SUPREME COURT OF QUEENSLAND

CITATION:	*Graham v State of Queensland* [2022] QSC 228
PARTIES:	**DAVID PHILIP GRAHAM** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	SC No. 1131 of 2022
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	20 October 2022
DELIVERED AT:	Rockhampton
HEARING DATE:	13 September 2022
JUDGE:	Crow J
ORDER:	**It is declared that the Notice of Claim for Damages dated 29 April 2022 complied with s 275 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – NOTICE OF INJURY – GENERALLY – where the applicant gave a Notice of Claim for Damages to his employer alleging psychiatric/psychological injury arising out of his employment – where the respondent claims that the Notice of Claim for Damages is not a compliant notice due a failure by the applicant to provide particulars of the "event" pursuant to regulation 120 of the *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld) – whether the Notice of Claim for Damages is compliant with s 275 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld). *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 31, s 275 *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld), reg 120 *Andersen v Aged Care Employers Self Insurance* [2011] QSC 101, cited *Callaghan v WorkCover Queensland* [2000] QSC 125, considered. *Koehler v Cerebos (Australia) Limited* (2005) 222 CLR 44; (2005) 79 ALJR 845; [2005] HCA 15, considered. *Kozarov v Victoria* (2022) 96 ALJR 405; [2022] HCA 12,

considered.
Scott v K & S Freighters [1999] QSC 427, applied.

COUNSEL: L Kennedy for the applicant
S J Deaves KC for the respondent

SOLICITORS: Morton & Morton Solicitors for the applicant
Crown Law for the respondent

[1] On 8 January 2018, the applicant, Mr Graham, commenced employment as a corrective services officer at Maryborough Prison. On 16 October 2019, Mr Graham was transferred into the correctional response team at the prison. On 2 April 2020, Mr Graham commenced suffering from psychiatric symptoms, yet he continued to work as a response officer. It would appear his symptoms worsened, and he ceased work on 21 March 2022.

[2] On 3 May 2022, Mr Graham gave a Notice of Claim for Damages[1] pursuant to s 275 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (WCRA) to his employer, the State of Queensland and to its insurer, WorkCover Queensland. The Notice of Claim for Damages, which was in the approved form, nominated the event causing the injury as occurring over a period of time from 1 November 2019 and 1 December 2020. In Question 40 of the Notice of Claim for Damages which requires a complete description of the details of the event resulting in the injury, the notice contained the following:

> "The claimant was a member of the correctional response team on a permanent basis. The claimant transferred into the correctional response team on or about 16th October 2019. The role of the correctional response team is to be the first responders to critical and acute prisoner situations. There was no rotation in and out of the correctional response team. Prior to the commencements [sic] of his role as a tactical response officer the claimant received approximately 3 days training primarily in physical fitness."

[3] In response to Question 42 which asked, "Was the event witnessed?" Mr Graham answered in the affirmative and advised, in respect of the identity of the witnesses, that they were "to be advised after disclosure".

---

1 Copy contained within Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 2-14.

[4] Mr Graham nominated the injury he suffered as being a post-traumatic stress disorder. Question 55 of the Notice of Claim for Damages required provision of "the full particulars of any negligence alleged against the worker's employer". The claimant alleged:

> "The employer was negligent in:
>
> (1) Failing to rotate the claimant out of the correctional response team on a timely basis to avoid chronic stress loading;
>
> (2) Failing to provide psychological debriefing after each conflict situation;
>
> (3) Failing to implement a system of monitoring the claimant's exposure to conflict and subsequent stress reactions;
>
> (4) Failing to train or adequately train the claimant in relation to his duties in the response team;
>
> (5) Failing to train or adequately train the claimant in relation to recognising and reporting symptoms and reactions to chronic stress loads."

[5] Mr Graham's solicitors, Morton & Morton, prepared a letter of 3 May 2022 enclosing not only Mr Graham's Notice of Claim for Damages, but a further 26 documents.[2] The second document was the authority to obtain information and documents dated 29 April 2022, the third document was the statutory declaration dated 29 April 2022, the fourth document was a copy of a letter to Mr Graham's employer serving the Notice of Claim for Damages dated 3 May 2022. Documents five to seven were records of medical practices. Document eight was the report of Dr Joseph Mathew, psychiatrist, dated 24 March 2022. Documents nine to 27 were financial and income tax documents.

