SUPREME COURT OF QUEENSLAND

CITATION:	*Hegarty v Queensland Ambulance Service* [2007] QCA 366
PARTIES:	**ROBERT WILLIAM HEGARTY** (plaintiff/respondent) **v** **QUEENSLAND AMBULANCE SERVICE** (defendant/appellant)
FILE NO/S:	Appeal No 4386 of 2007 SC No 3353 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2007
JUDGES:	Jerrard and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Judgment below set aside** **3. Plaintiff's action dismissed** **4. Plaintiff must pay defendant's costs of the action and of the appeal to this Court to be assessed on the standard basis**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE NERVOUS SHOCK OR MENTAL DISORDER – COMMON LAW – where the plaintiff worked as an operational ambulance officer for fifteen years – where in the course of that employment the plaintiff was exposed to numerous traumatic events – where the plaintiff developed post traumatic stress disorder and obsessive compulsive disorder – where the plaintiff presented with signs of dysfunction – where the defendant provided some training to the plaintiff directed at self- recognition of symptoms of stress disorders, and self referral – where the plaintiff did not recognise his signs of dysfunction – where the employer provided some training in recognising signs of dysfunction in others to some supervisors – where the plaintiff's supervisors did not recognise signs of dysfunction in the plaintiff – where the defendant had a system of counsellors and peer supporters available to its employees – whether the employer provided

adequate training to supervisors – whether the defendant was negligent – whether the defendant's negligence caused the plaintiff's mental disorder

Workplace Health and Safety Act 1995 (Qld) s 28

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44, considered
New South Wales v Fahy [2007] HCA 20, considered
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42, considered
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518; [2000] QCA 18, cited
Sellars v Adelaide Petroleum NL (1992-1994) 179 CLR 332, cited

COUNSEL: D O J North SC, with M T O'Sullivan, for the appellant
G W Diehm, with A Luchich, for the respondent

SOLICITORS: Crown Law for the appellant
Butler McDermott Lawyers for the respondent

[1] **JERRARD JA**: In this appeal I have read the reasons for judgment of Keane JA, and the orders he proposes. I respectfully agree with those reasons and orders, and add the following reasons of my own. The judgment under appeal records that recognition of occupational stress in emergency services personnel, including ambulance officers, gathered momentum in the 1980s and early 1990s. It was discussed in the first report of the Parliamentary Select Committee of Inquiry into the Ambulance Service, tabled in the Legislative Assembly in December 1990. That report resulted in the Queensland Ambulance Service developing and implementing a program known as "Priority One", aimed at reducing the impact of stress related problems of ambulance personnel and their family. The program was developed in May 1992 and progressively introduced over the following years. It had four elements:

- Critical incident stress debriefing;
- Peer support;
- A telephone counselling service; and
- Face to face counselling with a psychologist.

[2] The learned trial judge described critical incident stress debriefing as having been somewhat discredited by studies in the late 1990s, and Mr Hegarty was not subjected to that. It was not part of his case at trial that he should have been. But at the core of the litigation was the efficacy of the other aspects of "Priority One" and the extent to which, and the way in which, those were actually implemented at the time.

What Mr Hegarty revealed

[3] The plaintiff pleaded in 8C of the Statement of Claim that:

> "Between in or about 1992 and 1996 the plaintiff discussed with the defendant's officer-in-charge at Gayndah, Sam Borger, that he needed to get out of Gayndah because he was not coping or managing well with his duties as an ambulance officer in that his skill levels were deteriorating, he was having problems disassociating personal matters from professional issues and he felt he needed the security of working with someone who was at least as experienced as the plaintiff."

[4] He also pleaded that in or about 1994 and 1996 he had discussions to similar effect with the defendant State Sector Co-ordinator Gary Pratt, and that at a ceremony in 1996 at which he was presented with a national service medal he told Assistant Commissioner John Jacobsen and Deputy Commissioner Gerard Lawler of the same matters of which he had informed Mr Borger, and requested of Assistant Commissioner John Jacobsen and Deputy Commissioner Gerard Lawler a transfer, indicating that he would resign if he was not transferred. He also pleaded that at that same medal presentation ceremony his wife told Assistant Commissioner John Jacobsen and Deputy Commissioner Gerard Lawler and Sector Co-ordinator Gary Pratt that Mr Hegarty needed to leave Gayndah, that he was working too many hours and the family unit was not coping.

[5] He pleaded that although he was transferred to Bundaberg in 1997 he had developed a post traumatic stress disorder and an obsessive compulsive disorder as a consequence of his experience of the various traumatic and distressing scenes he had attended in the course of his employment. He pleaded that he had not received any counselling or psychological support, treatment or intervention with respect to the distress and angst experienced as a consequence of those events. He pleaded that features of the post traumatic stress disorder developed into clinically significant distress from about 1988/1989, and that thereafter he developed an obsessive compulsive disorder, and a fully blown post traumatic stress disorder from in or about the mid-1990s.

[6] He pleaded that at no stage before 1999 did the State of Queensland recommend that he seek counselling or psychological assessment through Priority One, or otherwise or refer him for counselling or psychological assessment, or arrange for him to have counselling or psychological assessment. He also pleaded that:

> "11. The Defendant did not at any time material to this action have in place any system of counselling and/or psychological support or treatment which would have resulted in the Plaintiff receiving the benefit of such support involved following involvement in such incidents.
>
> 11A. In the alternative, the system which the defendant had in place was inadequate and/or not a sufficient response to the more than trivial risk to which the Plaintiff was exposed, because:-
>
> (a) The Defendant did not have in place a system by which the Plaintiff received cognitive behaviour therapy following incidents which caused him distress or angst;

(b) The Defendant did not have in place a system whereby the Plaintiff's supervisors were trained to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, so that referral could be made for clinical psychological assessment and treatment such as cognitive behaviour therapy;

(c) The Defendant did not have in place a system whereby the Plaintiff received training/education through which the Plaintiff would have come to know and recognise the signs of the possible effects of the stress and angst following traumatic experiences;

d) The system did not take into account the fact that ambulance personnel such as the Plaintiff, at times worked primarily by themselves in small isolated rural ambulance stations.

11B. In the further alternative, despite the matters pleaded in paragraphs 8A to 8H inclusive above, at no stage prior to 1999 did the Defendant:-

(a) Recommend to the Plaintiff that he seek counselling or psychological assessment through Priority One or otherwise;

(b) Refer the Plaintiff for counselling or psychological assessment through Priority One or otherwise;

(c) Arrange for the Plaintiff to have access to counselling or psychological assessment through Priority One or otherwise;

12. If such a system of support, or alternatively a sufficiently adequate system of support as set out in paragraph 11A above, had been in place, the Plaintiff would not have developed the aforementioned psychiatric injuries or alternatively, he would have completely recovered from them, or the extent of the Plaintiff's psychiatric injuries would have been significantly limited compared with his current psychiatric condition.

12A. Alternatively, had the defendant's counsel recommended, referred to or arranged for the Plaintiff to have counselling or psychological assessment prior to 1999, due to the matters pleaded in paragraph 8A to H inclusive above, the Plaintiff would not have developed the aforementioned psychiatric injuries or alternatively, would have completely recovered from them, or the extent of the Plaintiff's psychiatric injuries would have been significantly limited compared with his current psychological condition.

> 13. In the premises, by virtue of the matters set out in paragraphs 10, 11, 11A, 12 and 12A above, the Plaintiff's injuries were caused by the employer's negligence, and/or breach of the aforesaid implied term of contract of employment, and/or breach of the aforesaid statutory duties."

[7] The learned judge accepted the following chronology which emerged from the plaintiff's cross-examination.

> "**1993** The plaintiff was aware of suffering lack of sleep, abdominal pain, back and neck pain, and intrusive dreams or recollections. He was not aware of hyper-vigilance, hyperactivity, hyper-alertness, teeth grinding, toileting problems, intolerance or social withdrawal.
>
> **1994** The plaintiff was aware of suffering lack of sleep, unspecified abdominal pain, unspecified back and neck pains, intrusive dreams or recollections and toileting problems. He was not aware of suffering hyper-vigilance, hyperactivity, hyper-alertness, teeth grinding, intolerance or social withdrawal.
>
> **1995** The plaintiff was aware of suffering lack of sleep, toileting problems, and intolerance. He could not recall hyper-vigilance, hyperactivity, hyper-alertness, or teeth grinding. He was not aware of social withdrawal, and he could not answer whether he suffered unspecified abdominal pains, or unspecified back and neck pain.
>
> **1996** The plaintiff was aware of suffering lack of sleep, intrusive dreams or recollections, hyperactivity, toileting problems, abdominal pain, intolerance and social withdrawal. He could not recall hyper-vigilance, hyper-alertness, or teeth grinding and he could not answer whether he suffered back and neck pain.
>
> **1997** The plaintiff was aware of lack of sleep (but not the same extent), intrusive dreams or recollections, toileting problems, abdominal pains, unspecific back and neck pains, intolerance and social withdrawal. He was not aware of hyperactivity, hyper-alertness, or teeth grinding, and he could not answer with respect to hyper-vigilance."

[8] The learned judge was satisfied that Mr Hegarty was experiencing the difficulties that he had described to the court and to Mr Borger in his conversations with the latter at Gayndah, and that those were part of the reason he wanted a transfer to Bundaberg. The judge noted that it was a recurring theme in the trial that the real reason why the plaintiff wanted a transfer to Bundaberg was to improve his skills and to provide better educational opportunities for his children. The judge accepted that those were among the reasons why the plaintiff wanted a transfer, and that they were the reasons the plaintiff gave when he applied for a transfer in or about May 1996. The judge also accepted the plaintiff's evidence that he had told Deputy Commissioner Lawler that he "wasn't coping" in Gayndah, that he was too attached

What Mr Hegarty did not reveal

[9] The learned judge included an annexure to the judgment, listing 21 incidents in Mr Hegarty's ambulance career which had been the source of intrusive thoughts and recollections for Mr Hegarty for many years. They had caused him nightmares and persistent dreams, mood swings, depression and anxiety, fatigue, increasing verbal aggression, profuse sweating, and he had begun grinding his teeth. There were a large number of other symptoms as well. Those included severe stomach pains and migraines, toileting problems and abdominal pain, unspecific back and neck pains, and a sense of intolerance and social withdrawal. A frequently described effect was that Mr Hegarty persistently recalled the events, and the injuries suffered by the people he had helped, had regular nightmares about the events, and felt disturbed and frustrated by the conduct of other emergency services personnel during some of those events. The reasons for judgment record that Mr Hegarty experienced intrusive thoughts and recollections of almost all of those 21 traumatic incidents on which he relied, with those sequelae continuing for years. Some of those incidents which he described as particularly significant still troubled him most at the trial. But Mr Hegarty did not tell any of his supervisors or fellow officers about those adverse effects and the problems they were causing him. Those effects and problems seem to be the most significant symptoms of the disorders he suffered.

