SUPREME COURT OF QUEENSLAND

CITATION:	*Woolworths Limited v Perrins* [2015] QCA 207
PARTIES:	**WOOLWORTHS LIMITED** ACN 000 014 675 (appellant) **v** **TREVOR PERRINS** (respondent)
FILE NO/S:	Appeal No 4917 of 2015 DC No 67 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 24 April 2015
DELIVERED ON:	27 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2015
JUDGES:	Fraser and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The judgment below is set aside.** **3. Judgment is entered for the appellant.** **4. The respondent pay the appellant's costs of and incidental to the trial and this appeal.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – WHERE NERVOUS SHOCK OR MENTAL DISORDER – where the respondent was employed by the appellant – where the respondent applied to take part in a management training programme during his employment – where the respondent was accepted into the programme then removed before the programme commenced – where the respondent made a second application for the management training programme the following year but was again removed before it commenced – where the respondent was diagnosed with "adjustment disorder with depressed mood", "dissociative disorder", and "substance abuse disorder" following his removal from the programme the second time – where the respondent had a history of drug abuse and depression – where the respondent had not indicated any factors which would negatively impact his performance when applying for employment

– where the respondent gave evidence at trial that he had notified the appellant of his vulnerability to psychiatric injury – whether the fundamental findings of fact made by the trial judge should stand – whether the appellant was negligent – whether the appellant's duty of care as an employer extended to avoiding psychiatric injury liable to be caused by insistence on meeting the criteria for promotion – whether appellant's alleged breach of duty caused the respondent's psychiatric injury – whether the respondent's psychiatric injury was reasonably foreseeable

Armagas Ltd v Mundogas SA [1985] 3 WLR 640, cited
Banque Commerciale SA (In liq) v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Hegarty v Queensland Ambulance Service [2007] QCA 366, cited
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15, applied
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254; [2000] HCA 61, cited
Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471; [2007] NSWCA 377, applied
Queensland Corrective Services Commission v Gallagher [1998] QCA 426, cited
Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co ("The Palitana") (1924) 20 LI L Rep 140, cited
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, cited
Turner v South Australia (1982) 56 ALJR 839, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, cited
Vozza v Tooth & Co Ltd (1964) 112 CLR 316; [1964] HCA 29, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, applied

COUNSEL: G W Diehm QC, with R Lynch, for the appellant
S J Keim SC, with S J Thackeray, for the respondent

SOLICITORS: DLA Piper for the appellant
David Jasinski Solicitors for the respondent

[1] **FRASER JA:** I have had the advantage of reading in draft the reasons of McMeekin J. For those reasons, with which I agree in all respects, the appeal should be allowed, the judgment in the District Court should be set aside and judgment should be entered for the appellant against the respondent, and the respondent should be ordered to pay the appellant's costs of the proceedings in the District Court and of the appeal.

[2] **GOTTERSON JA:** I agree with the orders proposed by McMeekin J and with the reasons given by his Honour.

[3] **McMEEKIN J:** Following a trial in the District Court the appellant, Woolworths Ltd (Woolworths), was ordered to pay damages to the respondent, Trevor Perrins, assessed in the sum of $585,152.74. It was held by the primary judge that Woolworths had caused Mr Perrins psychiatric injury and had done so in breach of its duty of care as his employer.

[4] Woolworths says that it was not in breach of its duty of care and that if it was the damages should properly be assessed at $91,167.50.

[5] The grounds of appeal extend over three pages. In summary Woolworths complain that the crucial findings of fact made by the primary judge were unsupportable, that findings made relating to workplace bullying were neither open nor relevant, that it was not shown that the risk of psychiatric injury was reasonably foreseeable, that no action of Woolworths was in breach of its duty of care, and that the assessment of damages was excessive.

[6] In my opinion the appeal should be allowed and the claim dismissed. That is so for these reasons:

(a) The duty of care owed was not as extensive as the primary judge apparently assumed;
(b) Taking Mr Perrins' case at its highest there was no foreseeable risk of psychiatric injury to Mr Perrins in the circumstances that pertained;
(c) If there was such a foreseeable risk Woolworths was not in breach of its duty of care;
(d) It was not shown that any act or omission relied on as being in breach of duty caused the injury suffered; and
(e) Mr Perrins' case should not be taken at its highest – the essential findings of fact underpinning the judgment below cannot stand.

A History of Drug Use and Depression

[7] Mr Perrins has had a troubled life. He has given various versions of his history. What seems uncontroversial is that he has used heroin, amphetamines and marijuana. He suffered sexual abuse as a 12 year old. He informed one doctor that he had a pot addiction from age 15. He was suicidal in his teens. He was imprisoned in his teens for "break ins" and drug offences. He had the devastating loss of a young child, apparently from suffocation, in 2003 (his age of 26) when the child was aged only eight or nine months. He blamed his ex-partner, or did so at one time. As a result he suffered from depression and received psychiatric care from time to time. While it is difficult to obtain an accurate view of Mr Perrins' drug use it seems that he was using amphetamines as late as April 2007.[1] He was sentenced to a period of imprisonment on 23 May 2008 for driving whilst disqualified. He was released on parole after two months.

[8] The extent to which this history was revealed to the Woolworths' managers is very much in issue.

The Background Facts

[9] The psychiatric injury complained of resulted from a decision by a manager to exclude Mr Perrins from a management training course for which he had been selected. The essential background facts leading up to the exclusion can be briefly stated. They are largely not in issue, although there are some key differences between the parties. I here assume the facts as found.

---

1 AB 71/35.

[10] Mr Perrins started working at Woolworths, through a labour placement agency, in 2007. He was then aged about 30 years having been born on 15 June 1977. He commenced in Woolworths' employ on probation on 12 May 2008. He was employed as an order selector, forklift operator, and truck unloader.

[11] On applying for employment Mr Perrins was required to complete two Pre-Assessment Forms. Woolworths sought information as to his condition that day. The forms were completed on 10 April 2008[2] and 29 December 2008[3]. Mr Perrins answered "no" to the following two questions in the form:

- "Are you on any medication at the moment, or recovering from illness?"
- "Are there any factors or circumstances, either physical or emotional, which you feel may impact negatively on your performance?"

[12] Associated with those forms was a "Confidentiality Form" by which Mr Perrins authorised "key HR personnel" to hear and see his "psychological assessment results". He went on in the next paragraph to confirm that he was not aware "of any conditions that may adversely impact on my performance."[4]

[13] In the latter part of 2008 Mr Perrins applied to join a management training programme conducted by Woolworths. There was a selection process which the learned primary judge described in these terms:

> "123. It is clear from the evidence of Miss Render and from Mr Rodriguez that the selection process was thorough and exhaustive. It involved formal psychological testing. It involved interviews with junior and senior managers. It required the applicants to undertake research so that they might make a presentation to a panel. Many applied, but only a handful succeeded in their application.
>
> 124. I think it most unlikely that the plaintiff could have "passed" this rigorous assessment process unless he was, as he claimed, on top of the issues which had bedevilled him in the past.[5]"

[14] On 2 February 2009 Mr Perrins received a letter of offer of a place on that trainee programme.[6] Shortly prior to that Mr Perrins claims that he told the logistics manager for Woolworths in Queensland, Mr Rodriguez, of his "entire history of the fact that I'd been a drug abuser. The fact that I'd lost a child, and had suffered some depression, and that I'd worked my way through it, how I'd cleaned myself up and where I wanted to aim towards getting…". When asked whether he had relayed his "criminal background" Mr Perrins confirmed that he had "relayed to him everything that had been in my past".[7]

[15] The learned primary judge found that this conversation occurred, presumably in the terms related by Mr Perrins, and summarised its effect in these words: "a discussion with Mr Rodriguez during which he spoke to him of, *inter alia*, significant problems

---

2 AB 557.
3 AB 561.
4 AB 562.
5 Reasons - AB 776.
6 AB 563-564 – Exhibit 11.
7 AB 10/5-25.

he had had in the past with drug abuse and with his mental health."[8] Mr Rodriguez was then Woolworth's most senior employee in Queensland responsible for 2,000 employees and with 100 to120 managers reporting to him.

[16] The letter of offer of 2 February 2009 informed Mr Perrins that he had been selected to participate in the programme, that it was a 12 month programme, that he would have "regular formal and informal reviews during the programme", and that "if you are failing to fulfil the requirements of the position you will be transferred back to your previous role". He too could elect to transfer back to this previous role. Further he was advised that he was not guaranteed a leadership position and "on the completion of the programme he would revert back to his previous role and wage."[9]

[17] After his selection on the programme Mr Perrins formed the view that he was not welcomed by other managers, was picked on for minor matters, and was at times publicly humiliated, laughed at and bullied.[10] These alleged acts were not pleaded – and remain unpleaded. Their relevance to any issue is questionable. I shall return to that issue.

[18] The management programme was initially to start on 30 April 2009 but was delayed to July 2009, at least so far as concerns Mr Perrins' involvement.

[19] On 6 July 2009, about a week before the course was to start, Mr Perrins was advised by a human resources manager, Ms Render, that he was being removed from the course due to his unsatisfactory attendance record.

[20] Woolworths had a policy. If in a six month period an employee was absent from his or her employment for a period that exceeded 100 hours off work then they were to be counselled – effectively enquiry made as to why they were not performing their obligations under their employment contract and what could be done about it.[11] At the time employees were entitled to 76 hours leave per year. Ms Render learnt that Mr Perrins had been counselled, his absenteeism having reached 489.32 hours over the previous 12 months – 358.75 hours being referable to his period in gaol.[12] Mr Perrins informed his counsellor, a Mr Hollands, that the balance was due to "personal issues which he is in control of now which will improve his attendance."[13] Employees in breach of the policy would not normally be permitted to enter the programme. Ms Render implemented this policy in removing Mr Perrins.

[21] Ms Render's evidence of the discussion on 6 July 2009, the occasion when she informed Mr Perrins that he was not to be included in the programme, was as follows:

> "Can you take us through what was discussed with Mr Perrins on that day?---We discussed the performance issues, specifically, his attendance, and that it would be - his attendance would be assessed in the next six months. Mr Perrins said that he'd had the family issues. He was stressed, which had made him sick. However, it all been sorted out now. Everything had been dealt with, and everything was fine. We did say to Mr Perrins that we needed to reassess his suitability for the program, due to the performance, and said to Mr Perrin that we stepping

---

8 Findings – [125] at AB 777.
9 AB 563-564.
10 Reasons - AB 762-763.
11 See the evidence of Mr Howbrigg at AB 107/5.
12 AB 626.
13 AB 627.