[6] In his report of 24 March 2022,[3] Dr Joseph Mathew, psychiatrist, diagnosed Mr Graham as suffering from post-traumatic stress disorder and major depressive disorder (severe) with melancholic features. On page 5 of his report, Dr Mathew opined that Mr Graham was unfit for any form of work or study and would be unable to engage in paid employment for the foreseeable future. Dr Mathew then set out several reasons as the basis of his opinion. The reasoning for the basis of the opinion with respect to unfitness for work is considerable. The same cannot be said

---

2 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 15-17.
3 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 18-30.

in respect to the basis of any opinion as to causation of the two injuries identified by Dr Mathew.

[7] Dr Mathew opines that Mr Graham has suffered from post-traumatic stress disorder and major depressive disorder (severe) with melancholic features but there is no opinion as to why his conditions were a consequence of any aspect of Mr Graham's work. Indeed, the question asked on page 6 of the report "1. Your diagnosis of any psychiatric injury suffered by our client as a consequence of the accident…" was not apt to describe the over period of time claim which Mr Graham seemed to be formulating in his Notice of Claim for Damages.

[8] On page 2 of Dr Mathew's report, the following is recorded:

> "**Mr Graham was exposure to trauma during his course of employment as a Corrections Officer**
>
> […]
>
> The tactical response unit had regular duties which included supervising the movement of prisoners. The unit was also summoned when there was a crisis or emergency. Mr Graham's unit had to manage prisoners who had harmed themselves and who were discharging blood. At other times, prisoners would be damaging the unit with metal bars or other objects. He was required to respond to violence. Sometimes the event would involve only several prisoners. At other times, his unit would be overwhelmingly outnumbered. At these times, they were required to deploy gas weapons. Prisoners would attack in whatever way possible, sometimes removing his gas mask. Mr Graham cited a stressful event in which the prisoners accessed the roof of the prison.
>
> Mr Graham was regularly threatened by prisoners. Prisoners would threaten to harm his family. It was known that prisoners' associates would sometimes follow staff home or place GPS trackers on their vehicles. Mr Graham did not know any co-workers who had been attacked outside of work."

[9] Absent from Dr Mathew's report is any discussion of any measures suggested which the employer could have taken reasonably to avoid Mr Graham suffering from his injury. This is not unexpected as the report was a quantum report, not a liability report.

[10] Following service of the Notice of Claim for Damages on 3 May 2022, the assistant Crown solicitor, Mr Zappert, responded on 6 May 2022 with a detailed five-page letter.[4] Relevantly, on page 2 of the letter, it is recorded that:

> "My client instructs that it is not satisfied your client's notice of claim dated 29 April 2022 complies with the WCRA.
>
> […]
>
> My client identifies the following aspects of non-compliance in your client's notice of claim:

Item	**Issue**	**Reason for non-compliance**
1.	Question 40	The Claimant has not provided adequate particulars of the events.
2.	Question 52	The Medical Assessment Tribunal report, on page 5, refers to the claimant working on cars at home and selling the cars for profit. We require details of any income the claimant is deriving from this work and evidence of such income."

[11] On 11 May 2022, Morton & Morton on behalf of Mr Graham responded that the matters identified as Items 1 and 2 relating to Questions 40 and 52 were not compliance issues and asked again for the respondent to consider its position and advise whether the Notice of Claim for Damages was compliant.[5] Importantly the letter also recorded "Should you wish to make requests for further information then our client will co-operate in providing such information as he is able".

[12] On 1 June 2022, the assistant Crown solicitor responded:[6]

> "We require your client to provide the description of the facts of the circumstances surrounding the claimant's injury, pursuant to section 120 of the *Workers' Compensation and Rehabilitation Regulation* 2014 by way of declaration from your client. The following response is broad and vague and does not describe the facts of the circumstances:
>
> […]

---

4 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 31-35.
5 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 page 36.
6 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 37-38.

> The claimant's allegations at Question 52 allege the employer failed to "*provide psychological debriefing after each conflict situation*". Which conflict situations is the claimant referring to?
>
> In respect to Question 52, the claimant is required to also provide details of any self-employment and income details."