Education by the employer

[10] The learned judge described the bridging course conducted by the Kangaroo Point College of TAFE, introduced to bring all ambulance officers' qualifications up to the same basic level. Part of that course included a self needs and self help component taught by a Mr Scully, who in April 1993 gave a presentation on self needs and self help, which covered the causes and effects of stress, and how to cope with it. Mr Hegarty had attended classes at the Oxley Police Academy in April 1993, as did Mr Borger. Mr Scully's presentation on self needs and self help included Mr Scully's talking about the effect of trauma under a number of sub-headings, and his giving various examples of conduct that might be indicators of a stress reaction. At the trial in 2007, 12 years later, Mr Hegarty could not recall that presentation, and the judge thought it understandable that Mr Hegarty could not recall receiving any training or instruction with respect to stress management at that time.

[11] The judge accepted evidence that neither Mr Hegarty nor Mr Borger had attended a broadcast in November 1992, presented by a one hour video, on the subject of Priority One. Mr Hegarty's evidence had been that video broadcasts via satellite television as a medium to provide information to employees were usually received in the early evening, and Mr Hegarty endeavoured to attend those, but sometimes work commitments and the unavailability of TAFE staff precluded his doing so.

[12] The learned judge also referred to evidence of the distribution of Priority One leaflets with payslips, and thought that the system for distributing those brochures attached to payslips was probably not implemented as consistently as Mr Scully thought it had been. The judge was not satisfied that Mr Hegarty had seen a brochure entitled "Your Reaction to Stressful Events" before he stopped employment.

What Mr Hegarty learned from his employment

[13] Mr Hegarty had become qualified to mentor junior officers and trainees by late 1998, gaining that qualification on 19 October 1998 that required that he attend at lectures and complete workbooks and assignments. Those lectures were conducted in 1997, and Mr Scully gave a two hour presentation on occupational stress and Priority One on 9 September 1997. Mr Hegarty could recall Mr Scully talking of Priority One, but not of occupational stress. He had participated in a peer support training course at Gympie between 7 and 12 February 1999, and at the conclusion had declined to act as a peer support officer, advising Mr Scully that he, Mr Hegarty had some private issues, being personal issues, that he needed to deal with first.

[14] The learned judge accepted that Mr Hegarty had received some training in the identification of possible signs of stress as part of the bridging course, and in his participation in various other courses. His evidence was that before he had applied to become a peer support officer in June 1997 he had known that a combination of symptoms such as he was experiencing might indicate a stress related condition, and that if someone else had been experiencing them, he would have suggested that he or she contact a peer support officer or Priority One, or else seek medical or other professional help. However, Mr Hegarty maintained that he did not recognise his own symptoms as possible signs of stress, and it was only when he did the peer support training course in February 1999 that he realised something was wrong, even though at that time, he did not understand what his problem was.

[15] The learned judge accepted that evidence, observing that it accorded with her overall impression of Mr Hegarty as an honest witness. It also accorded with the professional observations of the witnesses such as Dr Bell, Professor Bryant, and Professor Raphael, that it was not uncommon for patients to fail to recognise the significance of what was happening to themselves even though they might recognise the significance of similar signs in others, and with the common human failing of being unable to see ourselves as others see us.

[16] Accordingly, the learned judge held that the plaintiff had not made out his allegation that his injuries were caused by the failure of the State of Queensland to have in place a system which provided him with the training or education through which he would have come to know and recognise signs of possible dysfunction. The judge recorded that Mr Hegarty's counsel had conceded that allegation had not been made out.

Findings about Mr Hegarty

[17] Nevertheless, the judge had no hesitation in accepting that despite some improvement, the plaintiff remained a psychological cripple, incapable of working, and who had not worked since April of 1999. The learned judge elsewhere concluded that the judge was satisfied that Mr Hegarty's post traumatic stress disorder was sub-clinical through the early to mid-1990s, but that by mid-1996 it

was causing clinically significant distress and impairment in his social and occupational functioning. The judge was also satisfied that had Mr Hegarty come to the attention of competent mental health professionals such as psychiatrists and clinical psychologists at that time, a treatment regime directed to what was then psychological disorders (as opposed to one directed at the prevention of a disorder) would have been implemented at that stage; had that occurred, Mr Hegarty would probably not have suffered to the extent he subsequently did, and his long term prognosis would probably have been better.[1]

[18] The judge then found that Mr Hegarty was exposed to multiple traumatic events in his 15 year service as an ambulance officer, and that he experienced a cumulative stress reaction over time, as opposed to an acute reaction to a single traumatic event.[2] The judge referred to evidence from a Professor Bryant, and to the latter's opinion that the best approach an employer or organisation can adopt is one which involves identifying an individual at high risk of having a problem, and inviting that person to have an assessment or interview, in a confidential way that does not impact on his or her position within the organisation, to see if there is a problem. The identification of a person as being at risk might be achieved in a variety of ways, such as by self report, by observation of operational signs that the person is not functioning as well as he or she should (such as absenteeism, disciplinary problems, or a deficit in functioning), by supervisors being trained to identify behavioural signs which are flags or markers that the person needs assessment. There are various assessment tools available, including a telephone call or a visit from a counsellor, or by screening of high risk individuals.

[19] The judge noted that Professor Bryant acknowledged that a patient lacking insight was unlikely to self report, but that some conduct (for example, an employee complaining that his skills were deteriorating, a request for a transfer for various reasons and threatening to resign if not transferred, complaining of working too many hours, failing to respond to a code 1 emergency, a statement by a person in a small country town that that person was having trouble disassociating professional and personal relationships) if taken together would unequivocally be indicative of a potential problem. The judge noted that those examples were all taken from the plaintiff's case, and that the judge had accepted the plaintiff said all of those things to his superiors. The judge went on to record that it was a major part of the plaintiff's case that Priority One was deficient as a response to the risks to which he was exposed, because it did not include training supervisors to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, so that they could be referred for clinical psychological assessment and for treatment such as cognitive behaviour therapy.

Training of others

[20] The learned judge found that none of the plaintiff's supervisors had received training to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, and that the need to train supervisors to recognise signs of stress in staff members was appreciated even before the inception of Priority One. One of the recommendations of the Parliamentary Select Committee of Inquiry into ambulance services, which reported in December 1990,

---

1 That conclusion is at [111] at AR 2530.

2 At [113].

was for an education program aimed at promoting a better understanding of the causes and consequences of stress in ambulance work, directed to existing operational staff, senior management staff, and spouses/partners of ambulance officers. The judge went on to hold that Priority One was intended to provide a framework within which individuals might seek assistance through self referral, or alternatively peer support officers or supervisors might recommend assistance based on perceived problems, and that Priority One had not met this educational objective, as was apparent from the lack of training afforded to the senior officers with whom the plaintiff had contact.

[21] The judge accordingly found that during the time Mr Hegarty worked for the Queensland Ambulance Service, his supervisors and senior officers did not receive the requisite training. The judge found that although Mr Borger may not have been concerned about the way the plaintiff performed his work, the cluster of complaints made by Mr Hegarty were such that a properly trained supervisor in Mr Borger's position would have recognised those complaints as possible signs of stress, and would have suggested to Mr Hegarty that he approach Priority One or otherwise be assessed professionally.

[22] The earlier an appropriate treatment regime had been implemented, the greater would have been Mr Hegarty's chance of not suffering to the extent that he did and the greater would have been his chance of a better long term prognosis. The judge concluded that that was the thrust of all of the expert evidence, particularly of Dr Mulholland.

[23] The judge then went on to hold that the risk that ambulance officers could develop psychiatric injury in the course of their work was expressly recognised in the discussion document produced in early 1991, and the need for training of supervisors was also recognised at that early stage. Training of supervisors, focusing on the role of picking up signs of possible dysfunction was not impracticable or unduly expensive or inconvenient, and would have afforded a reasonable response to the risk, but was not provided. Thereby the Queensland Ambulance Service breached its duty of care to Mr Hegarty.

Findings by the judge

[24] The learned judge then concluded (at [150]) that if they had been given appropriate training Mr Borger, Mr Lawler, and Mr Jacobsen would have been able to recognise signs of possible dysfunction in the plaintiff in 1996, that they would have done so, and they would have suggested to him that he approach Priority One or otherwise be professionally assessed. The judge was satisfied that Mr Hegarty would have taken up such a suggestion, and that he would have been referred to clinicians for treatment, with the chance of a better outcome that had in fact been achieved. The judge held:

> "[153] By mid 1996 the plaintiff's OCD and his PTSD had both developed beyond the subclinical to the point of causing clinically significant impairment in his social and occupational functioning warranting professional intervention in the nature of treatment rather than prevention. By that time he had sustained recognisable psychiatric injury.
>
> [154] I am satisfied that the plaintiff's loss, namely the loss of the chance of a better outcome, was caused by his employer's

> negligence. I am satisfied, too, that his loss was sustained by mid 1996.
>
> [155] The plaintiff did not recognise his own symptoms as possible signs of stress; such lack of recognition was not unreasonable411 and so there is no basis for a finding of contributory negligence or of failure to mitigate his loss.
>
> [156] The plaintiff is entitled to succeed also on his claims for breach of contract and breach of statutory duty. These claims were pleaded in the alternative.
>
> [157] The employer's duty to take reasonable care to avoid injury to its employee was an implied term of the plaintiff's contract of employment. The defendant breached that term in the manner described above.
>
> [158] Pursuant to s 28 of the *Workplace Health and Safety Act 1995* (Qld) the plaintiff's employer was obliged to ensure his workplace health and safety – that is, to ensure that he was not exposed to risks that were more than trivial.412 Breach of that statutory duty constituted a civil cause of action.413 In the circumstances of this case, where the defendant admitted that there was a risk to the plaintiff which was more than trivial the defendant then had the onus of showing that the obligation was discharged in an appropriate way by the taking of reasonable precautions and the exercise of proper diligence. It failed to discharge that onus."

[25] The judge went on:

> "[160] I am satisfied on the balance of probabilities that the plaintiff lost the chance of a better outcome. The quantum of the judgment to be entered on his behalf must reflect the value of that lost chance, and the evaluation of it is to be approached as a matter of informed estimation.
>
> [161] The employer's liability stems from the failure of senior officers to identify signs of possible dysfunction in mid 1996, by which time the plaintiff had, in my judgment, sustained what the law classifies as psychiatric injury. Had appropriate treatment been commenced at or about the time his PTSD became a psychiatric injury and continued for two years or more, there was approximately a one third chance of a good outcome, 1/3 chance of a bad outcome in the sense of continuing significant symptomatology an incapacity for work, and a 1/3 outcome of an intermediate outcome.
>
> [162] I intend evaluating the loss of the chance of a better outcome by assessing the damages to which the plaintiff would be entitled if the loss to be visited on the employer were the whole of the plaintiff's suffering at and from that point in time in its sequelae, and then discounting that quantum by 35%."

The learned judge ultimately held that the plaintiff was entitled to judgment against the defendant in the sum $569,635.31.

My different conclusions

[26] Where I respectfully disagree with the learned trial judge is in the conclusion that if Mr Borger, Mr Lawler and Mr Jacobsen had been given appropriate training, they would have been able to recognise signs of possible dysfunction in Mr Hegarty in 1996. That is because Mr Hegarty did not describe giving unequivocal signs of dysfunction in 1996, as opposed to seeking a transfer to Bundaberg, without revealing the extent to which he experienced recurrent images and recollections of the stressful incidents he experienced as an ambulance officer. Absent that critical information, his behaviour was consistent with the opinions other officers had about him, namely that he was efficient, conscientious, ambitious, and good at his work.

