie told the respondent that this was not Ms Christie's area of expertise, and that she would continue in her endeavours to assist T with her drug problems.

[199] Ms Christie then provided what was described as a written referral of T to the Young Families Team. One of the services which it provided was called the Family Support Program, in which the respondent had worked since the commencement of her employment by the appellant in 2007. Before then, the respondent had worked as a youth worker for other organisations from 1999. She had studied for a Bachelor of Arts (Psychology), but had not completed her studies because whilst at university, she decompensated as a result of her being sexually abused as a child.

[200] At a meeting of the Young Families Team in October 2010, a Ms Kaphle expressed concerns about working with T, because of T's mental health and her drug and alcohol use. She said that anyone working with T "needed to have strong boundaries."[30] She referred to the "previous situation with Susie Turner and that we needed to be aware of the risks involved with this client."[31] But she said also that "we needed to provide support for her children and that we were the Young Families Program," that this was the team's "particular forte" and that "someone needed to take [T] on." This would require, Ms Kaphle said, the use of "extreme boundaries … around this client."[32]

[201] In her evidence in chief, when asked "what was the end decision at [this] meeting," the respondent answered:

> "So I said I would take this particular client on … we actually discussed … what options did we have in working with this client, so initially it was we needed to do the court support around this person and the support through [the Department] because her children were

---

30 Respondent's evidence at ARB 32.
31 *ibid*.
32 Respondent's evidence ARB 33.

> taken into care, and there was a further [court] order coming, so she needed support around this."

[202] The respondent's evidence was that she said that she would provide what was called the Circle of Security program, which she described as "a short sharp 10 week intervention," saying that she "felt comfortable doing that" because she would not be "an intensive support worker." By that she meant that her dealings with T would not be as intense as those which, because of the different nature of their tasks, Ms Turner and Ms Christie had undertaken. In effect, the respondent was to provide some tuition in parenting, at times working with T alone and at times assisting in her interactions with her children in the presence of someone from the Department. The tuition was to be largely in the form of DVDs, supplemented by some comments by the respondent. This was to happen in T's home, rather than at the appellant's premises where T might encounter Ms Turner. The plan then was for the respondent to make regular visits to T's home, instruct T with the use of the DVDs and then stay whilst the children visited in the care of someone from the Department. In late November 2010, the respondent was introduced to T by Ms Christie and explained the service which she would provide.

[203] The respondent was conscious of the risk of misbehaviour by T towards her. As a result of her conversations with Ms Christie, she adopted the practice of calling her workplace when she arrived at T's house and making a further call when she left. For part of that time when she was at the house, a child safety worker from the Department would be there with the children. But this was not the only work which the respondent did for T.

[204] The respondent's other work for T was not done in her home. The respondent accompanied T to support her in meetings with representatives of the Department. There were several occasions in December 2010 to February 2011, when the respondent recorded being with T when she saw her children at an office of the Department. The respondent also went with her to hearings in the Children's Court and the Family Court.

[205] T was continuing her heavy use of drugs and Ms Christie was finding it more difficult to deal with her volatile behaviour. On 3 March 2011, Ms Christie noted that she had explained to another within the appellant's office that she had "started to feel unsafe both physically and emotionally" and that this person had recommended that she not visit T's home by herself, considering T's "escalated drug use and mental health concerns." She recorded that she had told T that the home visits would cease and that T could come to see her at the appellant's offices. Ms Christie told the respondent of that decision.

[206] On 14 March 2011, the respondent went to the Family Court to observe a hearing about T's children. The case was then adjourned for two weeks. The respondent visited T at her home on 25 March and went back to the Family Court with T on 28 March. On 7 April, the respondent again visited T at her home. By this time, T had begun to ask the respondent about her personal life. The respondent's evidence was that T made sexual references and advances which made the respondent feel very uncomfortable.

[207] These were the circumstances then in which the respondent attended a meeting at the Chermside office of the Department, on 12 April 2011, where there occurred the incident which caused her illness.

[208] The purpose of this meeting was to have a representative of the Department discuss with T what should be the arrangements for T's contact with her children, in the context of an upcoming hearing in the Children's Court. This was apparently a review by the Department of the case plan for the children under Division 5 of Part 3A of the *Child Protection Act* 1999 (Qld). There were two representatives of the Department present, as well as T, her lawyer, her mother, her nephew (in a pram) and the respondent. The six adults sat around a table. During the meeting, T began to move her foot up the respondent's leg, (on the judge's findings) "caressing [the respondent's] genitalia with her toes"[33] on the outside of her underwear. The respondent moved her chair but T did this again. When the respondent told her to stop, T said "you just need a good fucking lay". The meeting was then stopped by T's lawyer. T again verbally abused the respondent, who then refused T's request to drive her home.