[13] Morton & Morton did respond on 22 July 2022, enclosing a statutory declaration from Mr Graham addressing the Question 52 matters,[7] that is the allegation of working in rebuilding and selling cars. That issue was therefore resolved. The issue in respect of Question 40 was not, however, resolved with Morton & Morton writing on 22 July 2022:

> "In relation to Q40 the answer is sufficiently particularised to allow your client to appreciate the claims made against it.
>
> In the fullness of time once your client has made proper disclosure then our client may be in a position to particularise the incidents (and will of course do so in any Court pleading) however our client's Notice of Claim sufficiently explains the allegation of breach of duty against your client."

[14] It would appear that there were several discussions between solicitors acting on behalf of the applicant and respondent, however, there is no evidence as to the subject of those conversations. The discussions prompted a further letter from Morton & Morton dated 18 August 2022 which provided, *inter alia*:[8]

> "We refer to the above matter and understand from our conversation with Ms Catford this morning that notwithstanding our letter of 22nd July 2022 your client is not prepared to accept that the Notice of Claim is compliant until the particulars requested in relation to the various incidents attended by our client had been provided.
>
> Our view is that the particulars requested are not matters of non-compliance. Further our client is prepared to provide the particulars once your client discloses the records in relation to each and every incident attended by our client in his role as a tactical response officer.
>
> Can we suggest that to avoid the matter being determined by the Court we proceed on the following basis:-
>
> 1. Your client agrees that for the purpose of the pending statute of limitation date the Notice of Claim is compliant; and

---

7 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 39-40.
8 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 41-42.

2. That our client provide to your client the requested particulars within 21 days of disclosure by your client of all of the relevant incident reports.

It is clear from the Notice of Claim that our client's claim does not arise from any one incident but in his role as a tactical response officer attending numerous incidents during the course of his employment. The case against your client can be easily understood without reference to each of the incidents attended by our client in his role as a tactical response officer.

Furthermore without your client's disclosure our client is unable to provide a Statutory Declaration in relation to the particulars requested because:-

i. He attended an incident at least daily during the course of his employment as a tactical response officer;

ii. Our client has suffered from a psychiatric injury the consequences of which are that it is difficult for him to recall each and every incident he attended in his role as a tactical response officer (because one of the symptoms of the psychiatric injury is impaired memory) and further by attempting to recall each and every incident it can only be damaging to our client's psychiatric health.

On the other hand the particulars requested by your client are already within its knowledge. Each and every incident that our client attended as a tactical response officer is known and recorded by your client. Indeed on the face of our client's Notice of Claim your client is required to disclose those documents."

[15] The Crown solicitor did not agree to the proposal contained in the letter of 18 August 2022, confirmed its view that the Notice of Claim was non-compliant and pointed to reg 120 of the *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld) (WCRR) as to what was required on the Notice of Claim.[9] The Crown solicitor then again referred to the information provided in Question 40 of the Notice of Claim for Damages and stated that it did not provide requisite details. The Crown solicitor then said:

> "The above description does not provide the requisite details. The types of incidents that your client attended could have been varied in nature, duration and intensity. It is not up to my client to make a determination as to which of any are relevant to the vague allegations contained in the notice. If your client suggests that particular incidents were relevant, then those should be particularised so that my client can identify them and disclose material required under section 279. If no particular incident was relevant, we question the

[9] Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 pages 43-44.

> need to disclose incident specific documents. The employer will not be able to provide disclosure under the WCRA until the claimant identifies the events upon which he relies."

[16] On 5 September 2022, Morton & Morton on behalf of the applicant stated:[10]

> "It is clear from our client's response to question 40 of our client's Notice of Claim for Damages that he does not allege that any specific incident or group of incidents are stressors. It is not our client's claim that any specific incident our client attended in his role as a Tactical Response Officer was a stressor that caused his injury.
>
> It is therefore not necessary for our client to identify isolated matters to the best of his recollection when in fact it is the totality of his role as a Tactical Response Officer that is causative of his injury.
>
> Our client has not made a vague allegation. Rather our client has made a very specific allegation and that allegation requires your client to disclose each and every incident that our client was required to attend in his role as a Tactical Response Officer. Disclosure is not determined by the convenience of your client but rather section 279 of the *Workers' Compensation and Rehabilitation Act* 2003.
>
> Once disclosure has been completed, our client will be in a position to swear a statutory declaration listing all of the incidents that he was required to attend. However, it seems to us that such statutory declaration does not advance the claim any further or provide any further information to your client in respect of the nature of his claim."