> him out - I'm stepping him out of the program, and that he could - there was a possible - possibility that he could be reassessed for the program for the next year, depending on his performance. He knew very clearly what - what the requirements were. And he was happy with that.
>
> And was he given any documents?---He was given the - the Woolworths standard individual performance and development program, which is used to assess the monthly staff. I gave him that so that he could have a look at that and be very clear on what the competencies were that the company required.
>
> All right. And did he - do you recall whether he seemed satisfied with that or not?---He was satisfied. Yes."[14]

[22] The primary judge apparently accepted that this conversation occurred.

[23] The learned primary judge's findings concerning Mr Perrins' reaction to his removal from the course in 2009 was expressed in this way[15]:

> "128. One can understand the frustration of the plaintiff, having been told that he was to be given the special opportunity of undertaking the management training course, and then being advised about a week before he was due to commence the course that he was to be taken off it for reasons which largely predated the first offer, and which he might reasonably suppose the company would have been well aware of all along.
>
> 129. One can understand that frustration being exacerbated when one takes into account the workplace taunting, teasing, even bullying, which began with the announcement of his appointment, and continued thereafter."

[24] On 17 May 2010 Mr Perrins again was offered, and again accepted, a place on the management training programme. He again received a letter of offer,[16] for present purposes in the same terms as the February 2009 offer.

[25] Mr Perrins account was that on receipt of the letter of offer he sought re-assurance from Ms Render that he would definitely start the programme. He alleged that he said to her: "… because if I am going to go through the same thing I've just been through I don't think I could handle it."[17] He was to start the programme on 5 July 2010.

[26] Again Mr Perrins claimed that managers continued to pick on him as before and that he complained to "his management team" but nothing was done.[18]

[27] On or about 1 July 2010 Ms Render decided to remove Mr Perrins from the programme, again, inter alia, because of attendance issues. Again there was a finding that, acting reasonably, Ms Render could have discovered the existence of those issues before making Mr Perrins the offer of joining the programme. Ms Render endeavoured to get in contact with Mr Perrins to advise him of her decision on that date but was unable to do so. Ms Render explained her decision this way:

---

14 AB 136/25-42.
15 Reasons - AB 777-778 paras [128]-[129].
16 AB 632-633 – Exhibit 14.
17 AB 12/5.
18 Reasons - AB 765 para [70].

> "…we require our managers to be trustworthy, dependable, responsible, have accountability, etcetera. The amount of absenteeism that Mr Perrins reverted back to we felt was not displaying those qualities that we were looking for in our management trainees."[19]

[28] On 5 July 2010 Mr Perrins turned up for work expecting to start the programme. He was left in Ms Render's office for a period while other attendees were dealt with. Eventually a Mr Cook, another manager, approached him and advised him of Ms Render's decision. Mr Perrins' evidence in chief was that he was given no reason for his removal from the programme.[20] Other contemporaneous evidence suggests that he was.

[29] Mr Perrins immediately felt unwell, went home, slept for days and eventually sought medical treatment. He was subsequently diagnosed as having a psychiatric illness. The expert evidence accepted by the primary judge was that the diagnosis was "adjustment disorder with depressed mood", "dissociative disorder", and "substance abuse disorder" all attributed to the events at his place of employment.

Pleaded Cause of the Injury

[30] It is useful to start with the pleading as to what it is that Woolworths did or failed to do that is claimed to have caused the injury and which is said to be in breach of the duty of care owed. This will assist in determining the scope of the duty that is relied on. That is the approach urged by Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[21] and it is useful here.

[31] There was no express finding by the primary judge of the act or omission that constituted the breach of the duty of care. His Honour found that Mr Perrins had "established on the balance of probabilities, the matters set out in paragraphs 7A to 7P of the Amended Statement of Claim".[22] Included in those paragraphs are three allegations of "unreasonable management action". Mr Perrins pleaded that as a consequence of those matters he suffered injury.[23] It is therefore essential that these acts or omissions be in breach of the duty said to be owed. There was no examination of these three crucial paragraphs in the judgment.[24] It would appear from the pleading that knowledge of Mr Perrins' vulnerability to injury was considered essential by the pleader. The allegations are:

> "7H. It was unreasonable management [action taken] in an unreasonable way for the defendant to allow the plaintiff to progress through the rigours of the selection process and then inform the plaintiff that due to well known issues he would not commence the program. ("The first said unreasonable management actions")
>
> 7N. It was unreasonable management [action taken] in an unreasonable way for the defendant to inform the plaintiff two (2) business days prior to the second management program commencing that he had been withdrawn. ("The second said unreasonable management actions".)

---

19 AB 139/46 -140/2.

20 AB 51/24.

21 (2000) 205 CLR 254 at 289-290 [103] and again urged by Hayne J in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2000) 211 CLR 317 at [276].

22 Reasons - AB 781 para [149].

23 Paragraph 8 of the Amended Statement of Claim.

24 Counsel for Woolworths drew attention to these allegations, and the crucial importance of them, in his written submission: AB 721. Counsel for Mr Perrins made no reference to the pleading at any stage – either in opening (AB 3/28) or closing (AB 738-743) submissions.

7O. It was unreasonable management action taken in an unreasonable way for the defendant:

(a) Not to advise the plaintiff the issues relating to the withdrawal from the first management trainee program were ongoing;

(b) Not to have in place a formal structure to assist the plaintiff deal with work related [issues prior] to issuing the plaintiff with a further contract for the second management trainee program;

(c) To use the issues in the past to deny the plaintiff entry to the second management trainee program when the defendant knew of the issues in his past prior to offering him the contract for the second management trainee program.

("The third said unreasonable management actions".)

7P. The defendant took the first and/or second and/or third unreasonable management actions when the defendant knew the plaintiff was vulnerable to psychological behaviour and/or injury."[25]

[32] It is evident from the pleading that paragraph 7H related to the events in 2009.

[33] I leave to one side the pleading of negligence and breach of contract (no distinction was drawn, at trial or on appeal, between the duties imposed under contact or in negligence) set out in paragraph 9 of the Amended Statement of Claim. His Honour did not refer to that paragraph. The pleading is couched largely in the most general of terms and where it does descend to particulars it is uninformative. It is unsurprising that the primary judge gave no consideration to the paragraph. No argument was addressed to this Court as to how the matters pleaded relate to the matters found or to any breach.

[34] On appeal it was submitted that the breach of duty lay first in offering Mr Perrins a position without first checking the facts to ensure that he was suitable (so within paragraphs 7H and 7O(c)); secondly in the manner in which Mr Perrins was told of his removal from the course, particularised as in not taking adequate steps to inform him of the decision to remove him, "sending Mr Cook along who did not know much about it, leaving him sitting in the room",[26] and not dealing with Mr Perrins "in a careful and decent and proper way, according to the proper standards that you would expect from qualified human resources departments from large corporations who have the resources to deal with these sorts of matters"; and thirdly in not explaining the reasons "up front".[27]

[35] These latter arguments go well beyond the issues raised in the pleadings. I did not understand Woolworths to accept that Mr Perrins was entitled to go beyond his pleadings. It is a "basic requirement of procedural fairness" that a party be restricted to its pleaded case save and unless the other party allows the first to raise other material facts and issues for the determination of the court: *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 296–297.

---

25 AB 699-701.

26 Transcript 1-40/37-45.

27 Transcript 1-44/1-6.

Analysis of The Plaintiff's Case

[36] To understand the problems with the plaintiff's case it is necessary to identify the assumptions that underlie it.

[37] There are three strands to the plaintiff's case as pleaded. In each the claim is that the act or omission involved "unreasonable management action" and so is said to be actionable. Why? Because doing so exposed Mr Perrins to a risk of debilitating psychiatric injury.

[38] The first strand is that Ms Render could have made timely enquiry of the payroll clerks, that if she had done so then she would have learnt that Mr Perrins' absenteeism was at unacceptably high levels such as to disqualify him for entry to the trainee programme (paragraph 7H and 7O(c)). The second strand is a variation of the first. The alleged breach involved a failure to advise the plaintiff that "the issues relating to the withdrawal from the first management trainee program were ongoing" – which I take to be again a reference to absenteeism (paragraph 7O(a)).

[39] Putting to one side factual issues, there are two fundamental assumptions underlying these strands. The first is that Woolworths were not permitted to rely on the absenteeism that the records revealed as a reason for removing Mr Perrins from the course, save on penalty of paying damages to Mr Perrins. That is relevant to the scope of the duty owed. The second assumption is that had Woolworths complied with its duty the injury that eventuated would have been avoided – presumably because Mr Perrins would never have been invited to enter the course at all and so would not have been disappointed; or that if he had been withdrawn for some reason, other than his own absenteeism that predated the letters of offer, the disappointment would have been less and so not injurious. Either alternative presents difficulties for Mr Perrins – the first was not pleaded and expressly not pursued before the primary judge;[28] the second was not the subject of any evidence.

[40] The third strand is that having wrongly picked Mr Perrins for the course Woolworths then acted insensitively in their handling of his removal. This too was "unreasonable management action" and so actionable. The premise is that by informing him of his withdrawal from the course earlier than was done (paragraph 7N) or by the provision of counselling in a timely way (paragraph 7O(b)) debilitating psychiatric injury would have been avoided. Again the implicit assumption is that "sensitive" handling would have avoided the injury.

The Content of the Duty of Care

[41] Is it right to assert that Woolworths were not permitted to rely on the absenteeism that the records would have revealed as a reason for removing Mr Perrins from the course once that absenteeism was discovered as seems implicit in the first and second strands? If not, then much of the case against Woolworths disappears. The only reason for the importation of such a restriction is that Mr Perrins might suffer psychiatric injury.

[42] While it is trite law to assert that every employer owes to each employee a duty to exercise reasonable care not to injure that employee, and further to assert that the duty extends as much to foreseeable risks of psychiatric harm as to physical harm, the content of the duty of care is not at large but needs to bring into account the contract that existed between the parties.

---

[28] AB 199/35.

[43] That point was made in *Koehler v Cerebos (Australia) Ltd*[29] where it was held that an employee could not succeed in a claim for damages against her employer for causing her psychiatric harm merely by insisting that she perform the duties that she had agreed to perform under her contract. The plurality there said:

> "[21] *The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment,* the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. …
>
> [22] No doubt other questions may arise. It is, however, neither necessary nor appropriate to attempt to identify all of the questions that could arise or to attempt to provide universal answers to them. *What is important is that questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties.*
>
> …
>
> [25] Issues about the content of the duty of care were not examined in any detail in the courts below. It was assumed that the relevant duty of care was sufficiently stated as a duty to take all reasonable steps to provide a safe system of work *without examining what limits there might be on the kinds of steps required of an employer*. Rather, attention was directed only to questions of breach of duty framed without any limitations that might flow from an examination of the content of the duty of care. As earlier indicated, the question of reasonable foreseeability is determinative.[30]
>
> …
>
> [34] It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. Yet it is that proposition, or one very like it, which must lie behind the Commissioner's conclusion that it required no particular expertise to foresee the risk of psychiatric injury to the appellant.
>
> [35] The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. … that invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned."[31]

[44] With those principles in mind I turn to consider the question that I have posed and the facts here.