[209] Two days later, the respondent wrote to T, explaining why she would no longer assist T. She described the incident as an "inappropriate physical contact with me by running your leg up against my leg in a slow and deliberate manner." The trial judge accepted that the respondent had there omitted a reference to being "touched in her genital region" because the respondent had wanted to be "diplomatic and professional rather than explicit."[34]

[210] There is no challenge to the findings that, in consequence of this incident, the respondent suffered from a psychiatric injury from which she will not recover. Her illness must be understood by reference to her health prior to this incident. As an adult, she had had psychiatric treatment as a consequence of her sexual abuse as a child. The incident with T, said one psychiatrist, had brought all of that back to her.[35]

[211] The two psychiatrists who gave evidence, Dr De Leacy and Dr Chalk, substantially agreed upon her condition and prognosis. The respondent suffers from a chronic post-traumatic stress disorder and major depression. The incident aggravated her pre-existing condition. In consequence of her illness, she became unable to work. She is suicidal and her illness caused the breakup of her marriage. As the trial judge said, the injury has had a devastating impact on all aspects of her life.[36] There is no challenge to the judge's assessment of damages.

A duty of care

[212] The trial judge described the relevant risk, which she said was the appellant's duty to avoid, as follows:

> "[160] As to the risk posed by T that she would sexually assault or otherwise behave in an improperly sexualised way with an employee of [the appellant], there is such a plethora of evidence of incidents other than the incident alleged to have occurred at McDonalds which should have alerted the

---

33 [2016] QSC 163 at [134].
34 [2016] QSC 163 at [140].
35 Report of Dr De Leacy 15 January 2014 p3, ARB 34.
36 [2016] QSC 163 at [166].

> employer to that risk, that this incident does not add to or subtract from that risk. Those incidents are set out in detail in the body of these reasons. In summary, both Ms Turner and Ms Christie stopped working with T because they felt unsafe due to T's sexualised and violent behaviour and threats. Adding to the risk was the knowledge that T was continuing to use dangerous drugs such as ice which could cause her to become volatile and even more aggressive.
>
> [161] This was not a case where the plaintiff suffered a psychiatric injury because of stress caused by stressful work which she had agreed to do as part of her contract of employment. This is a case where she suffered a psychiatric injury as a result of a sexual assault which happened during the course of employment. Her employment was the major significant contributing factor to her injury.
>
> [162] The risk that T would sexually assault one of the employees of [the appellant] was not inevitable but it was clearly foreseeable. The risk could not be said to be insignificant and in those circumstances a reasonable person in the position of the employer should have taken precautions to avoid that risk (WCRA s 305B). It was also clearly foreseeable that an employee would suffer psychiatric injury as a result of sexual assault."

That "incident," which the respondent said occurred at a McDonalds restaurant, was one in which the respondent said that she had witnessed T putting her hand down the back of Ms Christie's jeans, an incident which Ms Christie herself could not recall and which, she said, she would have recorded had it occurred. The trial judge appears to have made no finding about whether it did occur. Apart from that, there was nothing in the nature of an assault upon Ms Christie.

[213] The appellant's argument is critical of that reasoning about the duty of care, in several ways. It is said that the risk was too widely expressed, because it extended to behaving "in an improperly sexualised way." But the judge subsequently narrowed the risk as risk of a sexual assault. Secondly, it is said that the risk was wrongly defined, as a risk to all employees of the appellant, rather than as a risk to the respondent. That criticism has force. In the identification of the risk, it was necessary to distinguish the respondent's position from those of other employees. Many employees, having had no contact with T, were not exposed to any risk. And the risk to Ms Turner, had she continued to work with T, was affected by considerations which did not apply to the respondent's position.

[214] The appellant argues that the risk of a psychiatric injury to the respondent was also affected by the respondent's age, extensive experience and "contractually assumed role."[37] It was also affected, the appellant argues, by the more limited role of the respondent in working for T, compared with those of Ms Turner or Ms Christie. It was affected by the fact that there had not been any (proved) assault of any of the appellant's staff, until the subject incident in question. And it was also affected, it is argued, by the circumstance that the incident occurred, not in T's home, but at a meeting at the offices of the Department and with many other people present.

---

[37] Citing for this *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

[215] It will be necessary to return to those arguments in discussing whether the appellant breached its duty. The present question is whether it owed a duty of care to act in response to any foreseeable risk of a psychiatric injury to the respondent. It is the risk of injury to the respondent, rather than to a class of employees, which must be considered here, because the risk to another employee was not identical.