[17] On 6 September 2022, Mr Graham filed an originating application seeking a declaration that he has complied with s 275 of the WCRA in respect of an over period of time injury sustained between 1 November 2019 and 1 December 2020 whilst employed by the respondent by delivering a Notice of Claim for Damages declared on 29 April 2022.

[18] Both parties accept, as it was put by Demack J in *Callaghan v WorkCover Queensland*[11] "The dominant purpose behind the notice of claim is to facilitate settlement of claims". In *Callaghan's* case, Demack J did declare the Notice of Claim given by the applicant to be a complying Notice of Claim in circumstances where there were three distinct events included in the one Notice of Claim. As there were three separate events, causation was a live issue and Demack J accepted in respect of the complex question of causation in that case the applicant's description

---

10 Affidavit of Adrian Scott Land filed 7 September 2022 at Exhibit ASL-01 page 46.
11 [2000] QSC 125 at [21].

of each incident causing 15% impairment as compliant as "the answer given is the best a layman can do in the circumstances, and fairness compels its acceptance".[12]

[19] The respondent refers to the decision of Douglas J in *Scott v K & S Freighters*.[13] Douglas J said of the then-new workers' compensation scheme and after referring to s 280 of the *WorkCover Queensland Act* 1996 (Qld) and s 74 of the *WorkCover Queensland Regulation* 1997 (Qld):[14]

> "This legislation differs markedly from earlier Workers' Compensation legislation in that it requires that a system of lodging a claim and offers and rehabilitation be gone through before an action can be commenced. The whole scheme is designed to encourage settling of workers' actions rather than prolonging compensation by unnecessary recourse to the Courts."
>
> (emphasis added)

[20] Douglas J then made reference to Schedule B giving information as to particulars in the Notice of Claim. Douglas J referred to the information provided in Schedule B:[15]

> "It is true that the claim as forwarded by the claimant does not specify particulars in the way in which they might be specified as in a statement of claim. However, it is clear to me from a reading of schedule B which I set out earlier, that the claimant is making at least the following allegations by way of particulars against the employer.
>
> 1. That he was inexperienced in the driving of a straddle lift crane and that the employer was aware of that;
> 2. That the handbrake was badly designed in that it was easy to mistakenly put in the wrong position;
> 3. That the straddle crane had a tendency to creep forward even when the handbrake was engaged;
> 4. That the employer had been made aware of this problem and had not fixed it or alternatively, an employee, one Tonkin, was asked to repair it and did not do so properly or at all; and
> 5. That there was no system of recording reports about safety matters at the employer's workplace to ensure that safety was maintained.

---

12 [2000] QSC 125 at [27].
13 [1999] QSC 427.
14 [1999] QSC 427 at 2.
15 *Scott v K & S Freighters* [1999] QSC 427 at 5 - 6.

> In my view in a document such as this a claimant is not required to particularise the particulars required by schedule B in the same way as those particulars might be given in a Court document. He is, however, required to set out what occurred so that the employer can readily ascertain what the nature of the claim is against him.
>
> In my view what was set out by this claimant in Schedule "B" fulfills that requirement. Indeed a cursory look at the rest of the document reveals that he claims to have completed only eight years of formal education and is "semi-illiterate" (sic)."

[21] Although guidance may be had from the decisions of Demack J in *Callaghan* and Douglas J in *Scott*, it is important to appreciate that the legislative requirements have changed since those decisions. In particular, s 74 of the *WorkCover Queensland Regulation* 1997 (Qld), required a s 280 Notice of Claim for Damages to include under reg 74(1)(b) full particulars of the event including:

> "(ii) details of the facts as the claimant understands or recalls them to be of the circumstances surrounding the event
>
> […]
>
> (v) full particulars of negligence alleged against the claimant's employer and any other party upon which the claim is based."
>
> (emphasis added)

[22] The current provision is s 275 of the *WCRA* which provides:

> "**275 Notice of claim for damages**
>
> (1) Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period mentioned in section 302(1).
>
> (2) The claimant must—
>
> (a) give the notice of claim in the approved form to the insurer at the insurer's registered office; and
>
> (b) if the worker's employer is not a self-insurer, give a copy of the notice of claim to the worker's employer.
>
> (3) The notice must include the particulars prescribed under a regulation.
>
> (4) The claimant must state in the notice—
>
> (a) whether, and to what extent, liability expressed as a percentage is admitted for the injury; or
>
> (b) a statement of the reasons why the claimant can not admit liability.