---

29 (2005) 222 CLR 44 – my emphasis.

30 Emphasis added in paragraphs [22] and [25].

31 Emphasis in the original in paragraph [35].

The Other Obligations

[45] Woolworths had laid down certain criteria for entry to the training programme. Mr Perrins' complaint is that Woolworths required him to comply with those criteria. How could Woolworths be in breach of a duty of care in doing so?

[46] Mr Perrins applied to be considered for the management training course. He must be taken to have thereby represented himself to his employer as fit for the role of a manager – physically and emotionally. Further he must be taken to have accepted it was necessary that he meet the criteria that Woolworths laid down for acceptance into the course. It should be appreciated that it was no part of Mr Perrins' case that the matters that Woolworths relied on for his withdrawal were not legitimate concerns from Woolworths' perspective. His case depends on acceptance of the view that Woolworths were not permitted to rely on matters that properly disqualified Mr Perrins from entering the course.

[47] At no time did Woolworths indicate that non-fulfilment of their criteria, whenever discovered, would not be relied on. To the contrary, consideration of Woolworths' position shows that it was completely antithetical to its interests to carry someone into the programme who did not meet its criteria. The point of the process was for Woolworths to identify future leaders for their company. Plainly their intention was to invest time, money and personnel in training the few employees identified as suitable. To deny Woolworths its right to control its own process – as the first and second strands discussed above require – is to ignore entirely Woolworths' interests. Why should Woolworths be required to expend its resources on someone not suited? To import a duty of care that depended on Woolworths not acting on a failure by an employee to meet its criteria would be to completely ignore Woolworths' legitimate interests in the process.

[48] Fundamental to the complaint is that Ms Render should have known certain matters by a certain time. Woolworths had a system in place by which its managers, such as Ms Render, came to be informed of matters such as absenteeism. That system did not involve Ms Render checking payroll records which would have alerted her to the absenteeism record.[32] She was not authorised to do so, presumably for reasons to do with privacy. Presumably she did not check criminal records either. It could not be supposed for a moment that Woolworths would not have been entitled, say, to rely on the discovery of a criminal record of dishonesty, whenever discovered. Yet, the plaintiff asserts a line is crossed where the disqualifying factor was to be found somewhere in Woolworths' records when, with a different system, or if you like greater diligence, the factor could have been discovered before offering a place in the course. Why? There is no relevant distinguishing feature from Woolworths' perspective between a disqualifying factor located within the records and one not in the records. Why should the fact that one is more easily discovered than the other be relevant to the duty owed? The potential for injury upon discovery and reliance is surely the same.

[49] And why should Woolworths be alert to potential injury by an insistence on Mr Perrins meeting its criteria? Mr Perrins' seeking of a position in the course meant that he accepted, and believed that he was up to, the challenge of meeting those criteria. Conversely, he represented that he accepted the possibility of bearing the disappointment of not meeting those criteria.

[50] There was no finding that there was any sign (as opposed to the disputed conversation, to which I will come) that Woolworths's managers should have observed to alert them

---

32 See the references at [165] below.

to any psychological vulnerability. To the contrary Mr Perrins advanced himself implicitly as fit to cope with the disappointment of missing out.

[51] The case presented was that because of a casual conversation with a manager in which Mr Perrins revealed, in words not detailed, something of his past, Woolworths came under a duty of care not to rely on their own criteria in respect of that employee, and if it did so Woolworths was liable in damages for the consequences of that employee's reaction to their reliance.

[52] I know of no authority for the importation of such a duty of care.

[53] *Koehler* is authority for the proposition that the duty owed to an employee to protect the employee from psychiatric harm does not extend to injury suffered by undertaking the very obligation imposed by the contract. The duty for which Mr Perrins' contends effectively extends to just such an injury.

[54] Examination of what express contractual terms there were confirms my view that the duty cannot extend as far as it must for Mr Perrins to succeed on these arguments. As in *Koehler* there has been no comprehensive examination attempted here of the extent of the obligations of each of the parties. But what is clear enough is that Mr Perrins' involvement in the trainee programme was subject to the terms contained in the two letters of offer of 2 February 2009 and 17 May 2010.

[55] Woolworths expressly informed Mr Perrins in those letters that he "was not guaranteed a leadership position" even if he successfully completed the course. As well Woolworths had expressly reserved its right to transfer Mr Perrins back to his previous role if the Company thought that Mr Perrins was "failing to fulfil the requirements of the position" during the programme.

[56] It is apparent that both Mr Perrins and Woolworths operated on the assumption that the thwarting of his ambition was a possible outcome of the process and one that Mr Perrins might well have to live with. It was fundamental then to both sides that Mr Perrins had the capacity to deal with disappointed ambition.

[57] It is inconsistent with the reservation of those rights by Woolworths, and Mr Perrins' acceptance of those reservations, that their relationship was also subject to a duty not to injure him by withdrawing him from the trainee course before it began. To put the point another way – if Woolworths had no duty to preserve Mr Perrins' management ambitions either during or after the trainee course, why did they owe such a duty either before it commenced the selection process or at any time up to the commencement of the course? The answer that Mr Perrins gives is – because I might suffer injury. That was the only answer that could be advanced in *Koehler* and it was held not sufficient to justify the scope sought to be given there to the employer's obligations. That was so, in part, because the plaintiff's "agreement to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the appellant's psychiatric health. It runs contrary to that contention because agreement to undertake the work not only evinced a willingness to try but also was not consistent with harbouring, let alone expressing, a fear of danger to health."[33] The reasoning is applicable here, albeit applied not to performance of tasks but rather his continuation in the course. I cannot see that there is any distinction.

[58] On appeal it was put that the offer of the place on the programme created an expectation that Mr Perrins would not fail "even before he got to the first hurdle."[34]

---

33 *Koehler* at [28].

34 Transcript 1-45/20.

That may be so but it is not determinative of the extent of the duty. The fallacy lies in the translating of expectations into obligations, a breach of which results in damages. As well, it is a peculiar argument to put that it is Woolworths whose interests must suffer when it was Mr Perrins' own conduct in his continuing absenteeism that erected the first hurdle over which he stumbled.

[59] In my view, to the extent that Mr Perrins' case depends on a denial of Woolworths' ability to withdraw him from the training course, implicit in the first and second strands of his case, it fails at the threshold. That is so because examination of "the other obligations which exist between the parties" indicates that "the content of the duty of care, and what satisfaction of that duty may require" is not as wide as it must be for Mr Perrins to succeed. Whether that is seen as the duty not extending so far or as the reliance on such matters not amounting to a breach matters not.

[60] As to the third strand of the case – that it was not the withdrawal from the programme but the manner of the withdrawal that constitutes the essential breach of duty then the case fails for reasons best discussed under foreseeability, breach and causation.

Reasonable Foreseeability

[61] As can be seen from the analysis above the essential assumption underlying each proposition relied on is that the matter complained of involved a risk of injury. It may be that it did. But what Mr Perrins needs to show was that there was a foreseeable risk of injury as the law defines it. This was the principal point argued on the appeal. Woolworths submits that the primary judge erred in finding that such a risk existed.

[62] As Gleeson CJ said in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2000) 211 CLR 317,[35] reasonable foreseeability of the kind of injury suffered impacts, inter alia, on the scope of the duty of care and on breach of duty. As his Honour there pointed out it is as true today as it was more than 150 years ago to assert that a person "is not ... expected to anticipate and guard against that which no reasonable man would expect to occur."[36] I have set out the essential background facts. I will return in more detail to the evidence later.

[63] The primary judge's findings on this issue were as follows:

> "145. The defendant's treatment of the plaintiff throughout this sorry saga, but particularly at the time of his dismissal from the programme in July, 2010, appears to me to have been totally insensitive to the plaintiff's position. Important decisions were made which would have a significant impact on his life without even inviting him to respond to the issues perceived by the defendant to be important. The decisions to remove him from the course were based, in both cases but especially in the second case, on facts which Miss Render might have ascertained before the offers were made.
>
> 146. In my view, bearing in mind what the defendant, through its various agents, knew of the plaintiff, it should have realised that in treating him the way it did there was a real risk that his reaction would be far more serious than mere disappointment at missing out again.

---

35 At [12].

36 Quoting Pollock CB in *Greenland v Chaplin* (1850) 5 Ex 243 at 248 [155 ER 104 at 106].

147. In my view, it would have been foreseeable that such treatment would have a likelihood of causing psychological damage, and even psychiatric damage, to someone in robust health.

148. Bearing in mind what the defendant company knew of the plaintiff's background (from the conversations with Mr Rodriguez and Miss Render referred to above) I conclude that it should have been foreseen by the defendant that if it acted as it did the plaintiff would suffer significant psychiatric injury."[37]"

[64] I respectfully disagree with the primary judge's analysis in two ways. The first is the finding just mentioned that the "treatment" that Mr Perrins received "would have a likelihood of causing psychological damage, and even psychiatric damage, to someone in robust health". The second is his Honour's view that Woolworths were on notice of a particular vulnerability by reason of the several communications made to Woolworths' management.[38]

Far Fetched or Fanciful?

[65] With the greatest of respect I cannot accept the view – not that it is the correct question – that the "treatment" that Mr Perrins received "would have a likelihood of causing psychological damage, and even psychiatric damage, to someone in robust health." My own view is precisely to the contrary. Such a finding by the primary judge, of course, rendered it strictly unnecessary for his Honour to go on and consider whether there were background facts that should have put the employer on the alert. But his Honour did so and made these findings:

"139. In this case the plaintiff was someone who:
(a) had been for many years a user of illicit drugs;
(b) had suffered from depression;
(c) and, in particular, had suffered significantly following the death of his child.

140. These things, I have found, were made known to the defendant during the plaintiff's discussion with Mr Rodriguez.

…

142. Miss Render was aware, from her discussions with the plaintiff in 2009 that as a result of family issues he was feeling stressed, and that the stress made him feel "sick."

…

144. Additionally, I have accepted the plaintiffs evidence that he told Miss Render that he did not think he could handle going "through the same thing I've just been through."

…

148. Bearing in mind what the defendant company knew of the plaintiff's background (from the conversations with Mr Rodriguez and Miss Render referred to above) I conclude that it should have been foreseen by the defendant that if it acted as it did the plaintiff would suffer significant psychiatric injury.[39]"

---

37 Reasons – AB 781 para [145]-[148].
38 AB 781 – Reasons [148].
39 Reasons – AB 781-782 paras [139]-[140], [142], [144], [148].