[27] The plaintiff agreed in cross-examination that if he had been told in 1995 by another ambulance officer, that that officer was suffering from intrusive dreams and recollections of horrible scenes and bad accident events, and suffering a lack of sleep, and also that the time spent in the bathroom and toilet by that officer was unacceptable, and that the officer was becoming intolerant of others, this would have suggested in 1995 the possibility of a stress related illness. Mr Hegarty was aware of that in 1995 because of the information received in the course of his employment, about Priority One and stress related conditions. The answers assumed that the hypothetical ambulance officer revealed that that officer suffered from intrusive dreams and recollections, and spent prolonged periods in the bathroom and toilet. The evidence did not show that Mr Hegarty told Mr Borger, or Mr Jacobsen or Mr Lawler, of his intrusive dreams and recollections, or of the time he was spending in the toilet. That conduct had not been exhibited by him at the work place.

[28] Professor Bryant's view that the Queensland Ambulance Service should have trained its supervisors to identify individuals who are displaying signs of dysfunction, such as avoidance, concentration difficulties, or irritability, were not challenged by the appellant State, which argued that Mr Hegarty had not demonstrated those identifiable signs to his fellow officers or superior officers. The appellant conceded in oral argument that Mr Jacobsen and Mr Lawler had not undergone the training courses offered to Mr Hegarty and Mr Bolger, but contended it did not matter, because they did not have described to them the critically important symptoms of Mr Hegarty being constantly troubled by memories of traumatic events. Nor were they told about his toileting difficulties.

[29] The appellant's argument contended that exhibit 28, Mr Hegarty's application received in early May 1996 for a transfer from Gayndah to Bundaberg, gave entirely orthodox reasons for asking for that transfer. Those included increasing Mr Hegarty's skills, becoming an air attendant and possibly a paramedic, and his desire to improve his children's education opportunities. The fact that at or about the same time he expressed concern that he was losing his skill level in Gayndah, felt that he could not separate himself from the community and was becoming short tempered with other (volunteer) officers, as described to Mr Jacobsen and Mr Lawler, and the fact that his wife said he was working very hard and was very tired, did not disclose grounds for recommending he seek counselling.

[30] What that disclosed were reasons to improve his application for a transfer, which was what happened. He did not demonstrate any unexplained absenteeism, because in 1996 he had been suffering from a medical condition which had necessitated

some sick leave, and had been on annual leave in September and early October 1996. He had had an appendix operation on 1 November 1996. The fact of that level of physical illness would readily explain a degree of irritability and complaints of tiredness.

[31] The matters that Professor Bryant agreed would "raise a flag" to identify that the individual needed closer attention included a complaint that an individual was not functioning in their current capacity and had skill levels deteriorating, was having problems disassociating personal matters from professional issues, would resign if not transferred, and the employee's spouse saying he worked too many hours and the family unit was not coping. Those matters did not make a stress disorder the only explanation for them. They were explicable by reason of his physical condition and potentially resolved by the sought for transfer.

[32] Exhibit 49, distributed to the staff who had undertaken the bridging courses, included a document describing the effects of trauma. The plaintiff did not display or describe to others the significant indicators set out in that document. His evidence was that he was having difficulty with sleep and was incessantly troubled with disturbing memories of the traumatic events he had witnessed and participated in as an ambulance officer, but he did not tell anyone of that.

[33] Mr Diehm relied on attachment two to the policy and procedure statement issued in January 1991, which included that training programs would be formulated to educate staff about management and prevention of stress, and that supervisors and group leaders would be encouraged to recognise the importance of stress related problems and encourage staff to use appropriate services. He pointed to the evidence of Mr Jacobsen, when the latter agreed that Mrs Hegarty was in tears at the medal presentation ceremony. Mr Diehm submitted that if Mr Jacobsen and Mr Borger had been properly trained, each would have recognised critical signs in the cluster of complaints conveyed to each. But of those matters, most would seem resolvable by approving the requested transfer, such as concern about falling skill levels, needing to leave Gayndah and go to a place where Mr Hegarty did not know the local people as well, where the workload could be expected to be less because of the greater number of available officers, and after Mr Hegarty had had his operation.

[34] **KEANE JA**: The plaintiff served as an ambulance officer for 15 years from 1984 to 1999. He left this employment in 1999 suffering from post-traumatic stress disorder ("PTSD") and obsessive compulsive disorder ("OCD"). He claimed that the defendant, as his employer, was responsible for these conditions. In 2000, the plaintiff commenced an action claiming damages for negligence, breach of contract and breach of statutory duty. In April 2007, the learned trial judge gave judgment for the plaintiff against the defendant for $569,635.31.

[35] This sum was calculated by the learned trial judge's discounting by 35 per cent the damages to which the plaintiff would have been entitled if liability for the whole of the plaintiff's suffering and loss were to be sheeted home to the defendant.[3] This discounting was intended to reflect the learned trial judge's conclusion that the failure by the plaintiff's superiors within the ambulance service to identify signs of dysfunction in the plaintiff caused the plaintiff to lose the chance of "a better outcome" in terms of his suffering and incapacity for work.[4] The learned trial judge

---

3 *Hegarty v Queensland Ambulance Service* [2007] QSC 90 at [162].

4 [2007] QSC 90 at [160] – [161].

concluded that the plaintiff had lost the chance of a "better outcome" because the defendant had not established a program of training by which the plaintiff's supervisors would have come to know and recognise signs of possible psychological dysfunction in the plaintiff so as to be able to suggest that he seek treatment at an earlier point of time.

[36] The defendant appeals against this decision, contending that the learned trial judge erred in holding the defendant liable for the plaintiff's injuries. The defendant's principal contention is that even if a program of training of the kind referred to by the learned trial judge had been established, the plaintiff's supervisors could not have been expected to recognise signs of psychological dysfunction in the plaintiff. It is necessary to summarise the plaintiff's case and the learned trial judge's principal findings of fact before discussing in greater detail the argument agitated on appeal.

The plaintiff's case at trial: the issues

[37] The plaintiff was 45 years old at trial. He worked as an ambulance officer at Emerald and Ayr from 1984 to 1989. From 1989 to the end of 1996, the plaintiff worked at Gayndah; and from 1 February 1997 to 13 April 1999, he worked at Bundaberg. He has not worked since 1999.

[38] In the course of his service as an ambulance officer, he was required to attend many traumatic and distressing scenes. He did not receive any counselling or psychological support or treatment or intervention with respect to the distress he experienced on these occasions. He had been trained in accordance with a program, referred to in the ambulance service as "Priority One", to recognise in himself signs of dysfunction resulting from work related stress. This training was said to be inadequate because a stressed individual may not recognise in himself or herself symptoms of stress requiring treatment.

[39] The pleaded case of negligence, breach of contract or breach of statutory duty on which the plaintiff succeeded was that:

> "the Defendant did not have in place a system whereby the Plaintiff's supervisors were trained to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, so that referral could be made for clinical psychological assessment and treatment such as cognitive behaviour therapy".[5]

[40] The case actually made at trial for the plaintiff differed somewhat from this pleading. It was not suggested that the signs of dysfunction exhibited by the plaintiff should have led to an automatic compulsory referral to psychological assessment and treatment. The plaintiff's case was that, if an appropriate system of training for supervisors had been in place, the plaintiff's supervisors would have recognised signs of dysfunction in him and suggested to him that he seek psychological assessment and treatment. He would have voluntarily accepted such a suggestion and sought treatment earlier than he in fact did. If he had been treated earlier, he would either not have developed psychiatric injuries or would have suffered them to a lesser extent.[6]

[41] I pause here to observe that this elegant formulation of the plaintiff's case glosses over a number of issues. It must be said immediately that, while an employer owes

---

5 See the statement of claim, paragraph 11A(b).

6 See the statement of claim, paragraph 12.

the same duty to exercise reasonable care for the mental health of an employee as it owes for the employee's physical well-being,[7] special difficulties may attend the proof of cases of negligent infliction of psychiatric injury.[8] 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.[9] 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.[10]

[42] In relation to the content of the defendant's duty to the plaintiff in the present case, it was acknowledged by the defendant that there was a foreseeable risk that regular exposure to the vivid human tragedy of scenes of accident and illness could cause psychological stress, and possibly psychiatric injury, to ambulance officers. Indeed, it was as a result of the defendant's recognition of this risk that Priority One was developed by the defendant in the early 1990s.

[43] The area of debate in the present case concerned the extent to which the defendant was duty-bound to ensure that its superior officers should intervene with individual ambulance officers in relation to possible signs of deterioration in their mental health. The private and personal nature of psychological illness, and the consequential difficulties which attend the discharge of an employer's duty in this respect, must be acknowledged as important considerations. The dignity of employees, and their entitlement to be free of harassment and intimidation, are also relevant to the content of the duty asserted by the plaintiff. Issues of some complexity arise in relation to when and how intervention by an employer to prevent mental illness should occur, and the likelihood that such intervention would be successful in ameliorating the plaintiff's problems.

[44] The case made for the plaintiff at trial, and which was ultimately accepted by the learned trial judge, was that the plaintiff's supervisors should have been trained to identify possible signs of stress and invited him to seek professional help. The plaintiff's case means that the employer must be concerned, not only with non-performance by the employee as an employee, but also with possible episodes of unhappiness in the employee's private life. It is not self-evidently necessary or desirable that employees' private lives should be subject to an employer's scrutiny. To some extent in this case, the plaintiff's case, as it was developed in the course of evidence and in argument in this Court, depended on an assertion of a culpable failure by the plaintiff's superiors to scrutinise aspects of the plaintiff's private life away from work.

[45] Issues did necessarily arise, however, as to the identification of a sufficient basis for the making of a suggestion by the defendant that the plaintiff seek psychological assessment and treatment. The resolution of this issue is fraught with difficulties peculiar to cases of psychiatric injury. In cases of apprehended psychiatric injury, unlike cases concerned with the amelioration of physical risks in the workplace,

---

7 *State of New South Wales v Seedsman* [2000] NSWCA 119; *Mannall v State of New South Wales* [2001] NSWCA 327 at [64]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 [19].

8 *Gillespie v The Commonwealth* (1991) 105 FLR 196 at 202.

9 Cf *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 54 [24].

10 Cf *Calvert v Mayne Nickless Ltd (No 1)* [2006] 1 Qd R 106.

important values of human dignity, autonomy and privacy are involved in the formulation of a reasonable system of identification of psychiatric problems which may warrant an employer's intervention and the making of a decision to intervene. An employee may not welcome an intrusion by a supervisor which suggests that the employee is manifesting signs of psychiatric problems to the extent that help should be sought, especially if those problems are having no adverse effect upon the employee's performance of his or her duties at work.

[46] Employees may well regard such an intrusion as an invasion of privacy. Employees may rightly regard such an intrusion as a gross impertinence by a fellow employee, even one who is in a supervisory position. If an employee is known to be at risk of psychiatric injury, prospects of promotion may be adversely affected and questions may arise as to the entitlement, or even obligation, of the employer to terminate the employment.[11] Employees who are ambitious, and eager for promotion, and whose signs of dysfunction might equally be signs of frustrated ambition, might rightly be deeply resentful of suggestions which reflect an adverse assessment of the employee's ability or performance and prospects of promotion. Such employees can be expected to pursue such remedies as may be available for their grievance over the intrusion. Dissatisfaction or resentments of this kind may give rise to industrial relations issues for the employer, as well as defamation issues for other employees. A conclusion that an employer has acted unreasonably in failing to recommend psychological assessment and treatment cannot be made without recognising that the employer's decision must be made in a social, economic and legal context which includes these considerations.