[216] Undoubtedly there was a risk of a psychiatric injury to the respondent: that risk has eventuated. The immediate question is whether that risk was reasonably foreseeable by the appellant.

[217] A risk which is not far-fetched or fanciful is real and therefore foreseeable.[38] The risk of psychiatric injury came from the risk that T would do something to the respondent, which would be so disturbing or distressing that she might suffer such an injury from it. Where there was a real risk to the respondent's physical safety, in the company of T, there was a real risk of a psychiatric injury. That risk was foreseeable, and reasonably foreseeable. But as the appellant submits, the risk differed according to the context in which the respondent and T might be together. The difference, according to the context, was reflected in the course taken by Ms Christie, in deciding that she would continue to assist T, not by visiting T's home, but instead by T coming to the appellant's offices.

[218] Therefore it must be concluded that the appellant, as the respondent's employer, was required to have in contemplation a risk of psychiatric injury to the respondent, from something which might be done to her by T, and to take reasonable care to guard against it.[39]

Was the appellant's duty of care breached?

[219] A breach of that duty had to be proved according to the requirements of s 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), which is as follows:

> "305B General principles
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury."

---

38 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 per Mason J.

39 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 276 [8] (Gleeson CJ).

[220] Analogues of s 305B(2) in other jurisdiction have been described[40] as a reiteration of the considerations which were discussed by Mason J, in *Wyong Shire Council v Shirt*, as follows:[41]

> "[I]t is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

[221] Referring to that statement in *Shirt*, Gleeson CJ said in *New South Wales v Fahy*:[42]

> "This has since been referred to, somewhat unfortunately, as a "calculus". What is involved is a judgment about reasonableness, and reasonableness is not amenable to exact calculation. The metaphor of balancing, or weighing competing considerations, is commonly and appropriately used to describe a process of judgment, but the things that are being weighed are not always commensurate. As was pointed out in *Mulligan v Coffs Harbour City Council*,[43] there are cases in which an unduly mathematical approach to the exercise can lead to an unreasonable result.
>
> …
>
> Reasonableness is the touchstone, and considerations of foreseeability and risk avoidance are evaluated in that context … There may be cases where courts have lost sight of the ultimate criterion of reasonableness, or have adopted a mechanistic approach to questions of reasonable foreseeability, risk management or risk avoidance. Complaints about failure to warn seem to give rise to problems of that kind. There have been occasions when judges appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing.[44]"

[222] As s 305B(2) provides, the three considerations which are there prescribed may not be everything which the Court must consider in a particular case. So, the relationship between the parties, as employer and employee, is plainly relevant, but it is not determinative.

[223] Also relevant is the consideration which Mason J described as "other conflicting responsibilities which the defendant may have." The appellant assumes responsibilities in the provision of services to disadvantaged people who require them. A related

---

40 *Waverley Council v Ferreira* [2005] NSWCA 418 at [45]-[47]; *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at 397, 449; *Miller v Lithgow City Council* (2015) 91 NSWLR 752 at 774 [105].

41 (1980) 146 CLR 40 at 47-48.

42 (2007) 232 CLR 486 at 491 [6]-[7].

43 (2005) 223 CLR 486 at 490 [2].

44 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Neindorf v Junkovic* (2005) 80 ALJR 341; 222 ALR 631; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 425-427 [2]-[8].

consideration is the social utility from the provision of the appellant's services. T was a beneficiary of those services, but their potential benefit was more extensive. The respondent was assisting T to advance to a position where she could have more extensive contact with, and ultimately the care of, her two young children. There was a potential benefit for the children, as well as a more immediate practical benefit for those from the Department who had to deal with T's case in the work which the respondent was doing for T. Neither at the trial, nor in this appeal, was it suggested that there was no utility in the services which the respondent was providing to T leading up to, and at the time of, the subject incident. The trial judge remarked that the work of the appellant was important and socially valuable.[45]

[224] As I have said earlier, because of the circumstances of many of the young people who are assisted by the appellant, it is inherently likely that the appellant's employees have to deal with potentially volatile and threatening people. The appellant's duty was not to do whatever was necessary to ensure that its employees were completely safe; rather it was to respond *reasonably* to the relevant risk.

[225] The magnitude of the risk and the degree of the probability of its occurrence must be assessed according to what was understood, or should have been understood, by the appellant at the time.