[66] The correct question – which the primary judge recognised – was described as the "central enquiry" in *Koehler*[40] where the plurality said:

> "In *Tame v New South Wales*, the Court held that "normal fortitude" was not a precondition to liability for negligently inflicting psychiatric injury. That concept is not now to be re-introduced into the field of liability as between employer and employee. *The central inquiry remains whether, in all the circumstances, the risk of a plaintiff (in this case the appellant) sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.*[41]"

[67] In determining what may be "far-fetched or fanciful" the authorities make clear that the risk in question must not merely be "foreseeable" but must be "reasonably" so: see the various judgments in *Tame*.[42] Sight should not be lost of what is really in issue. The point of the enquiry is to determine whether it was reasonably foreseeable that the conduct complained of was likely to result "in mental anguish of a kind that could give rise to a recognised psychiatric illness" to adopt Gleeson CJ's words in his analysis of *Annetts v Australian Stations Pty Ltd*.[43]

[68] As Callinan J pointed out in *Koehler*[44] on which side of the line a particular case falls – far-fetched or not – is not always easy to say. At some level it could be said that any employee, if sufficiently vulnerable, might succumb to psychiatric injury or illness if disappointed in their ambition or in the performance of their colleague's duties when it impacts adversely on their hopes and ambitions. In that sense it is hardly far-fetched or fanciful to say that such decompensation might occur. But the reasoning and outcome in *Koehler* provides authority for the proposition that an employer need not guard against risks that are so generally expressed.

[69] The issue then is whether Woolworths ought *reasonably* to have foreseen that Mr Perrins was at risk of suffering psychiatric injury by twice disappointing Mr Perrins by withdrawing its offer of engagement in the trainee management programme not long before, or immediately before, he was to commence it, in an insensitive way, for reasons to do with well-established policy, and for reasons that should have been apparent to his manager before the offer was made, had enquiry been undertaken. Absent such a risk Woolworths was not under an obligation to avoid it.

[70] For present purposes I put to one side the point made above[45] that in putting himself forward for the trainee course Mr Perrins "was not consistent with harbouring, let alone expressing, a fear of danger to health."

[71] When one examines the relevant facts pertaining here, in my judgment, the employer could not have reasonably foreseen that by taking him off the course for trainee managers there was a risk of causing such mental anguish to Mr Perrins as to result in psychiatric decompensation.

[72] On the facts as found the human resources manager made a mistake – she twice failed to check Mr Perrins' absenteeism record before inviting him onto the management

---

40 (2005) 222 CLR 44.

41 *Ibid* at [33] – my emphasis.

42 Per Gleeson CJ at [12], McHugh J at [102], Gummow and Kirby JJ at [200], Callinan J at [331], each discussing the concept of foreseeability in the context of breach not whether a duty was owed.

43 (2005) 222 CLR 44 at [41].

44 At [54].

45 Above at [50].

programme. Indeed it may be too harsh to say that she made a mistake. It seems that she relied on a system by which information came to her, she not being in a position to physically observe Mr Perrins and his performance of his duties. Thus Ms Render relied on information from team leaders in the usual way and because of the timing of the counselling that took place she was not alerted by them to the true state of affairs until after the letter of offer was sent. Thus she learnt of the true state of affairs very late, about a week before the programme was to start on each occasion. Mr Perrins was informed immediately on the first occasion but very belatedly on the second. There was merit in the trial judge's view that the matter was not handled sensitively.[46] That the belated recognition of Mr Perrins' absenteeism and the insensitive manner of his removal from the course might cause disappointment, frustration at Ms Render's allegedly incompetent performance of her duties, and even anger from Mr Perrins at his time being wasted and his expectations built up are all understandable reactions. But in judging his expected reaction it needs to be recalled that Mr Perrins had himself been responsible for the absenteeism, had retained his employment and was told that he would be re-considered for the training course in the future. Against that background the notion that informing an employee that they had failed to meet certain objective criteria, expected of all employees, previously laid down and previously advised, would result in decompensation into psychiatric illness does not seem to me to be "reasonably foreseeable".

[73] My view is that disappointed ambition is a commonplace in the employment situation, sometimes resulting from events far more unfair than a colleague belatedly but accurately carrying out her duty, and sometimes disappointments occur on many more occasions than the two here, but psychiatric decompensation as a result is not commonplace. In my judgment very few people would react and suffer psychiatrically as did Mr Perrins if placed in his situation.

[74] I am comforted in that conclusion in that one of the psychiatrists who gave evidence had precisely that view. Dr Steinberg reflected on his own experience and expressed the following opinion:

> "Dr Steinberg could not recall anyone presenting with a psychiatric condition as a result of an incident comparable to that described by the plaintiff. People could feel upset, let down and annoyed (upon hearing news similar to that received by the Plaintiff) but the impact of that stress was not sufficient enough to cause a psychiatric condition in a normal person. Such an incident can cause disappointment, but is not on the list of trauma which would cause an illness."[47]

[75] I note that Dr Byth, whose evidence on Mr Perrins' psychiatric condition the primary judge accepted, thought that fully one–third of Mr Perrins' impairment was attributable to his pre-morbid state. And he opined that the impairment was very substantial – 25 to 50 per cent.[48] That might explain why Mr Perrins did decompensate.

[76] Finally I observe that I see no reason why I should not give effect to my own views in preference to those of the primary judge. The primary judge has no advantage here and while no doubt due deference needs to be given I am not only entitled but required to give effect to my own view on which side of the line the case falls.[49]

---

46 AB 781 at para [145].

47 AB 286 – file note of teleconference of 5 March 2014

48 AB 221 Exhibit 1 paragraphs 14.1 and 14.4; see AB 34/10 for Dr Byth's opinion on vulnerability and AB 797; Reasons [213] for a finding of pre-disposition to injury.

49 *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at 127-128 [27] per Gleeson CJ, Gummow and Kirby JJ.

Vulnerability – The Disputed Facts

[77] My second ground for disagreement with the primary judge's finding on foreseeability is that in my view it is not shown that Woolworths had notice of any vulnerability. As mentioned, Mr Perrins' case was that at some time in his past he had had difficulties with drugs, depression and the criminal law and that he had communicated these problems to Mr Rodriguez. It was here that the significant factual contest occurred.

[78] I hold my view as to the lack of notice of vulnerability irrespective of the findings on credit, but Mr Perrins' case is obviously so much the weaker if the conversations he alleges occurred did not take place in the terms he asserts.

[79] Woolworths argued that there were compelling reasons to reject Mr Perrins account – not that there were facts incontrovertibly established but rather that the primary judge "failed to use or … palpably misused his advantage" or found facts that were "glaringly improbable" and "contrary to compelling inferences".[50]

[80] It is convenient now to turn to the factual contest and the principles that govern appellate review of the findings made by the primary judge.

Relevant Principles

[81] In *CSR Ltd and Anor v Della Maddalena*[51] Kirby J set out the principles that apply on an appeal such as this one:

> "[19] In *Fox v Percy* there was an important change in the statement by this court of the jurisdiction and powers of intermediate appellate courts. … It involved a shift to some degree from the more extreme judicial statements commanding deference to the findings of primary judges said to be based on credibility assessments. It involved a reminder of the obligations of the appellate court, so far as it properly could, to perform its statutory functions of appellate review by way of rehearing, in a real and substantive way as the enacted law mandates.
>
> …
>
> [21] Even in the case of expressed credibility findings, the statutory duty to conduct a real "rehearing" remains. It may sometimes justify reversal of a decision by a primary judge who has "failed to use or has palpably misused his advantage" or where "incontrovertible facts or uncontested testimony" demonstrates the findings to be erroneous; or where they are "glaringly improbable" and "contrary to compelling inferences".
>
> [22] However, where the conclusion of the primary judge depends on inferences drawn from undisputed facts or facts that have been found but can equally be redetermined by the appellate court, without relevant disadvantage, the duty of the appellate court is clear. It derives from the parliamentary enactment. It 'will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it'."

---

50 *Fox v Percy* (2003) 214 CLR 118 at 128 [29] per Gleeson CJ, Gummow and Kirby JJ.

51 (2006) 224 ALR 1; [2006] HCA 1 – authorities and citations omitted.

[82] Applying those principles, in my respectful view, the crucial findings cannot stand.

The Contested Issues

[83] On this issue Woolworths disputed two findings of fact. Woolworths contended:

(a) That there should not have been a finding of any bullying or humiliation of Mr Perrins at the workplace, as Mr Perrins claimed, nor a finding that he had made any complaint to anyone in management about such things;

(b) That there should not have been a finding that Woolworths had any notice of any vulnerability to psychiatric injury – that the conversations with Mr Rodriguez and Ms Render that Mr Perrins relied on did not take place.

[84] Those matters depended entirely on the credit of Mr Perrins. On each of these significant issues the primary judge found that Mr Perrins' account should be accepted. In my view, there was no good reason shown for that acceptance and strong reasons justifying a rejection of his account.

Bullying and Humiliation

[85] Before turning to general credit issues it is useful to examine Mr Perrins' complaint of workplace bullying. The complaint about the alleged conduct had not been pleaded. It still remains un-pleaded. The primary judge found:

> "I am also persuaded that I should accept [Mr Perrins'] evidence that, after he was first accepted on the training programme he was bullied, humiliated, laughed at, and mocked by his co-workers, particularly including some senior to him. Indeed, it was not put to him that this conduct towards him did not occur."[52]

[86] It was hardly surprising that counsel for Woolworths did not put to Mr Perrins that the conduct did not occur. The first notice that the defendant had of the assertion was Mr Perrins' claim in his evidence-in-chief that it had occurred. No notice of the allegation had been given. No reference to such conduct had been made to any medical practitioner. No particulars of who was involved or precisely what was said and when were given. How counsel could have obtained any instructions on the point and at so late a stage is not clear.

[87] The relevance of this finding, for the primary judge, is that it led his Honour to accept that Mr Perrins' frustration at his treatment would be "exacerbated" by this alleged conduct.[53] There was no objection to the evidence, presumably because counsel for Woolworths thought that he could turn the complaint to his advantage, so long as it remained an unpleaded cause of the harm sued for. That was one of the arguments put below – if the conduct occurred it meant the end of Mr Perrins' case as his injury was the result of an unpleaded cause and not the subject of any medical evidence. Alternatively it was said the late introduction of these claims went to credit. In oral argument on appeal the proposition was put that there was simply no basis for accepting that any such conduct occurred. I agree.

[88] The difficulties surrounding an acceptance of Mr Perrins' evidence on this point seem to me to be overwhelming. Mr Perrins called no evidence to support his allegation that there was any such conduct. No witness called said they had ever seen such conduct. No witness called said that Mr Perrins had ever complained of such conduct.