[47] In the joint judgment of McHugh, Gummow, Hayne and Heydon JJ in the recent decision of the High Court in *Koehler v Cerebos (Australia) Ltd*,[12] it was said that a stable appreciation of the content of the employer's duty to take reasonable care is essential; and that it is erroneous to proceed on the assumption that "the relevant duty of care [is] 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 kind of steps required of an employer." Further, "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.

[48] In the course of argument in this Court, counsel for the plaintiff were disposed to argue that any manifestation of dissatisfaction by an employee of the ambulance service which might possibly reflect an underlying dysfunction called for an invitation by the employee's immediate supervisor or other superior officers to seek counselling. At the same time, so it was said, the "managerial aspect" of the employee's complaint was also to be addressed. How these two responses were to be coordinated was not explained. As will be seen, the plaintiff's formulation of the content of the obligation to take reasonable care for employees in the position of the plaintiff was not supported by the evidence.

---

11 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 – 54 [21].

12 (2005) 222 CLR 44 esp at 53 – 55 [19] – [25].

[49] In *New South Wales v Fahy*, [13] Gummow and Hayne JJ recently emphasised that what an employer acting reasonably must do by way of care for an employee is an issue which "requires looking forward to identify what a reasonable employer **would** have done, not backward to identify what would have avoided the injury." One must not lose sight of the important reasons for circumspection on the part of an employer which may reasonably forestall intervention in relation to the mental health of an employee. These considerations are easily lost from sight once an adverse outcome for the employee has resulted. It is necessary to resist the inclination retrospectively to find fault by devising chains of causation involving risks which were not reasonably regarded as significant before a particular event has occurred. In *Rosenberg v Percival*, [14] Gleeson CJ said:

> "In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed. Recent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated (See, eg, *Jones v Bartlett* (2000) 205 CLR 166 at 176 [19]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [17], 291-292 [109]). This danger may be of particular significance where the alleged breach of duty of care is a failure to warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action."

[50] It may also be noted here that the formulation of the plaintiff's pleaded case in the passive voice tends to gloss over the important point that, in the case actually made at trial by the plaintiff, "referral" was not something which was "made" as the inevitable consequence of identification by a supervisor of signs of stress in an employee. Assessment and treatment can only occur as a result of a decision to seek it. It was not suggested in the case actually made for the plaintiff that the decision to seek psychological help was a decision for anyone other than the affected employee. The plaintiff's case was that the plaintiff's supervisors should have made a decision to recommend to the plaintiff that he seek psychological assessment and treatment.

[51] A case of the kind advanced by the plaintiff necessarily invites attention to the nature of the training said to be required of the plaintiff's supervisors, both as to the kinds of sign which should have alerted them to the possibility of psychological dysfunction in the plaintiff, and as to the basis for making a decision that intervention to ensure that the plaintiff sought psychological assessment and treatment was the only course which would satisfy the obligation of reasonable care, that is to say that such a decision was the only reasonable course open to the defendant. It also invites attention to the likelihood that the plaintiff would have accepted and acted upon the suggestion, and the likelihood that, at the time when he could reasonably have been expected to be advised to seek assessment and

---

13 [2007] HCA 20 at [57].

14 (2001) 205 CLR 434 at [16] (citation footnoted in original).

treatment by the supervisor's intervention, the treatment which was then available would have been effective to ameliorate his condition. These are issues which have to be resolved in the plaintiff's favour before it can truly be said that the defendant's wrongful omission cost the plaintiff the chance of a better outcome in terms of the mental illness from which he suffers.

[52] Unless these issues are resolved in the plaintiff's favour, on the balance of probabilities, it cannot be said that the plaintiff has suffered the loss of a chance of a better outcome. In *Sellars v Adelaide Petroleum NL*,[15] Brennan J said:

> "In Bennett v Minister of Community Welfare ((1992) 176 CLR 408, at pp 422 - 423) Gaudron J. said:
>
> > 'It might be said that, where questions of causation depend on hypothetical considerations, allowance should be made, as in the assessment of damages, for the possibility that some event would not have occurred (See, in relation to the assessment of damages, *Malec v J C Hutton Pty Ltd*). Possibilities, if they are not fanciful, must be taken into account, at least in a general way, when ever causation or the related issue of prevention is in issue. But questions of that kind are not answered 'maybe' or, even, 'more probably than not'. They are answered 'yes' or 'no' depending on the probabilities for or against. In this respect, they are indistinguishable from the question whether an event happened (As to the 'all or nothing' approach to whether an event happened, see *Malec v J C Hutton Pty Ltd* (1990) 169 CLR, at pp 642 - 643) where possibilities are taken into account but, once the question has been answered, those possibilities have no further bearing on the matter.'
>
> I respectfully agree. Unless it can be predicated of an hypothesis in favour of causation of a loss that it is more probable than competing hypotheses denying causation, it cannot be said that the plaintiff has satisfied the court that the conduct of the defendant caused the loss."

In the same case, Mason CJ, Dawson, Toohey and Gaudron JJ said:

> "When the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of probabilities notwithstanding that the question is hypothetical."

[53] The crux of the plaintiff's case, which was accepted by the learned trial judge, was that, had the plaintiff's supervisors been sufficiently sensitised by the defendant to signs of distress in the plaintiff, they would have "tapped him on the shoulder" and encouraged him to seek psychological assessment and treatment.[16]

[54] The plaintiff's case was that the plaintiff would have readily seen the wisdom of his supervisor's intervention and sought assessment and treatment, and that this would have occurred at a time when that would have been effective and beneficial in terms of minimising the consequences of his disorder. The learned trial judge made

---

15 (1994) 179 CLR 332 at 367 – 368.

16 [2007] QSC 90 at [130] – [136].

findings in the plaintiff's favour on these issues as well. Her Honour found that the plaintiff would have embraced the suggestion that he seek psychological assessment and treatment[17] notwithstanding the scepticism with which, as her Honour acknowledged, the self-serving evidence of the plaintiff in this regard should have been treated.[18]

[55] It may be said that, in a context where "signs of dysfunction" sufficient to give rise to an occasion for intervention were manifest to others, but not to the plaintiff himself (notwithstanding his training), there must be, to say the least, a real question mark over the likely efficacy of a supervisor's intervention at that stage. The learned trial judge made findings in favour of the plaintiff on this issue, and there was evidence which supported those findings. Accordingly, the defendant's focus in the appeal is upon the learned trial judge's conclusion that a properly trained supervisor would have ensured that the plaintiff was invited to seek assessment and treatment in 1996. I shall discuss this argument after first setting out so much of the relevant evidence on this point and the learned trial judge's findings of fact to make the arguments in this Court comprehensible.

The plaintiff's case at trial: the evidence

[56] Professor Richard Bryant, a clinical psychologist, the principal expert witness called by the plaintiff, gave evidence of the signs of dysfunction which would warrant intervention by a supervisor. The following passage from the evidence introduces his views on this topic:

> "What sorts of things identified individuals as high risk?--I think there's a number of levels of indicators. I think the most salient indicator is if somebody says they have a problem, and that's in a sense the easiest level, if somebody puts their hand up and says, 'I have a problem and I need help', then clearly we can lead that person to help. I think the next level down is if there are operational signs that the person is not functioning as they should, for example if there is absenteeism, disciplinary problems, a deficit in one's functioning. Whilst that doesn't indicate a mental health problem, it is a flag of a possible problem and in an emergency service personnel this is always a risk. That person should be invited. And I think at a third level, if a supervisor identifies behavioural signs that there may be problems, such as irritability, conflict with peers, absent - late for work, those sorts of decrements in performance is another flag and I think if those sort of flags are raised, then it is wise to then invite the person to have an assessment, which is always going to be the most reliable way of seeing whether there's a problem.
>
> …
>
> And does this mean that they get trained up to be, in effect, clinicians making diagnoses or is it at some other level?-- Well, no, clearly not asking them to play the role of a mental health professional or a quasi mental health professional. **Their role is to identify and they should be trained to identify if a person is asking for help firstly; secondly, to identify if there are decreases in performance; and, thirdly, if there are behavioural signs such as acting out, irritability, disciplinary problems. And so, really**

---

17 [2007] QSC 90 at [138] – [142].

18 [2007] QSC 90 at [138].

> **teaching the supervisors to identify those very observable and salient indicators and then at that point I would suggest a flag needs to be raised.**" (emphasis added)

[57] As appears from this passage, Professor Bryant recognised that the "salient indicators" of the need for intervention, apart from a request for help, are "decreases in performance" and "behavioural signs such as acting out, irritability and disciplinary problems". Professor Bryant also recognised that supervisors cannot be expected to "play the role of … a quasi mental health professional". No doubt for this reason, Professor Bryant spoke of the relevant flags as "very observable and salient indicators".

[58] Professor Bryant gave evidence of a training program for operational commanders within the Royal Ulster Constabulary:

> "… I have worked recently on a matter with the Royal Ulster Constabulary during the troubles in Northern Ireland, and in the mid-80s that organisation, which clearly was exposed to enormous stress, set up a training program so that operational commanders, the people directly overseeing the police officers, they were trained to identify a number of areas that would raise a flag about, and those areas included whether somebody was exposed to particularly significant trauma or whether there was problems in the person's operational functioning such as whether there was absenteeism, increased sickness leave, et cetera. If those factors were there, they were trained to raise a flag to identify that those people needed closer looking at.
>
> MR DIEHM: Now, have there been other things over time which had been added to the training?-- To be honest, it's really been modifications of that approach. Not a lot has really, to be honest, happened in the last few decades in that regard. **It is still a matter of if we can train a supervisor to identify when a person is not functioning well and to encourage them to identify a person who is actually asking for help, then to direct - to invite that person to have an appropriate assessment.**" (emphasis added)

[59] Professor Bryant was then asked some further questions by counsel for the plaintiff which were directed to the "signs of dysfunction" relied upon by the plaintiff as having required his supervisors to "invite [the plaintiff] to have appropriate assessment". The relevant passage is as follows:

> "Okay. Does asking for help mean simply that they come along and say, 'I need help', or does it mean something else as well?-- It can mean various things. At the easiest level it means putting up your hand and saying, 'I have a problem.' And what most of the training programs would do to indicate if a person is saying they have a problem, it is not for the supervisor to determine the nature of that problem but rather just to refer them on so that appropriate assessment can be done and then an appropriate person can work out the nature of the problem.
>
> Now, what about at other levels? You said that's the easier levels. Are there other levels to people asking for help?-- Well, I think people - let me just reiterate what I have said. People can ask help for a problem or they can simply ask for help because they, for example,

> want to leave the job, want to transfer, want extended leave or want extended sick leave. Those sorts of factors are ways that people are indicating that they're not functioning in their current capacity and that should alert the supervisor that this person needs to be looked at.
>
> So if somebody says - an employee says, 'My skill levels are deteriorating', where does that fit into that picture?-- That would be raising a flag 'Why is that skill deteriorating?', and so then an invitation for an assessment should be offered.
>
> And if they say, 'I'm not coping or managing well with my duties' -----?-- The same.
>
> -----where does that fit in?-- Again, I think if somebody is saying, 'I am not managing with my duties', my evidence is that it should alert a supervisor to have that person receive an invitation to be assessed. If the employee made a comment to the effect that he was having problems disassociating personal matters from professional issues?-- Well, clearly raises the same flag.
>
> What if he was to say that he felt that he needed the security of working with someone who was at least as experienced as himself?-- That's borderline. That actually just may be a purely operational request and may not necessarily raise such a flag.
>
> Thank you. But if he told superiors that if he did not receive a transfer, he would resign?-- Flag raised.
>
> If an employee - no, I'll rephrase that. If an employer was told by the employee's wife that that employee needed to leave the town, to be transferred somewhere else because he was working too many hours and the family unit was not coping, if words to that effect were told, what would - what should that mean?-- I think an assessment should be offered."