(5) Any statement made by the claimant in the notice that is in the claimant's personal knowledge must be verified by statutory declaration.

(6) The notice must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement can not yet be made.

(7) The notice must be accompanied by the claimant's written authority allowing the insurer to obtain information, including copies of documents relevant to the claim, and in the possession of—

(a) a hospital; or

(b) the ambulance service of the State or another State; or

(c) a doctor, provider of treatment or rehabilitation services or person qualified to assess cognitive, functional or vocational capacity; or

(d) the employer or a previous employer; or

(e) persons that carry on the business of providing workers' compensation insurance, compulsory third party insurance, personal accident or illness insurance, insurance against loss of income through disability, superannuation funds or any other type of insurance; or

(f) a department, agency or instrumentality of the Commonwealth or the State; or

(g) a solicitor, other than where giving the information or documents would breach legal professional privilege.

(8) The notice must also be accompanied by copies of all documents supporting the claim including, but not limited to—

(a) hospital, medical and other reports relating to the injury sustained by the worker, other than reports obtained by or on behalf of the insurer; and

(b) income tax returns, group certificates and other documents for the 3 years immediately before the injury supporting the claimant's claim for lost earnings or diminution of income-earning capacity; and

(c) invoices, accounts, receipts and other documents evidencing the claimant's claim for out-of-pocket expenses; and

(d) for a claimant other than a worker with a terminal condition or a dependant—the notice of assessment for the injury sustained by the worker."

(emphasis added)

[23] Section 31 of the WCRA which defines "event":

> "**31 Meaning of *event***
>
> (1) An *event* is anything that results in injury, including a latent onset injury, to a worker.
>
> (2) An *event* includes continuous or repeated exposure to substantially the same conditions that results in an injury to a worker.
>
> (3) A worker may sustain 1 or multiple injuries as a result of an event whether the injury happens or injuries happen immediately or over a period.
>
> (4) If multiple injuries result from an event, they are taken to have happened in 1 event."

[24] Regulation 120 of the WCRR provides:

> "**120 Particulars of event**
>
> A notice of claim must include the following—
>
> (a) the date, time and place of the event;
>
> (b) the claimant's description of the facts of the circumstances surrounding the worker's injury;
>
> (c) the names and addresses of all witnesses to the injury, and their relationship, if any, to the worker;
>
> (d) the name and address of any person on behalf of the claimant's employer to whom the claimant reported the injury and the details of their employment;
>
> (e) the full particulars of the negligence alleged against the claimant's employer and any other party on which the claim is based;
>
> (f) if a party other than the claimant's employer is involved—
>
> (i) the liability expressed as a percentage that the claimant holds the other party responsible; and
>
> (ii) details of the notice of claim given to the party."
>
> (emphasis added)

[25] When comparison is made between reg 120 of the 2014 regulations and s 74(1)(b) of the 1997 regulations, it may be observed that the requirement for full particulars of the negligence alleged is required by s 120(e) and s 74(1)(b)(v) is the same. Also, both reg 120(b) and s 74(1)(b)(ii) require a statutory focus upon the claimant's understanding or recollection of the facts and circumstances. However, reg 120(b)

requiring the claimant's description of the facts and circumstances surrounding the worker's injury is a substantially lesser requirement than that required by s 74(1)(b)(ii) of a claimant being required to include full particulars of the "event" including "details" of the facts as the claimant understand or recalls them to be of the circumstances surrounding the event.

[26] It is also to be appreciated that there is a distinction between the word "event" and the word "injury" in the WCRA as is made plain by s 31 and the extended definition of injury in s 32. The omission of the word "event" (from s 74(1)(b)(ii)) and insertion of the word "injury" (in reg 120(b)) is significant.