---

52 AB 775 Reasons [116].

53 AB 778 Reasons [129].

[89] Mr Perrins claimed in the course of his evidence that he complained to his team leader, one Mr Markham. He claimed this eventually consistently and with apparent conviction.[54] Mr Markham was called by Woolworths and said that no complaint was made to him about such conduct. He was not cross examined.

[90] Despite this, the primary judge accepted Mr Perrins claim that he had advised his "team leader" that this conduct was occurring. His Honour held that Mr Perrins was wrong in his recollection that the recipient of his complaint was Mr Markham. He found that his team leader at the time of this report was one Mr Hollands.[55] Mr Perrins did not nominate with any precision a time when his complaint was made and did not allege that he had told Mr Hollands of this conduct. The evidence was that there were numerous team leaders – several per shift and three shifts per day.[56] Mr Hollands was not called to give evidence on the compelling ground that he was not material to any issue, so far as the defendant was aware. Mr Hollands' name appeared on documents, tendered for other purposes, as Mr Perrins' team leader at certain times. Woolworths were given no notice that the primary judge contemplated making any such finding. With respect, this finding was mere speculation on the part of the primary judge, quite unfair to the defendant, and impermissible.

[91] If one accepts Mr Perrins' account it requires a further and improbable conclusion that despite complaint to the appropriate person of quite markedly inappropriate conduct nothing was done in relation to it. No record was made nor action taken.

[92] Acceptance of the occurrence of the conduct also requires acceptance of a most improbable and unexplained silence about the matter from Mr Perrins over years. In the course of his evidence Mr Perrins attributed his attendance on a medical practitioner on 8 September 2009 to "workplace bullying".[57] The contemporaneous medical record does not support that claim.[58] Rather the practitioner recorded other problems - Family Court proceedings, difficulties with his partner and coping with the grief of the death of his son. It is difficult to believe that Mr Perrins would not have mentioned the workplace conduct if it was occurring and if it was of concern to him and difficult to accept that the doctor would ignore such a complaint if made.

[93] Ms Render put in evidence a note of a conversation that she had with Mr Perrins on 8 July 2010 in which she recorded: "Trevor spoke about not being in a mentally fit state as he was not sure where he stands with the people around him (we probed as to what he meant by this however he could not explain what he meant)."[59] There is no reason shown to doubt the accuracy of the note. Thus, when given the opportunity to mention matters such as workplace bullying, Mr Perrins did not speak up. If it had occurred, and was of concern, there was no good reason not to.

[94] It is difficult to believe that Mr Perrins would not have mentioned the workplace conduct to his treating psychiatrist or to the psychiatrists who examined and reported for medico legal purposes - if it had occurred and if it was of concern to him. Mr Perrins could hardly have failed to appreciate the significance of the complaint that he was making in the context of a claim for damages for psychiatric injury arising out of management conduct at the workplace.

---

54 AB 47/20; 100/11-18.
55 AB 775 Reasons [117]-[120].
56 AB 154/45.
57 AB 46/12-42.
58 AB 438 - Exhibit 8 – Brown Plains Medical Centre records.
59 AB 672 – Exhibit 26.

[95] Similarly, if that was so, one would expect to see the conduct pleaded expressly, if made known to his legal advisors. On appeal the submission was put that the trial judge's approach that the workplace conduct did not "negate" his findings on liability[60] was in accord with that of the "pleader who's decided not to plead those issues originally".[61] The implication is that the legal advisors knew all about the matter but ignored it. It is a startling thought that solicitors[62] would ignore their instructions on such a matter. Such a decision risks proceedings for professional negligence. Workplace bullying is, on its face, a cause of action much more commonly advanced as a cause of psychiatric injury than disappointed expectations of being trained. Furthermore, according to Mr Perrins' evidence, bullying was causative of the first symptoms of the injury. The notion that such a decision is explicable on the basis that such bullying, when established, does not "negate" other pleaded causes is quite remarkable. If the complaint was known at the time of pleading in 2013 it could only rationally have been omitted because the pleader was cognizant of the absence of the complaint from the records and reports and reached a view as to the probability of its acceptance.

[96] In summary – there was no prior complaint of this conduct over five years to any medical practitioner, there was no support from any other witness that the conduct had occurred, the one witness that Mr Perrins did identify as having knowledge of his complaints rejected the claim and was not challenged, the obvious opportunities to mention the matter to managers and medical practitioners were not availed of, and there was no pleading of the matter. To accept that such conduct occurred and was reported is to pile improbability on improbability. None of these, to my mind, cogent considerations were mentioned by the primary judge.

[97] In my view the acceptance of Mr Perrins' allegations cannot be supported. His evidence was against the probabilities and strongly so.

[98] That impacts on more general credit issues to which I now turn.

Mr Perrins' Credit

[99] Counsel for Woolworths submitted that it was Mr Perrins' reliability, not his honesty, that was in issue.

[100] There were cogent reasons for the primary judge to exercise caution in accepting Mr Perrins as reliable.

[101] First, his psychiatric condition was such that he was at a disadvantage in recalling past events and placing them accurately in time. He claimed that, due to his illness, "dates and times unfortunately ...don't mean much."[63] Despite that affliction Mr Perrins purported to place conversations in time accurately. The primary judge referred to this claim and observed:

> "Furthermore, on any view of the medical evidence in this case, it is clear that the plaintiff has been troubled over many years with psychiatric and psychological issues. One cannot ignore those problems when assessing his evidence in this case. He claimed that his illness deprived him of the ability to read - and was not challenged on this."[64]

---

60 A reference to the Reasons [151] AB 782.
61 Transcript 1-49/14.
62 Counsel did not draw the Statement of Claim.
63 AB 43/9; AB 752 Reasons [12].
64 AB 752 Reasons [12].

[102] Woolworths' submission was to the effect that this claimed inability to read reflected adversely on Mr Perrins' credit as it was wholly unsupported by any psychiatric explanation. For present purposes it is sufficient that I record that his psychiatric illness must have been severe indeed to result in such a disability. That his condition is severe is confirmed by his treating psychiatrist who summarised his presentation in January 2014 as follows: "He presents with multiple symptoms spanning all major classes of mental disorders, that is, anxiety, depression, personality disorder, substance-induced disorder and psychosis."[65] It is not irrelevant to record that aspects of his presentation were described as "delusional".

[103] Secondly, Mr Perrins had a long history of taking, and abusing, illicit drugs. That of itself can impact on a person's capacity to accurately record or recall events. The primary judge dealt with that drug taking, but more in terms of honesty than reliability:

> "He is a man who has, for a significant part of his life, been a user of illicit drugs, including, in his younger days, narcotics. My own experience, both at the bar and on the bench, has shown me that those who use such drugs over a significant period of time will often (but not invariably) become manipulative, and can make excellent liars."[66]

[104] Thirdly, Mr Perrins' recollections were shown to be inaccurate when compared to contemporaneous notes or statements signed by him. As the primary judge recorded:

> "There were several occasions when it was demonstrated, at least to my satisfaction, that his memory was, for one reason or another, inaccurate. For example, his oral evidence as to the conversations with Mr Cook when he was advised for the second time that he would not be commencing the training course differed significantly from the account he gave in writing on 5th August, 2010."[67]

[105] The significant difference there was that Mr Perrins claimed to have been given no explanation for his removal from the course by Mr Cook. Mr Perrins' own statement showed clearly that he had.[68] There were other instances.[69]

[106] Fourthly, the evidence that he gave was not only inconsistent with contemporaneous records but invariably painted Woolworths and its employees in an unfavourable light or himself in a good light. An example is that just cited – in his dealings with Mr Cook. Another example was his complaint that he was unfairly disciplined for improper stacking and suspended from forklift driving for six months.[70] He was in fact suspended for two weeks.[71] Another example is the claimed workplace bullying that I have analyzed above.

[107] Fifthly, quite apart from the discrepancy between his evidence and contemporaneous records, the late introduction of that workplace bullying, unexplained, as it was, of itself raises serious concerns about Mr Perrins' reliability.

[108] Sixthly, there were quite marked variations between his evidence and the history that Mr Perrins gave to medical practitioners. The most significant of these was the history that

---

65 AB 290.
66 AB 752 Reasons [11].
67 AB 751-752 Reasons [7].
68 AB 645-647 Exhibit 17; and see the evidence of Mr Cook: AB 53/39-55/3.
69 See the appellant's outline on appeal at paragraph 7(f).
70 AB 8/10-14.
71 AB 645-647 Exhibit 17; AB 634 -635 Exhibit 15.

he gave to his treating psychiatrist, Dr Randhawa, whose report was tendered by consent. Dr Randhawa recorded that Mr Perrins told him that his son died aged nine months in an accident for which he blamed his ex-partner, that he continued to feel very angry about the incident; and that he had in the past imported a sniper rifle from the US to have his ex-partner killed but was caught by the CIB before he could cause any damage to anyone.[72] When challenged about relating this to Dr Randhawa, Mr Perrins denied ever doing such a thing and had no recall of telling the psychiatrist such a thing.[73]

[109] Whatever the explanation for this discrepancy the inescapable conclusion is that Mr Perrins' recollections of significant life events is unreliable – if the event occurred as related to the practitioner he misled the court, it matters not whether it be due to his psychiatric and drug affected condition or some other cause. If it had not occurred, he misled the psychiatrist. It is impossible to know who Mr Perrins is misleading and when.

[110] Another example of this variability between his evidence and the history that Mr Perrins gave to medical practitioners is in account of his drug use. Mr Perrins told Dr Byth in April 2012 that "his current use of illicit substances consisted of occasional use of marijuana when it was available. He would 'try not to use marijuana, and I mainly use it if I am very anxious; but if I buy 10-15 cones, I will get through it in one session'."[74] Three months later he told Dr Steinberg that he had stopped taking marijuana six months previously.[75] It is worth noting that Dr Steinberg's opinion was that Mr Perrins presented for that interview "with a clinical condition consistent with intoxication with either marijuana or amphetamines"[76] – a condition entirely consistent with the history given to Dr Byth.

[111] Seventhly, it is not irrelevant to bring into account the motivations that witnesses may have and the overall probabilities: *Armagas Ltd v Mundogas SA* [1985] 3 WLR 640 at 676. Consciously or unconsciously motivations can affect the evidence given. And in my judgement the probabilities were against, not for, Mr Perrins' account.

[112] Given these various matters there were compelling reasons to treat Mr Perrins' evidence with considerable caution. The primary judge acknowledged some of those difficulties[77] but, with respect, did not provide any satisfactory reason for ignoring them.