[60] It is important to state immediately that there was no evidence that the plaintiff ever told any of his superior officers in the unequivocal way suggested to Professor Bryant by the plaintiff's counsel in this passage that he was "not coping or managing well with any duties" or that he was "having problems disassociating personal matters from the professional issues", or that his "skill levels were deteriorating" because of personal difficulties in exercising those skills as opposed to the lack of opportunity to exercise those skills. As will be seen, the evidence is that while the plaintiff said that he was not managing and was having problems being objective, his complaints were couched in terms distinctly more equivocal than the legal arguments advanced for the plaintiff would have it.

[61] It is also important to understand these statements by Professor Bryant in the context of the evidence which he had already given, which made it clear that supervisors who were not trained mental health professionals could not be expected to pick up signs of dysfunction which were not "very observable and salient indicators". The evidence was that the plaintiff suffered emotional disturbance by reason of nightmare flashbacks to human tragedies in which he had been involved, but that he had never told anyone at work about these problems. In this regard, the following passage in Professor Bryant's cross-examination is important:

> "For idiosyncratic reasons or for reasons that they keep everything to themselves and hide it very well from their workers, they can do that?-- Those cases will always exist

Those cases will always exist. Can I suggest - suppose a man were to say, 'All these suppressed emotions over the years, I just put it on the back burner. Never do anything about it except keep it at the back. Never talk to anyone about it, either friends, work colleagues or family', that would be a person who might be difficult for even that best practice system to pick up?-- That sort of person would probably – it would make it difficult for them to self-identify but if they actually have a disorder, despite the avoidance, which is essentially what you're describing, one should still see observable symptoms manifested in behaviours, which is the definition of disorder.

A trained clinician will be more acute to this than a co-worker or supervisor who may have been trained - who may have been given some education in what to look out for?-- A trained clinician will certainly be much, much more adept at identifying clinical signs but in terms of supervisors, I'm not saying we train them to identify clinical signs; I say we train them to identify markers that we need the person assessed such as absenteeism, deficiencies in working, et cetera.

What if a person lived in a small country town for eight years and regularly saw his GP for a range of complaints such as undiagnosed bowel condition, nonspecific pain, back pain, neck pain, maybe even complaints of insomnia, something like that, but also regularly, as an ambulance officer, worked near or was seen by the GP in emergency situations yet there is no suggestion the GP has picked anything up or ever suggested there was a problem or observed a problem, is that indicating this person may not be demonstrating a distinct problem?-- No, I mean that's a very common scenario with a lot of our emergency service personnel. They regularly have medical checkups and often see a GP and it's never picked up-----

But it's hard to see-----

MR DIEHM: Let the witness answer the question?-- When I'm with a GP, I will behave a certain way. When I'm at work and I've had my supervisor, who is probably the best person to actually see me constantly under various conditions, typically they're the best person to actually evaluate whether there is a performance change.

MR NORTH: If these people report or observed nothing abnormal, then you have not a case but an unknown sort of scenario?-- If there is no detection of dysfunction then either, yes, there is no dysfunction or we have a problem in how the supervisors are identifying or not identifying, rather, the functioning.

So it may be if there were no - if supervisors and co-workers were to say that working with and seeing this man over the years and noting no change in his behaviour and noting no signs that they had been told to look out for in co-workers of signs of illness behaviour, it may be that this person was functioning and not acutely ill until relatively late in the piece, shortly before stopping work?-- **Well, your Honour, I think to answer that question we need to take in all the evidence of this person's functioning. I'm reluctant to concede that because a supervisor says that a person is functioning well, that they are. And I say that because a lot of**

our experience with emergency organisations, we have had many, many, many cases where we have had people who are highly dysfunctional and we are actually treating this person at the time and at the very same time we have their line commander swearing black and blue that everything is fine and I think, sometimes, it speaks to the capacity of people, you know, to detect deficits in functioning and that does require a level of training so that people can identify what is a deficit in functioning.

If the person himself says that he was doing his work well up until very close until the end, is that an indicator that he may be hard to pick up?-- Possibly. Again, I'm reluctant to say that any one of these things is an issue. We need to see it in its entirety.

…

You spoke of a certain way in which the Royal Ulster Constabulary operated in the 1980s?-- Yes.

Are there published papers or research studies to do with that program?-- I believe there are internal reports, not published programs.

You were asked about certain specific symptoms or signs that may raise alarm bells with a supervisor, like skills deteriorating, somebody complaining that their skills were deteriorating?-- Yes.

That could equally be a complaint or a call - or calling for no more than a need for training or retraining. If somebody were to say, 'I've forgotten to how to do it', or, 'I can't do it as well as I used to'?-- My advice would be in the context of an emergency organisation, if somebody needs more skill, then that's a training issue, but if there is a deficiency in skills, I still advise that it raises a flag. We need to understand why is there a detriment in performance and an assessment would be indicated.

But if there is a deficiency?-- Yes.

But if a person - so what you're looking for is not just the complaint that skills are deteriorating, you have got to see that there is a deficiency in skills or a reduction in skill level at the time?-- Sorry, I fail to note the distinction.

Well, you see, is it this, that if a worker were to come and say, 'My skills are deteriorating', the first response might be to see what could be done by way of training or retraining but if that failed, then the flag would go up?-- I would put the flag up initially.

All right?-- Because all-----

What if-----?-- All we're talking about here is not saying this person needs help but rather in the context of people who are being repeatedly exposed to trauma, it's a matter of having them assessed to see what might be underlying that problem.

What if the complaint were that the worker wanted to get a higher skill level than they had in a different work environment from where they were; that would not be necessarily a common indicator?-- In itself, no.

If a person, we've already addressed this, were to request a transfer, there might be other quite routine issues that wouldn't indicate illness behaviour?-- That's true.

Such as a request for a transfer to have a more challenging future in a bigger centre?-- That's possible.

And if it was combined with compassionate grounds to do with health issues for children's - treatment of children's health issues in a bigger town and education of children who are growing up and going to secondary school, that would be nothing out of the ordinary, would it?-- Probably not.

If somebody were to say, 'Look, I want to transfer on those grounds because we need to be in a bigger town for those sorts of reasons but if it can't come through, I may have to think about resigning', that's not necessarily an indicator of a mental health issue, is it?-- If I had somebody who was being repeatedly exposed to trauma and they're saying, 'If something doesn't happen', even for practical reasons such as children's schooling, 'I will leave', I would probably want to have that person - I would invite that person to have an assessment.

But it could also equally indicate that there is a bargaining chip about it, upping the ante?-- I think the critical word, your Honour, is it could and we just don't know, which is why I'm saying, in terms of enhancing the mental health of that organisation, it doesn't harm to have an assessment and then at least we know where we stand.

HER HONOUR: I think what you're saying, Professor, is this and tell me if I've misunderstood you, that while these various factors, particularly if taken one by one separately from each other, may not be an indicator of a mental health issue. If they are in the context of someone who has been repeatedly exposed to traumatic events, the possibility of their being a mental health indicator is increased and hence the flag should go up?-- Absolutely. Thank you." (emphasis added)

[62] The Priority One program, of which the plaintiff and other employees in the ambulance service were informed in the early 1990s, gave advice about self-care in relation, inter alia, to occupational stress in the ambulance service environment.[19] As part of the information provided to ambulance officers under the Priority One program, officers were advised that key indicators of trauma related stress which might require professional assistance included:

"- deterioration in work habits / attitudes
- chronic lateness
- absenteeism
- excessive use of sick leave
- increase in drug / alcohol use
- significant personality changes (eg. isolation, irritability)."

[63] Before the inception of Priority One, one of the recommendations of the Parliamentary Select Committee of Inquiry into Ambulance Services reported to Parliament in December 1990 that "an education program aimed at promoting a

---

19 [2007] QSC 90 at [53] – [69].

better understanding of the causes and consequences of stress in ambulance work should be directed to … senior management staff."

[64] The evidence was that the plaintiff was a hard working, conscientious, competent and ambitious ambulance officer. The plaintiff himself identified only one incident which involved unsatisfactory performance of his duties by reason of his developing psychological difficulties. This occurred in 1999, shortly prior to his ceasing work, at a time when it was of no relevance to the liability of the defendant. The plaintiff told Dr Bell, a psychiatrist who treated him, that he had made no mention of his emotional stress to anyone at work.

[65] According to the plaintiff's wife, it was only after the plaintiff had transferred to Bundaberg that he began to manifest changes in his attitude to his family. In late 1998 and early 1999, he became very aggressive, abusive and short-tempered.

[66] In the years leading up to 1996, the plaintiff sought treatment from medical practitioners for problems which were diagnosed and treated as physical problems. He underwent an appendix operation in November 1996. He had a considerable period of sick leave and then went on six weeks' annual leave on 16 December 1996.

[67] In an endeavour to make out the plaintiff's case that the plaintiff's supervisors had been alerted to signs of dysfunction which should have led them to suggest to the plaintiff that he seek psychological assessment and treatment, the plaintiff relied upon conversations which he or his wife had with his supervisors, Mr Borger, Mr Lawler and Mr Jacobson.

[68] The plaintiff gave evidence of a conversation with Mr Borger during his period of service in Gayndah. This conversation probably occurred in 1996. The plaintiff said that his skill levels were dropping, that he was becoming very impatient with other officers and, in particular, training the honorary ambulance officers. He said that "the people in Gayndah were getting too close to me or I was getting too close to them and there was an attachment forming and I needed to get out of Gayndah." He said that: "I wasn't managing as well as what I thought … I felt I could be doing better, be more in control, be more objective … I requested that I needed to get out of Gayndah."

[69] The plaintiff's wife said that, in June 1996, she said to Mr Borger "how I was fed up with the long hours and the ambulance, and the fact that Rob just couldn't seem to get a transfer." In October 1996, she told Mr Borger that the plaintiff "had been having terrible stomach aches and headaches and nausea, and that the local doctor had thought it was appendicitis … and that he was very tired and he hadn't had a day off in a long time."

[70] On 17 July 1996 at a National Service Medal presentation to the plaintiff for 15 years of exemplary service, the Deputy Commissioner, Mr Lawler, and the Assistant Commissioner, Mr Jacobson, were present. Mr Borger was not present. The plaintiff said that he told Mr Lawler:

> "That I wasn't coping in Gayndah. I'd been in Gayndah too long. I was getting too attached to the people in Gayndah and I was unable to detach from them when I was treating them. The treatments were becoming personal. I had indicated that my skill level was dropping and I'd noticed that it was dropping. I was having difficulty

> communicating with other officers as well as communicating with honorary ambulance officers. I indicated quite strongly that I needed to get out of Gayndah. I'd been there too long."