[27] As explained by Dalton J in *Andersen v Aged Care Employers Self Insurance*[16] at [23]:

> "[23] The *WCRA* defines "event" as, "anything that results in injury" – s 31(1); "injury" as, "personal injury arising out of, or in the course of, employment" – s 32(1), and "impairment" as, "loss of efficient use of any part of a worker's body" – s 37. An injury is not the means by which damage is inflicted, but is the effect on the person of the worker of an event, as can be readily seen when the schedules to the *WCR Regulation* are perused. In common parlance one might speak of being injured by lifting a heavy load. But in terms of the *WCRA* definitions, lifting the heavy load is the event, the injury is what results from that, say a back strain."

[28] King's Counsel for the respondent points to a number of difficulties, inconsistencies or contradictions in the Notice of Claim for Damages and with reference to the subsequent correspondence. Firstly, it is pointed out there is a disjunction between the description of the event in the answer to Question 40 and the particulars of negligence in the answer to Question 55. As to Question 40, it does not once mention the word "incident" but rather talks of response to critical and acute prisoner situations and complains of no rotation in and out of the correctional response team, as well as a lack of adequate training.

[29] In the particulars, on the other hand, in answer to Question 55, reference is made to debriefing after each conflict situation. The reader is left to guess whether the conflict situations or instances of conflict are the critical and acute prison situations referred to in answer to Question 40. That can then be compared to the factual basis

---

16 [2011] QSC 101.

which underpins Dr Mathew's report, contained on page 2 of the report and set out above, where a stressful event was recounted by Mr Graham when prisoners accessed the roof of the prison. It is apparent that Mr Graham also told Dr Mathew of other stressful situations being summonsed to crises or emergencies, managing prisoners who had harmed themselves and were discharging blood, being asked to intervene when prisoners were damaging the unit with metal bars or other objects, being required to respond to violence, being outnumbered on occasions, and being attacked by prisoners who would remove his gas mask when gas weapons were deployed.

[30] Dr Mathew's report also records instances of Mr Graham being regularly threatened by prisoners with personal harm or harm to his family. It is apparent that the factual basis of the case included in Dr Mathew's report is quite different to that contained in the Notice of Claim for Damages. The letter of Morton & Morton of 5 September 2022 compounds the confusion in respect of assessing Mr Graham's case because it specifically states that Mr Graham's claim is not in respect of any specific incident or group of incidents, and that a specific incident or group of incidents were not stressors. The same letter then goes on to demand that the respondent disclose "each and every incident that our client was required to attend in his role as a Tactical Response Officer".

[31] If indeed, as the letter of 5 September 2022 records, the claimant's case is not that any specific incident or groups of incidents caused any stressors which caused or contributed to his injury, it cannot be that any specific incident or group of incidents could be relevant in proof of Mr Graham's claim such that it would not be appropriate to disclose documents for each and every incident (which is not relevant).

[32] In *Koehler v Cerebos (Australia) Limited*,[17] the High Court said:

> "[19] Because the appellant's claim was framed in negligence, and because her claim was brought against her employer, it may be thought necessary to have regard only to the well-established proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work. From there it may be thought appropriate to proceed by discarding any asserted distinction between psychiatric and physical

17 (2005) 222 CLR 44; (2005) 79 ALJR 845; [2005] HCA 15.

injury, and then focus only upon questions of breach of duty. Questions of breach of duty require examination of the foreseeability of the risk of injury and the reasonable response to that risk in the manner described in *Wyong Shire Council v Shirt*. But to begin the inquiry by focusing only upon questions of breach of duty invites error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties into account.

[…]

[21] The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. (This last class may require particular reference not only to industrial instruments but also to statutes of general application such as anti-discrimination legislation.) Consideration of those obligations will reveal a number of questions that bear upon whether, as was the appellant's case here, an employer's duty of care to take reasonable care to avoid psychiatric injury requires the employer to modify the work to be performed by an employee. At least the following questions are raised by the contention that an employer's duty may require the employer to modify the employee's work. Is an employer bound to engage additional workers to help a distressed employee? If a contract of employment stipulates the work which an employee is to be paid to do, may the employee's pay be reduced if the employee's work is reduced in order to avoid the risk of psychiatric injury? What is the employer to do if the employee does not wish to vary the contract of employment? Do different questions arise in cases where an employee's duties are fixed in a contract of employment from those that arise where an employee's duties can be varied by mutual agreement or at the will of the employer? If an employee is known to be at risk of psychiatric injury, may the employer dismiss the employee rather than continue to run that risk? Would dismissing the employee contravene general anti-discrimination legislation?