[113] I turn to the reasons that the learned primary judge gave for acceptance of Mr Perrins' evidence. His Honour commenced with the following preliminary observations:

> "6. So far as the plaintiff's credibility is concerned I should say that I watched him carefully during his evidence, and also during the trial when he was not giving evidence. I think it fair to say that I was relatively impressed with the manner in which he gave his evidence on the first day, but less impressed on the second day. On the second day, more so than the first, he seemed to focus less on giving direct answers to the questions asked of him, and at times became argumentative with defence counsel.
>
> …

---

72 AB 289.
73 AB 45/1-20.
74 AB 217 – Exhibit 1.
75 AB 273 – Exhibit 4.
76 AB 274 – Exhibit 4.
77 AB Reasons 774 [110].

> 9. When confronted with some of these inconsistencies it seemed to me that the plaintiff responded appropriately.
>
> 10. It seemed to me to be important, when considering the plaintiff's evidence, to bear in mind his history and his health."[78]

[114] As to the first observation, no matter how impressed the primary judge may have been with Mr Perrins' presentation that can have no bearing on the assessment of his reliability. One can be sincere but sincerely wrong. As well Atkin LJ's observation in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 LI L Rep 140 at 152, comes to mind that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

[115] As to the second observation I do not share the primary judge's view that Mr Perrins somehow met the problem of his inconsistencies. His Honour footnoted a reference to the cross examination of Mr Perrins on his assertion that Mr Cook provided no explanation for his withdrawal on the second occasion. After confirming to counsel that he was "certain" that Mr Cook had given no explanation to him[79] counsel confronted Mr Perrins with his own type written statement of several years before where he had detailed the three explanations given to him by Mr Cook and his responses to them.[80] Nothing in his answers in cross examination explained why his confident denials of any explanations being proffered were explicable and consistent with a good and accurate recall.

[116] As to the third observation the point that the primary judge was making, as I perceive it, is that what discrepancies there were could be explained by Mr Perrins' "history and his health".[81] That might well be so but does not meet the complaint that Mr Perrins was an unreliable witness.

[117] In my view, given these many problems, Mr Perrins fell into that class of witness whose evidence ought to be rejected unless it was inherently probable or confirmed by other cogent evidence.

The Conversation with Mr Rodriguez

[118] I turn then to the material findings. The crucial conversation is that with Mr Rodriguez. His Honour held that the conversations were such that Woolworths ought to have appreciated that there "was a real risk that his reaction would be far more serious than mere disappointment at missing out again." In my view that finding is strongly against the probabilities, unsupported by any other evidence, and contrary to matters that were either found to be established or not in contest.

[119] First, it is relevant to note that Mr Perrins had told Woolworths that he was well. I refer to the information that Mr Perrins was required to supply on the application for employment forms that he completed. The primary judge pointed out that the various queries in the Pre-assessment form were subject to the referral at the commencement of the form to problems that might impact on the assessment "today" – not in the past or generally.[82] That does not alter the fact that Mr Perrins was presenting himself as

---

78 AB 751-752 Reasons [6], [9] – [10].
79 AB 90/1.
80 AB 90-92.
81 And see AB 774 Reasons [112].
82 AB 755 Reasons [22] footnote 15.

emotionally stable. In considering Woolworth's corporate knowledge one can hardly ignore the one formal written communication provided by the employee concerning his health.

[120] Secondly, consider the context. The conversation with Mr Rodriguez took place around February 2009 and about the time that Mr Perrins underwent rigorous testing to ensure that he was a fit and suitable candidate as a manager – a person who was "to provide [the company] with future leaders" as the primary judge found,[83] and so one who was to play a more responsible role in Woolworths' business. More responsibility usually means more stress. Hence Mr Perrins was presenting himself to Woolworths and to Mr Rodriguez, by his application, as a person ready for that role.

[121] Thirdly, what weight was Mr Rodriguez to give to the fact that he had retained psychologists to assess the very risk? The rigorous testing had included psychological testing. Either Mr Perrins revealed these aspects of his past, said to be relevant to an assessment of him to the psychiatrist, or he did not. The evidence is silent. Either way, Woolworths and Mr Rodriguez were entitled to assume that such testing would bring to their notice any vulnerabilities that Mr Rodriguez might have that would impact on his ability to cope with the stresses expected of a position as manager. An ability to cope with the stress of a management role is not shown to be different in any material way from the stress of being disappointed at missing out on a position in a training course for a management role, no matter how insensitive or incompetent the handling of it. In fact I would expect the stresses involved to be considerably greater in the management role.

[122] Fourthly, how did Mr Perrins represent himself? As the primary judge pointed out, in Mr Perrins' conversation with Mr Rodriguez Mr Perrins said that "he had 'worked though' his various problems and 'cleaned [him]self up'".[84] The primary judge observed, but seems to have given no weight to, this presentation. His Honour recorded "that I think it most unlikely that the plaintiff could have 'passed' this rigorous assessment process unless he was, as he claimed, on top of the issues which had bedevilled him in the past."[85] I agree. The issue is why Mr Rodriguez should not also have been entitled to take that view. [86]

[123] Fifthly, how probable was it that such a conversation would have taken place? It will be recalled that Mr Perrins claimed to have discussed with Mr Rodriguez his drug use, the loss of a child when a baby and his consequent depression, his prison record, and how he had worked his way through these many difficulties in his life and "cleaned himself up". This was said to have been volunteered by him and not due to any enquiry made by Mr Rodriguez. Mr Rodriguez said that it was not common practice for him to have one-on-one interviews with staff members such as Mr Perrins and he had no recollection of ever having had one.[87] When the terms of the alleged conversation was put to him Mr Rodriguez replied: "It's an unusual set of circumstances, however I don't recall such a conversation".[88]

[124] The inference that the primary judge drew, accurately in my view, was that Mr Rodriguez was indicating that the more unusual the conversation the more likely

---

83 AB 759 para [40].
84 AB 780 para [141]; AB 775 para [121].
85 AB 776 para [124].
86 The primary judge seems to have well appreciated the point in submissions but for some reason decided against it: AB 202/15.
87 AB 62/5.
88 AB 62/45.

it is that he would expect to recall it.[89] The conversation was well out of the ordinary. In my opinion, and contrary to the views of the primary judge, it is a conversation that a manager, even a busy one, might well remember, particularly given that he was considering selecting Mr Perrins for a more responsible role in the company and expending the company's resources on training him.

[125] Apart from the lack of any recall by the only other witness to the alleged conversation, when one might well expect recall, there were other problems with the claim. It was essentially improbable that Mr Perrins would make a clean breast of his past and it was improbable that if he did Mr Rodriguez would have thought him suitable as a manager.

[126] There was no external imperative on Mr Perrins to tell Mr Rodriguez anything of his past and contrary to his interests to do so. It is not consistent with his behaviour up to that point. As I have mentioned he had not revealed his emotional problems in the pre-employment assessment forms because the issues, he said, were "irrelevant".[90] He had been through an interview with Ms Render not long before as part of the selection process and had said nothing to her. The interview was intended, amongst other things, to understand the applicants' "potential weaknesses in their style or their aptitude that might be an inhibiting factor for future success."[91] It is difficult to believe that there was not ample opportunity to reveal these problems then. Why the sudden change of heart? Such disclosure could only harm his prospects of obtaining a place in the programme, a place that he had pursued for several months. There was no apparent reason for Mr Perrins to make such disclosure.

[127] Sixthly, assuming some sort of conversation about his past occurred, the problem remains that Mr Perrins did not explain what precise history he gave. And what account he gave of how long before in his life the events occurred that he revealed is unknown. There is a great deal of difference between an account of problems long in the past and overcome and an accurate account of Mr Perrins' difficulties. It would be scarcely credible that he could have told Mr Rodriguez that he had been using amphetamines until a month or so before he commenced driving forklifts at Woolworths, that he had a "pot addiction" since the age of 15 years, that he was "going through a stage" of giving marijuana up, and that the marijuana problem was "being solved",[92] that he had been a heroin user in his teens, that he had been gaoled for drug possession and break-ins in his teens, and gaoled again in 2008, that he had required psychiatric care on and off for years including inpatient admission in 2005 and treatment continuing as late as 2006 with more than one attempt at suicide, without Mr Rodriguez not only recalling the conversation but taking immediate action on it by excluding Mr Perrins from a more senior role at Woolworths – at least until further enquiry had been made. He, of course, did the precise opposite but selected him. In my view that action says a great deal about the probabilities of what took place.

[128] Effectively the primary judge took the view that rather than take Mr Perrins at face value, and his performance on testing at face value, and his formal written communication at face value, Mr Rodriguez was put on notice that he was dealing with someone liable to succumb to psychiatric injury if placed under pressure and that he should presumably alert the relevant human resources managers to the issue. I draw the opposite conclusion.

---

89 AB 759 Reasons [39].
90 AB 49/15.
91 AB 65/34.
92 AB 42/1-20.

[129] The second relevant conversation was with Ms Render on 6 July 2009, the first occasion when she informed Mr Perrins that he was not to be included in the programme. Again the information was revealed in a way that suggested that any concerns had been overcome: "Mr Perrins said that he'd had the family issues. He was stressed, which had made him sick. However, it all been sorted out now. Everything had been dealt with, and everything was fine."[93] Ms Renders' contemporaneous note of the conversation is not inconsistent and she recorded that there had been a "family court issue" and that the "court is finished".[94] The "Record of Formal Counselling Interview Session" of 10 June 2009 also records a reference to the Family Court and that matters would improve as he had gained "visitation to his children".[95] Mr Perrins' own evidence was that he had "won" in the Family Court.[96]

[130] Stress experienced in the highly emotionally charged arena of a Family Court dispute, particularly disputes involving children, does not necessarily mean an inability to cope with normal life stressors. Mr Perrins said that the Court matter had been completed. His own assessment was that this had been successfully concluded from his perspective and was behind him. Why should Ms Render's view be any different? Her note records that Mr Perrins' suitability for the programme was to be re-assessed over the next six months. In effect Ms Render gave herself time to wait and see.

[131] The third conversation that the primary judge gave significance to is the one previously mentioned, again with Ms Render, which was said to have occurred nearly a year later in May 2010, on the occasion of Mr Perrins being offered a place in the programme for the second time. Mr Perrins says that he sought re-assurance from Ms Render that he would start the programme, because he thought that he would "not be able to handle… going through the same thing".[97]

[132] I have reservations about the content of that alleged conversation. The reasons given by the primary judge for accepting the conversation occurred was that Mr Perrins was positive in his recollection, that it was likely that he would have said something of the sort, and Ms Render could not positively deny that it occurred.[98]

[133] There is no support for the occurrence of the conversation and it has an air of convenience to it. While improbability is not so much a feature of this claimed conversation the general difficulties in the way of accepting Mr Perrins' testimony remain. I observe too that the crucial part of the conversation with Ms Render was not, in fact, put. The version put to Ms Render was that Mr Perrins said to her that "he didn't want to go through that again" not that Mr Perrins could not "handle" it.[99] Ms Render's lack of recall of the conversation therefore loses some of its force.