The plaintiff also said that he had a separate conversation with Mr Jacobson in which he "repeated the same things … [and] [made] the same requests." The plaintiff's wife was also party to a further discussion with Mr Jacobson and Mr Lawler in which these points were repeated.

[71] The plaintiff said that Mr Jacobson and Mr Lawler said that "they would discuss it and see what could be done in getting me out of Gayndah." It should be noted here that the plaintiff also said to Mr Jacobson and Mr Lawler that he wished to leave Gayndah to improve his children's educational opportunities, and that he had been in Gayndah and done his "western service long enough". He said that if he was not "moved out of Gayndah by that Christmas, they'd have my resignation."

[72] The plaintiff had, in fact, made a written application for a transfer on 8 May 1996. It was in the following terms:

> "I wish to make application for a voluntary transfer from the Gayndah Station to the Bundaberg Station. I have been working at the Gayndah Station in the capacity of Qualified Ambulance Officer and Relieving OIC for almost eight years. During this time my family and myself have achieved all the goals we set ourselves and we are now looking forward to a more challenging future.
>
> My personnel [sic] goals include increasing my skills, becoming a [sic] air attendant and possibly a paramedic if the opportunity arises. I feel I could better serve the QAS in a larger centre.
>
> On compassionate grounds I desire a transfer due to my son being a chronic asthmatic. His doctors are in Bundaberg and they recommend a coastal climate to improve his condition.
>
> Also both my children have been educated at a private Catholic school which unfortunately only goes to Year 7. My daughter has great academic ability as was the school captain last year and also was awarded the Mayors Bursary for citizenship. However this year she began High School, and the only school available is the local State school, whereas we wish to continue her education at Shalom College. We are looking to our long term future and feel Bundaberg would serve our goals in view of the educational facilities, doctors, future university campus etc.
>
> I feel that my career record with the Ambulance will prove to you that I am a dedicated and loyal member of the service. If you have any questions please do not hesitate to contact me."

[73] The defendant emphasises the need to understand the conversations of the plaintiff and his wife with his supervisors against the background of his application of 8 May 1996 from which it appears that the plaintiff's concern was to gain the opportunity to improve his skill levels and to move from a work environment where his career was not advancing. The defendant argues that there was no indication that he was not coping with work or, for that matter, with life in general; and no basis for a decision on the part of his supervisors that the only reasonable response to what was being said by the plaintiff and his wife was a recommendation that the plaintiff seek psychological assessment and treatment.

[74] The defendant also argues that Mr Lawler and Mr Jacobson were not the plaintiff's operational commanders, and were not in the supervisory position spoken of by Professor Bryant. The plaintiff counters with the argument that the defendant's own discussion of the need to educate people as to the risks of exposure to trauma related stress extends to superior officers who are not the immediate line commanders of ambulance officers.

The learned trial judge's findings of fact

[75] The learned trial judge accepted the evidence of Professor Bryant. Her Honour also accepted the evidence of the plaintiff and his wife. The defendant does not challenge the learned trial judge's acceptance of these witnesses as credible and reliable. Rather, the defendant's criticism is directed to the insufficiency of that evidence and the findings of fact based upon it as support for the judgment in favour of the plaintiff. I shall return to this criticism after noting the learned trial judge's findings of fact.

[76] As to the conversations in which the plaintiff's dysfunction was alleged to have been made manifest to his superiors, the learned trial judge made the following findings of fact in relation to conversations with Mr Borger:

> "The plaintiff and his wife gave evidence of several conversations with Mr Borger in Gayndah in which they voiced their concerns. Mr Borger did not deny that these conversations occurred, but he could not remember them. I am satisfied that the conversations did occur, and the fact that they did so is consistent with the plaintiff and Mrs Hegarty's accounts of the emergence and progression of his behavioural, physical and emotional problems. I am satisfied, too, that Mr Borger was an honest witness, who simply could not remember these conversations.
>
> (a) The plaintiff said that on more than one occasion he talked to Mr Borger 'regarding how [he] felt [he was] going in [his] employment at Gayndah'. The first of these was 'a couple of years' into Mr Borger's permanent service there. He told Mr Borger that he was concerned his skill levels were dropping; that he was becoming impatient with other officers, particularly honorary officers; that he was becoming too close to the people in Gayndah which was preventing him being objective and performing his duties as well as he would have liked; and that he needed to 'get out of Gayndah'. He said Mr Borger made no reply.
>
> (b) Mrs Hegarty recounted a conversation she had with Mr Borger at the ambulance station on the day of an ambulance competition in June 1996. She said she told him that she was 'fed up' with the long hours the plaintiff was working, and with the fact that he could not get a transfer.
>
> (c) She gave evidence of another conversation she had with Mr Borger at a fete on the Gayndah Hospital grounds in October 1996. In the time leading up to this conversation, the plaintiff had been working largely by himself, doing relieving work in smaller, nearby centres and Mr Borger had also been away. She told Mr Borger -
>
> 'that [the plaintiff] had been very ill while Sam [Borger] had been wherever he had been. That he

> had been having terrible stomach aches and headaches and nausea, and that the local doctor had thought it was appendicitis'.
>
> She also said that the plaintiff 'was very tired and . . . hadn't had a day off in a long time.' She could not recall Mr Borger's response.
>
> As I have said, Mr Borger had no recollection of specific conversations along these lines; he could recall only that the plaintiff wanted a transfer from Gayndah to Bundaberg to improve his skills and to provide better educational opportunities for his children. It was a recurring theme in the trial that those were the real reasons why the plaintiff wanted a transfer to Bundaberg. By all accounts he was an able and ambitious ambulance officer whose career was not going to advance if he stayed in Gayndah. Further, there would be much better educational opportunities available to his children in a larger centre and one of his children who suffered from asthma would benefit from the milder climate of Bundaberg. I accept that they were among the reasons why he wanted a transfer, and I observe that they were the reasons he gave when he applied for a transfer in about May 1996. But I am satisfied, too, that the plaintiff was experiencing the difficulties he described to the Court and to Mr Borger, and that they were another reason why he wanted to transfer to Bundaberg."[20]

[77] In relation to conversations with Mr Lawler and Mr Jacobson, the learned trial judge accepted the evidence of the plaintiff and his wife reflected in the following passage from her Honour's reasons:

> "The plaintiff was awarded a Queensland Ambulance Service national service medal while he was at Gayndah. It was presented to him at a ceremony there on 17 July 1996, attended by Deputy Commissioner Gerard Lawler, Assistant Commissioner John Jacobson, Sector Co-ordinator Gary Pratt, Mrs Hegarty and others. The plaintiff alleged that there were conversations between him and Mrs Hegarty and these officers. Understandably, he and his wife had more distinct recollections of the particular ceremony than did the visiting officers, who would have attended various similar ceremonies in other centres in the course of their duties. Mr Lawler had no specific recollection of the ceremony or of any conversations he had that day. As I shall describe, Mr Jacobson's evidence differed somewhat from that of the plaintiff and his wife, and Mr Pratt did not give evidence.
>
> (a) The plaintiff gave evidence of a conversation between him and Mr Lawler, a conversation between him and Mr Jacobson, and a third conversation with Mr Lawler and Mr Jacobson in which Mrs Hegarty joined.
>
> (b) Mrs Hegarty gave evidence of a conversation she had with Mr Jacobson before the ceremony, another conversation with him after the ceremony, and a third conversation she had with Mr Lawler, Mr Jacobson and Mr Pratt.

---

20 [2007] QSC 90 at [32] – [33].

(c) Mr Jacobson gave evidence of a conversation with the plaintiff and Mrs Hegarty and Mr Lawler; he could not recall any conversation with the plaintiff alone or with Mrs Hegarty alone.

According to the plaintiff he told Mr Lawler that he 'wasn't coping' in Gayndah, that he was too attached to the people there and unable to 'detach' when treating them, that his skill levels were dropping, and that he was having trouble communicating with other officers, including honorary officers. He said –

> 'I indicated [to Mr Lawler] quite strongly that I needed to get out of Gayndah. I'd been there too long.'

He said Mr Lawler said he-would discuss the matter with Mr Jacobson and see what could be done.

Mr Lawler impressed me as an honest witness, and responsible and professional in his approach to his work. That he had no recollection of the ceremony or of such a conversation is consistent with his usual practice of distancing himself from local issues and leaving them to be dealt with at local level.

The plaintiff gave evidence of repeating the same concerns in his conversation with Mr Jacobson and making the same request for a transfer, and Mr Jacobson saying he would see what could be done. He said that he raised the same issues in the third conversation (with Mr Lawler and Mr Jacobson) and nominated two stations to which he would like to be transferred, Bundaberg being his first choice. He said they promised to discuss it and see what could be done; he said his wife joined the conversation and similar topics were traversed. Although the precise sequence is not clear, their wish to send their children to a high school in Bundaberg was also raised. He said that in one of the conversations he said he would resign if not transferred out of Gayndah by Christmas.

Mr Jacobson made a speech at the ceremony. Mrs Hegarty said he spoke with her before the ceremony, to check details such as the plaintiff's work history, but Mr Jacobson could not remember doing so. She was upset and cried during the ceremony - something both she and Mr Jacobson remembered. She said that after the ceremony she went into the superintendent's office in the ambulance station to fix her makeup and Mr Jacobson followed her. She said she told him that the family was 'at breaking point': that the plaintiff was working very long hours, and that they had been trying to transfer out of Gayndah for quite a while. She said that Mr Jacobson said he understood because he had lost a marriage through overworking. She said she told him that their asthmatic son suffered every winter in the dry climate, and that she wanted her children to attend a Catholic high school, but there was none in Gayndah. She said she thought she had said something like –

> 'Everybody in Gayndah thinks Robert is so wonderful in the job that he does and is so caring and giving ... I don't see any of that when he gets home. There's nothing left for us.'

I am satisfied that Mr Jacobson did check the plaintiff's career details with Mrs Hegarty before the ceremony, despite his having no

recollection of having done so. It was the sort of step someone in his position could be expected to take, and from his perspective there would have been nothing noteworthy in his doing so."[21]

[78] In relation to the inadequacy of the Priority One program, the learned trial judge found:

"The need to train supervisors to recognise signs of stress in staff members was appreciated even before the inception of Priority One. One of the recommendations of the Parliamentary Select Committee of Inquiry into Ambulance Services which reported to State Parliament in December 1990 was –

'64.2 An education programme aimed at promoting a better understanding of the causes and consequences of stress in ambulance work should, be directed to existing operational staff, senior management staff and spouses/partners of ambulance officers.'

A Discussion Document was generated by a working party in February 1991. It recognised education as 'the singularly most important component' of the proposed program, and said it should be directed at -

'(a) Operational Staff at:
- Recruit Level and during ongoing training at the Board Courses.

(b) Controllers/Despatch Room Personnel
(c) Superintendents
(d) Senior Uniformed Officers
(e) Supporting and Ancillary Staff.'

It recognised the need for a mechanism for referrals, for example, to a psychiatrist.