[226] It was known that T was a volatile, often drug affected and aggressive young woman, who had made threats and unwanted sexual advances to employees of the appellant. Her behaviour towards Ms Turner had made it impossible for her to continue to do work for T. The relevant risk to the respondent was that T would do something to her, which would be so disturbing or distressing to her that she would suffer a psychiatric injury. The potential magnitude of that injury was substantial. The likelihood of such an occurrence was affected by the nature and extent of the respondent's dealings with T and, importantly, by the places and circumstances of their meetings. As the respondent acknowledged at the time, the nature and extent of her dealings with T were expected to be less "intensive" than those experienced by Ms Turner or Ms Christie, because of the different nature of their tasks. Some of the meetings between the respondent and T were in T's house and for part of them, the respondent and T were alone. The probability of such an occurrence was higher in that context than when the respondent and T were together at other places, such as when they were at the Family Court or the Children's Court or, as in the subject incident, at an office of the Department.

[227] The probability of such an occurrence in this meeting was low, not only because of where it took place, but also because of who was present and the purpose of the meeting. There were several other persons seated around this table, including T's mother and her lawyer. This was an apparently safe environment. The potential for any assault, which caused or threatened a physical injury or a psychiatric injury to the respondent, was slight. It could have been reasonably expected that T would be conscious of the need to present herself favourably to the officers of the Department, whilst they were discussing her future relationship with her children.

[228] Unknown to the defendant, there was a factor which markedly increased the likelihood that the respondent would suffer a psychiatric injury, namely her particular vulnerability from her abuse as a child and her consequential mental condition. Although the notion of "normal fortitude" is no longer a condition of

---

45 [2016] QSC 163 at [163].

liability in this context,[46] a plaintiff's vulnerability remains a relevant consideration. Again, this is because the essential criterion is one of reasonableness. In *Tame v New South Wales*, Gleeson CJ said:[47]

> "The variety of degrees of susceptibility to emotional disturbance and psychiatric illness has led courts to refer to 'a normal standard of susceptibility' as one of a number of 'general guidelines' in judging reasonable foreseeability. This does not mean that judges suffer from the delusion that there is a 'normal' person with whose emotional and psychological qualities those of any other person may readily be compared. It is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm. Such people might include those who, unknown to a defendant, are already psychologically disturbed. That idea is valid and remains relevant, even though 'normal fortitude' cannot be regarded as a separate and definitive test of liability."

[229] For these reasons, the probability that the respondent would suffer a psychiatric illness from something happening on the occasion of this meeting, *according to what was known or ought to have been known by the appellant*, was very slight. Indeed, it was so slight that the risk of a psychiatric injury, in that context, was "insignificant" in the terms of s 305B.

[230] The risk was higher when they met at T's home, with no one else present. A reasonable response to that risk may well have been for the appellant to direct the respondent not to continue to meet T in that way. But the same service could have been provided at the appellant's office: it was provided in T's home because of the prospect of T encountering Ms Turner, but that predicament was not unavoidable.

[231] In my conclusion, it would have been an unreasonable constraint upon the valuable work performed by the appellant, for it to be legally obliged to withdraw its services in T's case, even where these services were performed in environments as apparently safe as government offices or courts.

[232] The trial judge acknowledged that the incident had not occurred in T's home. Her Honour said that this did not matter because "the visits by [the respondent] to T's home as part of her work for [the appellant] created the relationship between T and [the respondent] which gave T the opportunity to take advantage of that relationship to engage in inappropriate sexualised behaviour towards [the respondent], in this case a sexual assault."[48] It may be accepted that this incident, most probably, would not have occurred had T not met the respondent on the several occasions which I have described. In hindsight, their previous dealings are, in part, an explanation of the occurrence of this incident. But the question here is whether, according to what was then known or should have been known, those dealings had created such a risk that, in the apparent safety of such a meeting, T would do something which was so distressing that it would cause the respondent a psychiatric injury, that the appellant

---

46 *Tame v New South Wales* (2002) 211 CLR 317 at 332-333 [16], 343-344 [62], 384 [199]; *King v Philcox* (2015) 255 CLR 304 at 335 [76].

47 (2002) 211 CLR 317 at 333 [16].

48 [2016] QSC 163 at [163].

was legally obliged to avoid it. In my conclusion, there was not such a risk which the appellant was obliged to avoid.

[233] For these reasons, the appellant was not legally obliged to withdraw its services to T. Its duty of care to the respondent could have been discharged consistently with the respondent continuing to assist T, but away from T's home. The appellant was not negligent and the respondent's claim should have been dismissed. I would allow the appeal, set aside the judgment below and order that the respondent's claim against the appellant be dismissed.