[134] But accepting that some such thing was said does not assist Mr Perrins. In hindsight and with knowledge of a subsequent psychiatric breakdown the conversation carries a certain connotation. But prospectively what was Ms Render to draw from such a statement? Can she be criticised for assuming that Mr Perrins meant anything more than that he would be annoyed, even upset, if it all came to nothing?

---

93 AB 136/25-35.
94 AB 670; findings at AB 780 para [142].
95 AB 651-652.
96 AB 77/30.
97 AB 765 – Reasons [66]-[69].
98 AB 158/38; AB 765 Reasons [69].
99 AB 158/10.

[135] There is considerable force in Woolworths' submission that at the heart of the primary judge's approach lies a logical inconsistency. On the one hand it is accepted, and in fact common ground, that in his manner of presentation Mr Perrins had demonstrated that he was fit and suitable for a superior role in the business – one of only a very few selected for the role. Yet the findings assume that by reason of the way that Mr Perrins presented himself to his managers Woolworths should have realised that the risk of suffering a psychiatric illness from something as modest as twice frustrating his ambition because of him breaching well understood policies was not far-fetched or fanciful and therefore reasonably foreseeable.

[136] Given the reservations that in my opinion ought to attend the acceptance of the evidence given by Mr Perrins there are strong reasons to be sceptical that the conversation with Mr Rodriguez occurred, or that if it did any significant information was conveyed. The primary judge acknowledged at least some of those reservations that I have mentioned but nonetheless accepted that the conversation occurred. The reasons that his Honour gave are not, with respect, persuasive. Apart from the general observations that I have referred to above the primary judge was prepared to accept Mr Perrins' claim that this conversation occurred for three reasons, as best I can discern.

[137] The first reason was that Mr Rodriguez was mistaken in his recollections as to the extent that he was involved in the selection process for trainee managers. The inference was that his memory was therefore unreliable. While the finding concerning his involvement was plainly open to the primary judge it did not really meet the point. Forgetting the extent of one's involvement in a process that had taken place five years before does not logically lead to the view that Mr Rodriguez' non recollection of a conversation, one that was well out of the ordinary and potentially of considerable significance to the process then underway, was explicable and consistent with the conversation having taken place.

[138] The second and third reasons that appear are that Mr Perrins had been "largely consistent in his evidence in respect of the meeting with Mr Rodriguez"[100] and that the meeting with Mr Rodriguez would have been "very significant" for Mr Perrins but not Mr Rodriguez.[101] As to that last point the only reason that the conversation would lack significance to Mr Rodriguez is if nothing of much importance was said. All depends on what he was told. As to the second reason, consistency in a mistaken view of a past event in the circumstances here does not seem to me to carry any great weight. I observe that Mr Perrins was consistent too in his claim that he reported his complaints of workplace bullying to Mr Markham. He was consistent in his claims that he was given no explanation for his removal from the training course until confronted with his own inconsistent statement. He was consistent and he was wrong.

[139] While I am conscious of the respect that must be paid to the findings made below, and giving due weight to the advantages that the trial judge enjoyed,[102] I am unable to accept that this finding should stand. The primary judge does not appear to have given any significant weight to the many problems that confronted any acceptance of Mr Perrins' evidence. The reasons that he gave for accepting Mr Perrins on this point are, with respect, unconvincing.

[140] If the contention be that Mr Perrins may have said something in passing to Mr Rodriguez but in terms that did not alert Mr Rodriguez to any present cause for

---

100 AB 761 Reasons [46].

101 AB 761 Reasons [45].

102 *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118.

concern then I would have no difficulty with that finding. But his Honour went much further than that. In my opinion Mr Perrins failed to establish that there was any significant information provided to Mr Rodriguez as claimed.

No Notice of Vulnerability

[141] I return then to the second point – that in my view it is not shown that Woolworths had notice of any vulnerability.

[142] There was a finding by the primary judge that Mr Perrins health started to go downhill after the first dismissal.[103] The medical records show that there was some decompensation in the months that followed and a return to drug taking.[104] But there was no finding, and so far as I can see no evidence, that this was made known to the employer or that there were any signs of such decline that a reasonable employer should have observed. In fact the evidence of the observations apparently made at work were to the contrary. There was evidence that the "leadership team" thought that Mr Perrins' performance had improved over the months to May 2010 and that is why he was offered a second chance at the programme.[105]

[143] This factor was not mentioned by the primary judge. Thus Woolworths had available to it some evidence of Mr Perrins' psychological resilience to the events that transpired. The events of July 2009 and July 2010 were remarkably similar. There was no suggestion, at least obvious to the employer, of any decompensation at all, let alone of so serious a nature as decompensating into psychiatric illness, following on from the 2009 events. All indications were that Mr Perrins accepted the 2009 decision: Mr Perrins thanked Ms Render for being given the opportunity to be re-assessed the following January.[106] Ms Render said that Mr Perrins was "happy" with their discussion.[107] If Mr Perrins coped perfectly well with his disappointment on the first occasion why should the employer assume that it would be disastrous to Mr Perrins' psychiatric health if he was again removed from the programme? The primary judge pointed out in the course of submissions[108] that there was no reason to think that the employee would react the same way on the occasion of the second disappointment and that there might be what his Honour termed "compounding". But that, with respect, is to miss the point. It was for the plaintiff to demonstrate that there were signs of decompensation that would alert a reasonable employer to a risk of injury. This was some indication of resilience and so went the other way. There was no sign of any decompensation such as to alert Woolworths to any possibility of psychiatric injury.

[144] If one accepts that there was no reliable evidence of the two conversations that I have dealt with then Woolworths had no notice of any vulnerability at all.

[145] Even assuming that a conversation of some sort with Mr Rodriguez took place, considered singly and together, the three conversations relied on, separated as they were by significant periods of time, and given the context in which they took place, in my opinion could not have alerted a reasonable employer that this employee was liable to decompensate into psychiatric illness when told, perhaps in an insensitive way, that he had yet again breached the policies relating to absenteeism and so was yet again not considered management material.

---

103 AB 780 para [143].
104 AB 438 – drug screen positive for cannabis and benzodiazepines on 23 September 2009.
105 AB 155/30-45.
106 AB 78/5.
107 AB 136/33; AB 670 for Ms Render's contemporaneous note of the conversation.
108 AB 185/40; 189/40.

[146] It seems obvious that the managers at Woolworths did not hold the view that Mr Perrins was unusually vulnerable to psychological stressors as he presumably would not have been offered the position if they detected any such thing. I cannot see any reason to hold that the managers should have taken any other view. Far from leading to a conclusion that there were reasons for concern, Mr Perrins' demonstration of his suitability for a more senior role strongly leads to a conclusion opposite to that reached by the primary judge.

[147] As Mr Perrins' case was predicated on a finding of a foreseeable vulnerability that is sufficient to dispose of the appeal but, in case I am wrong in my analysis, I shall go on to consider the question of breach.

Breach of Duty

[148] As previously mentioned the primary judge nowhere identifies precisely what act or omission of Woolworths constituted the breach of duty.

[149] Here I assume that damage was not farfetched or fanciful and so reasonably foreseeable and that the risk was reasonably preventable – in the primary judge's analysis by Ms Render checking the payroll records in a timely way to detect absenteeism, or by approaching the withdrawal on the second occasion more sensitively. McHugh J explained in *Tame* the next necessary step, a step not addressed below:

> "*Once these two questions are answered favourably to the plaintiff, there is a slide - virtually automatic - into a finding of negligence.* Sometimes, courts do not even ask the decisive question in a negligence case: did the defendant's failure to eliminate this risk show a want of reasonable care for the safety of the plaintiff? They overlook that it does not follow that the failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligence. As Mason J pointed out in *Shirt*[109] *in a passage that is too often overlooked*:
>
> > '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.'"[110]

[150] In my respectful opinion what the primary judge has failed to do is to ask the critical question – what is the response that Woolworths ought to have made to the foreseeable risk of injury (as found by the primary judge) looked at prospectively. As to the prospective nature of that enquiry see the observations of Hayne J in *Vairy v Wyong Shire Council*.[111] The importance of recognising the prospective nature of the inquiry in cases involving psychiatric injury, was emphasised by Spigelman CJ in *Nationwide News Pty Ltd v Naidu*:-

> "The prospective nature of the inquiry as to breach has particular significance in the case of the risk of psychiatric injury. In any organisation, including in employer/employee relationships, situations

---

109 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

110 (2002) 222 CLR 44 at [99] – citation of authority omitted and my emphasis.

111 (2005) 223 CLR 422, 461 at [124] and following.

> creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. The law of tort does not require every employer to have procedures to ensure that such relationships do not lead to psychological distress of its employees. There is no breach of duty unless the situation can be seen to arise which requires intervention on a test of reasonableness."[112]

[151] That test of reasonableness requires an assessment of the "degree of probability that the risk of psychiatric injury may occur, even when the reasonable foreseeability test of a risk that is not far fetched and fanciful, has been satisfied"[113] as well as a consideration of the conflicting obligations on the employer. Particularly pertinent are the remarks of Keane JA (as his Honour then was) in *Hegarty v Queensland Ambulance Service* on whether a response is required at all:

> "It must be said immediately that, while an employer owes the same duty to exercise reasonable care for the mental health of an employee as it owes for the employee's physical well-being, special difficulties may attend the proof of cases of negligent infliction of psychiatric injury. In such cases, the risk of injury may be less apparent than in cases of physical injury. Whether a risk is perceptible at all may in the end depend on the vagaries and ambiguities of human expression and comprehension. *Whether a response to a perceived risk is reasonably necessary to ameliorate that risk is also likely to be attended with a greater degree of uncertainty; the taking of steps likely to reduce the risk of injury to mental health may be more debatable in terms of their likely efficacy than the mechanical alteration of the physical environment in which an employee works*."[114]
>
> …
>
> "… 'litigious hindsight' must not prevent or obscure recognition that there are good reasons, apart from expense to the employer, why *the law's insistence that an employer must take reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee's mental health*, even in the most stressful of occupations. A statement of what reasonable care involves in a particular situation which does not recognise these considerations is a travesty of that standard."[115]

[152] I will deal with each of the relevant allegations.

Paragraph 7H – Reliance on Well Known Issues

[153] As discussed above, an essential prerequisite under this ground is that Woolworths breached whatever duty it owed to Mr Perrins because its managers failed to check his payroll records before offering him a place in the course. Woolworths had a system in place by which Ms Render would learn of relevant problems. That did not involve this step. Given the low level of risk of injury; the employee's inevitable knowledge of his own level of absenteeism; the duties that Ms Render had quite apart from concern for Mr Perrins' mental health; and that Woolworths' interests were adequately met by the system in place I am not persuaded there was any need for Woolworths to alter its system.