Priority One was intended to provide a framework within which individuals might seek assistance through self referral or alternatively Peer Support Officers or supervisors might recommend assistance based on perceived problems. While performance-related matters and stress-related matters were to be treated as separate issues, where they were identified as related, they were to be addressed individually while acknowledging their connection. Training programs educating the staff about management and prevention of stress were to be formulated, and incorporated in key training areas, particularly induction training, management development, supervisor training and volunteer training.

That Priority One did not meet this educational objective is apparent from the lack of training afforded to the senior officers with whom the plaintiff had contact. It was recognised, too, in the Multi-Method Evaluation and Review of the QAS Staff Support Service 'Priority One Program' published in 2003. The report was produced by a committee chaired by Professor Embelton with the assistance of Dr Shakespeare-Finch. Professor Embelton has been a consultant to the Queensland Ambulance Service since 1994, and he has contributed to workshops and seminars associated with the program and given lectures on 'psychological trauma, implications for trauma

---

21 [2007] QSC 90 at [34] – [40].

> [sic], the area of post traumatic stress disorder' as well as communication. I was unimpressed with his attempt to put a gloss on the report when he said -
>
> > '… we saw this as issues of reinforcement, to reinforce this [training of supervisors], to bring it into much more stronger consciousness and so that - and enhancement of what was already happening. So we were quite aware that it was happening, that there was adequate work being done, however, we wanted to stress this and underline it even more. In any system you can always develop, enhance.'
>
> I am satisfied that at least during the time the plaintiff worked for the Queensland Ambulance Service his supervisors and senior officers did not receive the requisite training."[22]

[79] The learned trial judge found that the plaintiff's PTSD and OCD did not impair his social and occupational functioning until mid-1996. At that time, it might have been susceptible to treatment to the plaintiff's ultimate advantage. Her Honour said:

> "I am satisfied the plaintiff's PTSD was sub-clinical through the early to mid 1990s but that by mid 1996 it was causing clinically significant distress and impairment in his social and occupational functioning. I am also satisfied that had he come to the attention of competent mental health professionals such as psychiatrists and clinical psychologists at that time, a treatment regime directed at what were then psychiatric disorders (as opposed to one directed at the prevention of disorder) would have been implemented at that stage; had that occurred, he would probably not have suffered to the extent he subsequently did, and his long-term prognosis would probably have been better.
>
> I am satisfied too, that his OCD was fully blown at least by then."[23]

[80] The learned trial judge accepted the plaintiff's case that Priority One was deficient because of the absence of training for supervisors to identify signs of psychological dysfunction. Her Honour said:

> "It was a major part of the plaintiff's case at trial that Priority One was deficient as a response to the risk to which he was exposed, because it did not include training supervisors to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, so that they could be referred for clinical psychological assessment and treatment such as CBT.
>
> I am satisfied that none of the plaintiff's supervisors received such training. Mr Scully said that neither Mr Lawler nor Mr Jacobson received supervisor training because of their high rank within the Queensland Ambulance Service. Mr Tighe apparently gleaned some training of this type as part of his training to be a Peer Support Officer, but that was after he had left Gayndah.
>
> In the course of his long career as an ambulance officer Mr Borger was himself exposed to many horrific accident scenes. Even

---

22 [2007] QSC 90 at [131] – [133] (footnotes omitted).

23 [2007] QSC 90 at [111] – [112] (footnote omitted).

> now in his retirement he has disturbing memories of some of them, but he has always been 'able to cope with it'. He clearly regarded it as quite normal for someone who had attended those sorts of scenes to still think about them many years later. Mr Borger impressed me as a compassionate man, and I am sure he would have assisted the plaintiff to obtain help through Priority One had the plaintiff requested it. But in the absence of such a request, he treated distress consequent on exposure to traumatic incidents as simply part of the job they had to do. His failures to recognise the concerns expressed to him by the plaintiff and his wife as flags of possible dysfunction and to suggest to the plaintiff that he speak with a Peer Support Officer or a counsellor are consistent with his not having received relevant training as a supervising officer. The bridging course and the brochures had focussed on self recognition and self referral, and there is no evidence that he received any other training focussing on his role as a supervisor in this respect."[24]

[81] The finding which is the subject of the defendant's principal attack on the appeal is in the following two passages. In the first of these passages her Honour said:

> "I have accepted the evidence of the plaintiff and his wife as to their conversations with Mr Borger. I am satisfied on the balance of probabilities **that even though Mr Borger may not have been concerned about the way the plaintiff performed his work, the cluster of complaints made by the plaintiff was such that a properly trained supervisor in his position would have recognised them as possible signs of stress, and suggested to the plaintiff that he approach Priority One or otherwise be assessed professionally. The matters raised by Mrs Hegarty, if considered in isolation from those raised by the plaintiff, did not bear that quality, but in the context of the plaintiff's complaints, they added to the overall picture presented to Mr Borger, making it an even clearer example of circumstances in which a properly trained supervisor would have been alerted to the possibility of the plaintiffs suffering stress.**
>
> **Similarly, I have accepted the evidence of the plaintiff and his wife as to their conversations with Mr Jacobson and Mr Lawler at the medal ceremony. And again I am satisfied that the cluster of complaints was such that properly trained officers in their positions would have appreciated that these were flags of possible dysfunction, and suggested to the plaintiff that he approach Priority One or otherwise be assessed professionally.**
>
> **I find that the system which the Queensland Ambulance Service had in place did not provide adequately for the training of supervisors to identify signs of dysfunction in personnel regularly exposed to distressing and traumatic experiences, so that they could be referred for psychological assessment and treatment (if necessary).**"[25] (emphasis added)

---

[24] [2007] QSC 90 at [128] – [130] (footnotes omitted).

[25] [2007] QSC 90 at [134] – [136] (footnotes omitted).

[82] The defendant draws attention to the learned trial judge's reference to a "cluster of complaints" and makes the point that no one supervisor was privy to the total cluster of complaints relied on by the plaintiff. The defendant also emphasises the slide in her Honour's reasons from reference to "flags of possible dysfunction" to a finding of a failure by the defendant to provide "adequately for the training of supervisors to identify signs of dysfunction".

[83] The learned trial judge, having reviewed the evidence concerning conversations between the plaintiff and his wife on the one hand, and the plaintiff's superior officers on the other, said:

> "The conversations which should have alerted senior officers to the possibility of dysfunction took place in 1996, and the plaintiff's chronology of his emerging symptoms (which I have accepted …) indicates significant functional impairment by that time. In all the circumstances, I infer that had one of the plaintiff's supervisors tapped him on the shoulder and suggested he approach Priority One or otherwise be professionally assessed at about that time, he would have done so. I am not satisfied on the balance of probabilities that he would have done so at an earlier time.
>
> The counsellors retained by Priority One were hand picked, based on expert advice, for their suitability and knowledge in managing the needs of ambulance personnel. I infer that had the plaintiff been referred to or approached one of them, he would have been professionally and competently assessed and referred to treating clinicians, as in fact occurred when he consulted Mr Clarke. The earlier an appropriate treatment regime had been implemented, the greater would have been his chance of not suffering to the extent he did, and the greater would have been his chance of a better long-term prognosis: this was the thrust of all the expert evidence, and particularly that of Dr Mulholland, which I have set out …"[26]

[84] In relation to the related issues of breach of duty and causation, the learned trial judge concluded:

> "I am satisfied that if they had been given appropriate training, Mr Borger, Mr Lawler and Mr Jacobson would have been able to recognise signs of possible dysfunction in the plaintiff in 1996, that they would have done so, and that they would have suggested to him that he approach Priority One or otherwise be professionally assessed. I am further satisfied that the plaintiff would have taken up such a suggestion, and that he would have been referred to clinicians for treatment, with the chance of a better outcome than has in fact been achieved."[27]

[85] The learned trial judge summarised her conclusion in relation to the defendant's liability for the plaintiff's condition in the following terms:

> "By mid 1996 the plaintiff's OCD and his PTSD had both developed beyond the sub-clinical to the point of causing clinically significant impairment in his social and occupational functioning warranting professional intervention in the nature of treatment rather than

---

26 [2007] QSC 90 at [141] – [142] (footnote omitted).

27 [2007] QSC 90 at [150].

> prevention. By that time he had sustained recognisable psychiatric injury.
>
> I am satisfied that the plaintiff's loss, namely the loss of the chance of a better outcome, was caused by his employer's negligence. I am satisfied, too, that his loss was sustained by mid 1996."[28]

The argument on appeal

[86] Mr North SC, who appeared with Mr O'Sullivan on behalf of the defendant, submitted that there was no sufficient basis for the learned trial judge's conclusion that training of the plaintiff's superiors along the lines recommended by Professor Bryant would have made any difference to the plaintiff's outcome. According to Mr North's principal submission, as stated in the defendant's written outline, the learned trial judge did not "descend to the detail of the conversations" between the plaintiff and his wife, on the one hand, and Mr Borger, Mr Lawler and Mr Jacobson, on the other, to identify what was said in the plaintiff's cluster of complaints:

> "[which] were the words or matters that ought to have put a reasonable supervisor who had been properly trained on notice of the possibility of some psychiatric illness or pathology … nowhere does her Honour say what in the conversations ought to have put any one of the gentlemen concerned on notice that they ought to recommend to Mr Hegarty that he approach Priority One or seek help or assistance from Priority One or a mental health professional."

[87] To the extent that the learned trial judge seems to have regarded the "cluster of complaints" as critical to her conclusion that the defendant had failed adequately to train the plaintiff's superiors to identify signs of dysfunction, the defendant makes the point that no one officer was privy to the total cluster of complaints. And it was no part of the plaintiff's case that the defendant was duty-bound to keep a dossier of complaints by employees in order to decide when and whether they might require an invitation to seek psychological assessment.

[88] The defendant also advanced a further submission that no sufficient basis was established to support the conclusion that there was a system, recognised as efficacious, which a reasonable employer would have adopted to train its supervisors. In my view, it is not necessary to resolve this subsidiary argument.

[89] In my respectful opinion, there is much force in the defendant's principal submission. Bearing in mind the plaintiff's proficiency in his duties, his ambition, his apparent physical problems and his reasonable requests for a transfer from Gayndah, it is difficult to see how a layman in the position of any of the plaintiff's supervisors, even one trained in the manner suggested by Professor Bryant, could have been alerted to discern in the plaintiff's cluster of complaints a "signal" that the plaintiff was not coping with the stresses of his job. It is even more difficult to see the basis on which the defendant's officers could have been instructed to conclude that the only reasonable response to what the plaintiff actually said to his supervisors would have been advice to seek psychological assessment and assistance.

---

[28] [2007] QSC 90 at [153] – [154] (footnote omitted).

[90] In terms of Professor Bryant's evidence of the signs that might warrant intervention, there was no explicit indication from the plaintiff or his wife that the plaintiff was suffering from stressful experiences in the course of his employment. Indeed, it is clear that, although the plaintiff's evidence was that he was suffering emotional disturbance and nightmare flashbacks, he made no mention of this to any of his superior officers. His reasons for suppressing this information no doubt seemed good to him at the time. What he did complain about was directly relevant to issues other than his dysfunction.