[…]

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

> foreseeable, in the sense that the risk was not far-fetched or fanciful.
>
> [34] It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. Yet it is that proposition, or one very like it, which must lie behind the Commissioner's conclusion that it required no particular expertise to foresee the risk of psychiatric injury to the appellant.
>
> [35] The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. That is why, in *Hatton*, the relevant question was rightly found to be whether this kind of harm to this particular employee was reasonably foreseeable. And, as pointed out in that case, that invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned.
>
> (footnotes omitted)

[33] More recently in *Kozarov v Victoria*,[18] Gordon and Steward JJ considered Ms Kozarov's post-traumatic stress disorder claim against the State of Victoria for vicarious trauma as a result of prolonged exposure in Ms Kozarov's work in the Specialist Sexual Offences Unit of the Victoria Office of Public Prosecutions.

[34] The Office of the Director of Public Prosecutions had a vicarious trauma policy from January 2008. The work of the unit to which Ms Kozarov was deployed routinely involved interaction with survivors of trauma, attending court to instruct in sexual assault cases, meeting with child and adult victims of sexual offences and their families, viewing explicit child pornography and preparing child complainants for cross-examination. Their Honours said at paragraphs [82] to [86]:

> "[82] Victoria had a duty of care to take all reasonable steps to provide Ms Kozarov with a safe system of work. The trial judge found that a safe system of work should have included: "an active OH&S framework; more intensive training for management and staff regarding the risks to staff posed by vicarious trauma and PTSD; welfare checks and the offer of referral for a work-related or occupational screening, in response to staff showing heightened risk; and, a flexible approach to work allocation, especially where required in

---

18 (2022) 96 ALJR 405; [2022] HCA 12.

response to screening, including the option of temporary or permanent rotation from the SSOU where appropriate". That finding was not challenged by Victoria in the Court of Appeal or in this Court.

[83] Victoria's duty was "not merely to provide [that] safe system of work", but to "establish, maintain and enforce such a system", taking account of Victoria's power, as employer, "to prescribe, warn, command and enforce obedience to [its] commands". Indeed, as senior counsel for Victoria conceded, the duty required Victoria to do "almost everything" it could "short of forcing rotation" to protect Ms Kozarov from the risk of psychiatric injury.

[84] The duty of care not being in dispute, it does not fall for this Court to consider whether "[t]he trial judge and the Court of Appeal … formulated an unrealistic duty to intrude into an employee's mental well-being", which might raise considerations of privacy, autonomy and dignity of the person, or whether the content of the duty was defined without properly considering the contract of employment, equity and any applicable statutory provisions. Victoria's submissions to that effect are rejected.

Breach

[85] The trial judge found — and it has not been challenged — that Victoria breached its duty of care. Her Honour said that Victoria's "response to the risks to [the] SSOU staff and [Ms Kozarov] was not that of a reasonable employer. [Victoria] failed to implement the steps required to prevent injury to its employees."

[86] The trial judge explained that Victoria's breach was in respect of each aspect of the duty of care, as follows:

(1) "[t]he OH&S framework within the SSOU was woefully inadequate and did not include a sufficient program of rigorous training for staff and management about the cumulative impacts of vicarious trauma and the risks of PTSD from the work";

(2) Victoria did not "provide training to assist management to identify 'red flags' or training on how and when managers should respond to signs of concern, including by conducting welfare checks or referring an employee for optional work related screening";

(3) "when a welfare inquiry [of Ms Kozarov] was plainly required (around the end of August 2011), this did not occur, and there was no offer of occupational screening"; and

(4) there was no "system in place to respond to the outcome of any such screening"."