---

112 (2007) 71 NSWLR 471, 477 at [20].
113 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 per Spigelman CJ, 478 at [26].
114 [2007] QCA 366 at [41] – my emphasis.
115 [2007] QCA 366 at [47] – my emphasis.

Paragraph 7N – Informing of the Withdrawal Two Days Before

[154] Absent extreme vulnerability there is simply no reason to be concerned about the timing of the withdrawal. And if such vulnerability is assumed then once the process commenced any decision had risks – either to leave Mr Perrins in or take him out. What was Woolworths to do? For example, was it not foreseeable that greater disaster might lay further on in the future if he was led to believe that he might one day be entrusted with responsibilities, and came to realise that his beliefs were never to be realised?

[155] In my view only "absolute and unremitting solicitude for an employee's mental health", regardless of the probability of that risk of injury occurring, and regardless of Woolworth's interests, could have reasonably stayed management's hand once it was appreciated that Mr Perrins was unfit for the role. That is not the standard set by the law.

Paragraph 7O(b) – Formal Structure to Assist

[156] The allegation of a need for "a formal structure to assist the plaintiff with work related issues" ignores the fact that there was such a structure in place – the counselling that was in fact undertaken.

[157] No evidence was led as to the form this "structure" was to take. Absent evidence there was no basis for finding that the allegation was made out.

[158] Again absent significant vulnerability why do anything? The risks were small.

Paragraphs 7O(a) and (c) – Reliance on Reasons Pre-Dating the Offer

[159] There is here a disputed issue of fact.

[160] Woolworths contend that contrary to the pleading in paragraphs 7O(a) and (c), the factors that led to Mr Perrins' removal from the course were not exclusively those that pre-dated the second offer made on 17 May 2010. The primary judge made a finding to the contrary.

[161] Before turning to that debate I note that the pleading in paragraph 7O(a) – failing to advise that issues relating to the withdrawal from the first management trainee program were "ongoing" – read literally, is simply wrong. It is common ground that the issues that led to the decision to withdraw Mr Perrins from the programme on the second occasion all post-dated the withdrawal from the first management trainee program. Mr Perrins' absenteeism, that was one of the problems on the second occasion, related to a different period to the absences from work that were in issue on the first occasion.

[162] If the pleading is intended to assert that Woolworths failed to advise Mr Perrins that continued absenteeism would be detrimental to his prospects of re-appointment to the course then it is again against the uncontested facts. Mr Perrins could hardly assert that he was ignorant of the importance that Woolworths placed on proper attendance at work given his peremptory withdrawal from the course in 2009 for that reason. But significantly, Ms Render gave evidence that was not challenged, that Mr Perrins was expressly told of that continuing importance.[116] Whatever his state of knowledge or ignorance may have been before that conversation with Ms Render in 2009, Mr Perrins was in no doubt after it that absenteeism beyond a certain amount might well lead to his being withdrawn from the course.

---

116 See [21] above; AB 166/10-30.

[163] In my view that is sufficient to dispose of the allegation in paragraph 7O(a).

[164] I return to the factual issue. It is common ground that on 18 May 2010, the day after the letter of offer, Mr Perrins made an error in his stacking of certain pallets.[117] The matter was reported on 20 May. He was counselled on 25 May.[118] There were safety connotations. On the same date he was counselled for his excessive absenteeism – 133.73 hours over the last six months.[119] On 9 June 2010 Mr Perrins was counselled for taking "unscanned breaks on more than one occasion".[120] Each of those matters was relevant to his suitability as a trainee for the management course.[121]

[165] It seems that it was the fact of counselling that resulted in Ms Render learning of the issues,[122] not their appearance somewhere in the records. She was not authorised to access the payroll records which would have revealed the absenteeism.[123] It was the counselling sessions that ended up on the personnel file and Ms Render had access to that file.[124] And it was the fact of counselling having taken place that apparently might prompt a supervisor to approach a HR manager such as herself to report the event.[125] Ms Render was unable to say, by the time of trial, how the various matters had come to her attention. I note that the same officer, a Mr Howbrigg, was the counsellor in relation to each matter. His evidence was that he would file his report of the counselling in an in tray in the HR department.[126]

[166] The primary judge took the view that only the absenteeism issue was known to Ms Render at the time the decision was made to withdraw Mr Perrins from the course and the other matters only became known to her subsequent to the withdrawal.[127] While Ms Render did give that impression in one set of answers[128] she expressly said at another point, in response to direct questioning, that the other two matters that post-dated the letter of offer were drawn to her attention in the week prior to the course commencing.[129] The primary judge referred to this later evidence but, for reasons unexplained, implicitly rejected it.[130] His Honour found that Ms Render only learnt of the later matters in the course of the meeting on 8 July 2010. There are two difficulties with that finding. First, Ms Render's contemporaneous note of the meeting is not consistent with it.[131] Her note records the matters at the very outset of the meeting not part way through the meeting. And secondly, Mr Cook seems to have been well aware of the three matters on 5 July when he met Mr Perrins[132] and he had taken his instructions from Ms Render. The primary judge did not mention either matter. Nor did his Honour note that for his finding to stand, of the two counselling reports that Mr Howbrigg said that he filed in the HR department in relation to the matters

---

117 AB 662 – Exhibit 20.
118 AB 634 – Exhibit 15.
119 AB 648 – Exhibit 18.
120 AB 636 – Exhibit 16.
121 AB 139-140.
122 AB 169/45.
123 AB 166/5; 169/25-33.
124 AB 168/25-35.
125 AB 165/33.
126 AB 114/23.
127 AB 774 Reasons [109].
128 AB 139/15.
129 AB 156/40-45.
130 AB 774 Reasons [107]-[108].
131 AB 672 – Exhibit 26.
132 AB 646 – Exhibit 17 - Mr Perrins' statement.

discussed on 25 May – concerning absenteeism and stacking of pallets – for some reason only one came to Ms Render's attention. If one did why not the other? And presumably, in the normal course, all three reports filed by Mr Howbrigg would have found their way to Ms Render.

[167] Ms Render's evidence was not challenged.[133] At most, it was only her reliability that was in issue and given the lack of challenge even that may be overstating things. In response to more general questioning she gave the impression that she knew only of the absenteeism at the time of the withdrawal and learnt of the two other matters later. In response to specific questioning she corrected that evidence. The contemporaneous notes were consistent with her corrected evidence and inconsistent with the impression given in response to general answers. In the circumstances the primary judge certainly has no advantage and the finding his Honour made is, in my view, against the weight of the uncontradicted evidence.

[168] In the view I take it does not matter whether the decision to withdraw Mr Perrins from the course was based only on his absenteeism that largely pre-dated the letters of offer or included the two later matters. However to the extent that Mr Perrins' case depended on a finding that his withdrawal was based solely on reasons that pre-dated the letter of offer in my view his action must fail.

[169] In any case the analysis set out in relation to paragraph 7H is generally applicable here as well.

Causation

[170] Finally there is the issue of causation. The issue is relevant to the attempted recasting of the case on appeal, and to every cause pleaded.

[171] While in a general sense there is no difficulty with the finding, assuming one accepts the psychiatric evidence preferred by the primary judge, that the events at his place of employment led to Mr Perrins' decompensation, that is not the same as demonstrating that Woolworth's caused the injury by a breach of their duty of care.

[172] In my view that problem permeates the whole of the case. I put to one side factual issues.

[173] In order to establish the necessary causal link between any arguable negligence on the part of the employer and the injury suffered by the employee, it is necessary to show that the measures that it is said the employer failed to adopt *would* protect the employee from injury, not "could" or "might": *Queensland Corrective Services Commission v Gallagher* [1998] QCA 426 at [26] – [27] per de Jersey CJ citing *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316, 319; *Turner v South Australia* (1982) 56 ALJR 839, 840 per Gibbs CJ. In that latter case Gibbs CJ said:

> "When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury *would probably have been averted*, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 416-417, 419."[134]

---

133 AB 167/40 for the cross examination.

134 My emphasis.

[174] Mr Perrins' case does not confront that difficulty.[135]

[175] As an example, take the case pleaded in paragraph 7O(b) – not having in place "a formal structure to assist the plaintiff deal with work related issues prior to issuing the plaintiff with a further contract for the second management trainee program." I cannot see that there was any evidence to enable a finding to be made that some form of "formal structure to assist the plaintiff deal with work related issues" would, on the balance of probabilities, have avoided injury. A lack of proof that counselling of a particular type would have protected the plaintiff was the precise ground upon which *Gallagher* was decided.

[176] The same point can be made about each of the pleaded causes and to the re-casting of the case on appeal. Each assumes that but for the matter complained of (reliance on "well known issues"; failure to advise of "on going issues"; using past issues to deny entry; notification two days before rather than some other, unspecified, time; failing to apply "proper standards … of qualified human resources departments" – whatever they might be), there would have been no injury – but without any evidence that was so. As was said in *Gallagher* the fact that the plaintiff might attribute his decompensation to a certain cause does not establish that it was so.

Damages

[177] In the view I take there is no need to go on and attempt to assess the appropriate level of damages.

Conclusion

[178] While I have reached a very different view to the primary judge I cannot leave the case without recording that his Honour was not greatly assisted by the way in which the plaintiff's case was pleaded and argued. The repeated focus on what was said to be "unreasonable management action" did more to obscure than expose what was in issue. As Woolworths submitted on appeal an employer can be as unreasonable as it pleases provided it does not breach its duty of care. The pleading seems to have raised a false issue and led to a failure to address fundamental questions of the duty owed, its breach and the causation of harm, despite the efforts of counsel for Woolworths[136] to keep matters on track.

[179] In summary there was no foreseeable risk of injury against which Woolworths were required to guard. Assuming a foreseeable risk of injury, the pleaded causes of the psychiatric injury in paragraphs 7H, 7N and 7O of the Amended Statement of Claim fail for lack of proof of causative effect or because the allegations depend on facts not found or that are unsupportable, a duty of care that is wider than the law imposes, actions or omissions that were not in breach of any possible duty, or some combination of each.

[180] The orders I propose are:

(a) That the appeal be allowed;
(b) That the judgment below be set aside;
(c) That judgment be entered for the appellant;
(d) That the respondent pay the appellant's costs of and incidental to the trial and this appeal.

---

135 Counsel for Mr Perrins made no submission to the primary judge on causation. The case as presented to the primary judge seemed to assume that a temporal connection between the events at the workplace and the onset of injury was enough to establish the necessary causal connection: AB 3/28; AB 747 at para 66. Woolworths' submissions, accurately enough, were that it was necessary to causally relate the breach found to the harm: AB 719-720 para 6.

136 Mr Richard Lynch.