[91] It is true that the plaintiff did say that he believed his skill levels were dropping, but this was not suggested to have resulted in any deficit in performance. Further, it seems to have been put in terms of a concern by the plaintiff with the nature of his service in Gayndah and his desire for a transfer to a bigger centre where his skill levels could improve. His superiors could reasonably have understood him as stating his desire to work in a more challenging environment. There was no suggestion at all that he was not coping with the demands of his job. Indeed, he was awarded a medal for exemplary service at the very time when it is now suggested that his superior officers should have somehow gleaned that he felt that he was not coping with the demands of his job.

[92] It is also true that the plaintiff did say that he was irritable with other officers, but, once again, this seems to have been put on the basis that the plaintiff was tired of service in Gayndah. The plaintiff's superiors had no reason to think that this was not a perfectly reasonable attitude on the part of a proficient and ambitious officer whose family were expressing a desire to live elsewhere.

[93] In relation to the plaintiff's wife's conversation with Mr Jacobson on the day of the medal presentation to the plaintiff, it is important to note that her complaint was that the family was suffering. That complaint is the sort of complaint which might be made by the spouse of any employee who is wholeheartedly committed to his or her career. It is also the sort of complaint that might be made by a spouse of an employee who has performed a long period of service in a small town. Most importantly, the plaintiff's wife did not in any way suggest that the plaintiff was suffering problems with stress, or, indeed, any problems of a psychological nature. That was hardly surprising because it was not until 1998 or 1999 that she herself came to an appreciation that the plaintiff was suffering problems of that kind. The crucial point for present purposes is that there was nothing in the conversation between the plaintiff's wife and Mr Jacobson which would have conveyed to him that the plaintiff's complaint related to anything other than an issue of industrial relations.

[94] Whatever a mental health professional may have intuited from an interview with the plaintiff had the plaintiff presented as a patient, it is difficult to see what it is that should have served to alert the plaintiff's supervisors that the plaintiff was suffering some form of psychiatric dysfunction. The plaintiff did not present to his supervisors as someone who was struggling to cope: rather, he presented to them as a very competent and ambitious officer who was making a request for a transfer from rural service to a more demanding role.

[95] In *Koehler v Cerebos (Australia) Ltd*,[29] it was said of the unsuccessful claimant that:

> "her complaints may have been understood as suggesting an industrial relations problem. They did not suggest danger to her psychiatric health. When she did go off sick, she (and her doctor) thought that the illness was physical, not psychiatric. There was, therefore, in these circumstances, no reason for the employer to suspect risk to the appellant's psychiatric health."

The same observations are appropriate in this case. While the special nature of the work of ambulance officers must make line commanders alert for signs of dysfunction, a complaint which is readily understood as "an industrial relations problem" is not apt to warrant a response appropriate to a perceptible psychiatric problem.

[96] I am, with respect, unable to accept that the plaintiff's supervisors would have discerned that the state of the plaintiff's mental health was precarious if they had been given explicit instruction to recognise the signs of trauma-related stress in others. The thrust of the plaintiff's "cluster of complaints" was directed to the pursuit of a reasonable demand for a transfer for perfectly understandable reasons to do with the advancement of his career and the improvement of his family life. Having regard to what was said, a layman, even one sensitised by the kind of training of which Professor Bryant gave evidence, could reasonably have regarded the plaintiff's "cluster of complaints" as raising reasonable demands for preferment in the service, not as exhibiting signs of psychological dysfunction which called for advice to seek psychological assessment and treatment.

[97] In my respectful opinion, the evidence did not permit the learned trial judge to find that the discharge of the defendant's duty to take reasonable care for the mental health of the plaintiff required the defendant to ensure that the plaintiff's superior officers regarded the complaints of the plaintiff and his wife as warranting an invitation to the plaintiff to seek psychological assessment and treatment. It may be accepted that a line commander of an ambulance officer must be vigilant for signs of dysfunction in ambulance officers because of the regular exposure of such officers to stressful situations, but that vigilance must respect, and be exercised in a context which recognises, the dignity of individual employees and their entitlement to privacy, at least where the only signs of possible dysfunction are equally explicable as the assertion of legitimate grievances about the terms and conditions of employment, and there is no suggestion that the officer's performance at work has been or is likely to be adversely affected in any way, and the employee chooses not to convey information which would clearly signal a level of psychological distress.

[98] To illustrate the unreasonableness of the plaintiff's case on this point, one need only consider, without the bias of litigious hindsight, whether a reasonable response by Mr Lawler, Mr Jacobson and Mr Borger when confronted by the plaintiff's demands was to treat them at face value as a claim for an improvement in the conditions of his employment. Having regard to the communications which actually occurred, including the plaintiff's application of 8 May 1996, a reasonable response would have been that the plaintiff's demands would be considered to see what could be done. I am, with great respect, unable to see how a supervisor in their position

---

[29] (2005) 222 CLR 44 at 59 [41].

would have "recognised what they were told by the plaintiff and his wife as possible signs of stress" warranting a suggestion that the plaintiff seek psychological assessment and counselling as the only reasonable response to what was being said. A properly trained supervisor in their shoes could reasonably have considered a suggestion that the plaintiff should seek assessment and treatment for psychological dysfunctionality as unnecessary and, indeed, a quite inappropriate affront to a valued officer of high proficiency whose reasons for seeking a transfer were perfectly reasonable.

[99] From the plaintiff's perspective, it may be that, in accordance with the finding in favour of the plaintiff made by the learned trial judge, the plaintiff would have "seen the light" and embraced that suggestion. But from the perspective of any reasonable supervisor in the shoes of Mr Borger or Mr Lawler or Mr Jacobson, even one sensitised by the advice of Professor Bryant, a reasonable evaluation of the situation would not have led to an appreciation that any of the plaintiff's demands were the occasion for making such a suggestion.

[100] Accordingly, in my respectful opinion, there was no sufficient basis in the evidence for the conclusion that, if the defendant's supervisors had been trained as Professor Bryant suggests, and if any one of them had been aware of the "cluster of complaints" made by the plaintiff and his wife, they would have responded in the manner which would have been necessary to making good the theory of the plaintiff's case. None of the statements made by the plaintiff or his wife to Mr Borger or Mr Jacobson or Mr Lawler was apt to alert any one of those officers to the distress from which the plaintiff was suffering. That is hardly surprising given that the plaintiff had been at pains not to disclose his emotional turmoil. It has been seen that the learned trial judge held that it was the "cluster of complaints" that should have "raised flags" of dysfunction which might not have been raised by the complaints considered individually. The first difficulty with this approach is that none of the plaintiff's superiors was privy to the totality of the cluster of complaints. I have already observed that it was no part of the plaintiff's case that the defendant was duty-bound to keep and update a dossier of the plaintiff's complaints so that the totality of such complaints could be reviewed from time to time in order to assess the plaintiff's mental health. As I have said, none of the complaints was an unequivocal sign of dysfunction as opposed to a reasonable request for an improvement in his working conditions. How the sum of such complaints might reasonably be taken to have greater significance than each of them as an indicator of dysfunction eludes me. My difficulty in this regard is not resolved by Professor Bryant's ready embrace of the learned trial judge's leading question bearing in mind his clear statements that, to warrant an invitation to seek assessment and treatment, the signs of dysfunction must be clear and unequivocal. The retreat from that clearly stated position involved in Professor Bryant's assent to her Honour's leading question reflects a failure to recognise the good reasons for circumspection on the part of superior officers in dealing with industrial or personnel relations issues involving reasonable grievances by employees as if they were signs of mental illness.

[101] The plaintiff's case must fail on the basis that, on the balance of probabilities, even if the defendant had adopted the system of training advocated by the plaintiff, there is no sufficient basis for a finding that the defendant's supervisors would have concluded from their discussion with the plaintiff and his wife that the only reasonable course was to advise the plaintiff to seek psychological assessment and

treatment. As Brennan J said in *Sellars v Adelaide Petroleum NL,*[30] because it cannot be "predicated of an hypothesis in favour of causation of a loss that it is more probable than competing hypotheses denying causation, it cannot be said that the plaintiff has satisfied the court that the conduct of the defendant caused the loss."

[102] The plaintiff's case fails because the likelihood is that, in truth, supervisors trained in accordance with Professor Bryant's evidence would not, in the circumstances of this case, have intervened in the manner required to make good the plaintiff's case of negligence.

Breach of statutory duty

[103] In *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2),*[31] this Court held that s 28(1) of the *Workplace Health and Safety Act 1995* (Qld) conferred a civil cause of action upon employees injured as a result of a breach of that provision. Section 28(1) provides: "An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work."

[104] Relevantly for present purposes, s 27 of the Act sets out how the obligation imposed by s 28(1) might have been discharged where there was no applicable compliance or advisory standard: an employer "may choose any appropriate way to discharge the obligation and discharges the obligation only by taking reasonable precautions and exercising proper diligence to ensure the obligation is discharged."[32]

[105] In *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2),*[33] this Court said that s 28(1):

> "adds to the common law of negligence by placing the onus on employers to establish [the matters of defence referred to in s 26, s 27 and s 37 of the Act], once the employee has proved the employer breached the obligation to ensure the workplace health and safety of the employee, thereby causing injury to the employee. "

[106] In the present case, the plaintiff did not, in my respectful opinion, prove that the defendant caused the plaintiff injury by a breach of the obligation to ensure the workplace health and safety of the plaintiff. As a result, there is no occasion to consider whether the defendant met the onus of proof of the matters of defence referred to in s 27 of the Act.

Conclusion and orders

[107] In my respectful opinion, the judgment in favour of the plaintiff cannot be sustained. The appeal should be allowed and the judgment below set aside. The plaintiff's action should be dismissed.

[108] The plaintiff must pay the defendant's costs of the action and of the appeal to this Court to be assessed on the standard basis.

[109] **DOUGLAS J**: In *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42 Gummow J emphasised at [43] that all duties of care are to be discharged by the exercise of reasonable care and do not impose a more stringent or onerous burden;

---

30 (1994) 179 CLR 332 at 367 – 368.
31 [2001] 1 Qd R 518.
32 [2001] 1 Qd R 518 at [36].
33 [2001] 1 Qd R 518 at 532 – 533.

see also his Honour's reasons at [51]. The Priority One program was clearly a serious attempt to discharge the obligations placed on the defendant as an employer in this context. Even if the plaintiff's superiors should have been trained more carefully to recognise in certain circumstances that ambulance officers needed to be tapped on the shoulder and advised to undergo psychological counselling, the fragmentary evidence relied on by the plaintiff here was readily understood as a complaint referable to the exigencies of his employment in a small country town. Even the tearful reaction of his wife when the plaintiff was awarded a medal on 17 July 1996 focused on the effect of his working long hours on their family rather than on his own psychological condition. The significant changes in his personality became apparent after he had transferred to Bundaberg. His and his wife's complaints in 1996 were not such as to suggest that his employer should have referred him for psychological assessment or treatment at that time.

[110] Judging the matter prospectively and not by retrospectively asking whether the defendant's actions could have prevented the plaintiff's injury,[34] requires the conclusion that the plaintiff has not shown that the symptoms he displayed in 1996 should have elicited the further response from the defendant for which he argued.

[111] Accordingly, I agree with the reasons of Jerrard JA and Keane JA and the orders proposed by Keane JA.

---

[34] *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42 at [65]-[69].