(footnotes omitted)

[35] In respect of causation, their Honours said:

> "[90] As to causation, it was not in dispute in this Court that "if [Ms Kozarov] had been offered an appropriate welfare enquiry, she would have taken up that offer" and that "screening by a clinician at or about the end of August 2011 would probably have revealed [Ms Kozarov's] work-related symptoms of PTSD".
>
> [91] The only question was whether notification of Ms Kozarov's work-related symptoms of PTSD would have "prompted reduction of [Ms Kozarov's] exposure to trauma by 'altering work allocation, or arranging time out, or rotation to another role, if required', because [Ms Kozarov] *would have co-operated with those steps* if appropriately informed of the rationale for such actions" (emphasis added).
>
> [92] Contrary to what the Court of Appeal found, Ms Kozarov *would* have co-operated and her exposure to trauma *would* have been reduced.
>
> [93] On a "real review" of the evidence, that inference had a greater degree of likelihood than any competing inference and should not have been overturned by the Court of Appeal.
>
> [94] First, the matters relied upon by the trial judge in support of the finding that Ms Kozarov would have accepted an offer of screening *also* support the finding that Ms Kozarov would have co-operated with a reduction of her exposure to trauma. Those matters were that Ms Kozarov: "had previously been outspoken about the impacts of her work in the SSOU at staff meetings and during the resilience training session with Mr Carfi on 20 April 2011"; "was prepared to accept a referral to [a psychologist] by her [general practitioner] when she was unwell in August 2011"; "had been willing to liaise with Mr Carfi and [a human resources] manager about her future role at the OPP after 9 February 2012"; and "agreed to be assessed by Mr Carfi at the request of the OPP in March 2012". It is also inherently implausible that Ms Kozarov would have accepted an offer of screening, leading to a probable diagnosis of PTSD, but then would not have co-operated with a course of action to relieve the PTSD in the circumstances.
>
> [95] Second, in the counter-factual where Victoria *had* discharged its duty of care , Ms Kozarov would have responded to an offer to reduce her exposure to vicarious trauma if she: (a) had received "more intensive training" on the risks posed by vicarious trauma and PTSD; (b) had been diagnosed by a clinician with work-related symptoms of PTSD; and (c) had received an offer from management of modified work allocation, time out or rotation. That is very different to what

> in fact occurred. As such, very little (if any) weight should be given to Ms Kozarov's application for promotion within the SSOU on 28 August 2011 or her strong response to Mr Brown's assertion on 29 August 2011 that she was not coping with her work. As senior counsel for Victoria properly conceded, neither of those matters occurred against the background of Ms Kozarov having been diagnosed with PTSD. Yet, those are the matters on which the Court of Appeal placed principal weight.
>
> [96] Third, the unchallenged expert evidence of Professor McFarlane, a clinical psychiatrist and international expert on PTSD, was that "a very significant majority of people", if assessed as having a work-related psychiatric injury, and after having had explained to them what is happening to them and having been given the context, consequences and circumstances of their continued employment in their role, will accept the advice of a clinician in respect of that injury. While this is not conclusive, neither the Court of Appeal nor Victoria identified any reason why, on the counter-factual, Ms Kozarov's response to the diagnosis of work-related symptoms of PTSD would have been different from the response of the very significant majority of people. And, as senior counsel for Victoria properly conceded, this was "a very important consideration".
>
> [97] Finally, given that Ms Kozarov *would* have co-operated with the reduction of her exposure to trauma, no barrier to causation is presented by her contract of employment. As the trial judge found, assuming Ms Kozarov's co-operation, "no good reason was advanced by [Victoria] showing why [Ms Kozarov] could not have been rotated to another part of the OPP that did not manage sexual offences". The question of whether Victoria could have *compelled* Ms Kozarov to rotate does not arise, as compulsion would not have been necessary."
>
> (footnotes omitted)

[36] In *Kozarov*, the High Court held that in certain cases an employee is able to demonstrate the very nature of the role taken by the employee carried with it an inherent and obvious risk of psychiatric harm, thus satisfying the obligation of foreseeability.

[37] In determining whether a Notice of Claim for Damages is compliant, it is necessary to have reference to s 275 and reg 120. Section 275 requires a Notice of Claim for Damages to be given in an approved form, currently version 3 of the form. Section 275(8) distinguishes between the Notice of Claim for Damages and the accompanying documents being those documents supporting the claim. Section

275(5) requires any statement made by a claimant in the notice that is in the claimant's knowledge to be verified by statutory declaration.

[38] Sections 275(6) and (7) refer to the notice being accompanied by a genuine offer for settlement (or reasons as to why an offer for settlement cannot yet be made) and by the claimant's written authority to obtain information. Although s 275(6) and (7) refer to the offers of settlement and written authorities to accompany the Notice of Claim for Damages they are in fact included in ss (5) and (6) in the approved form referred to in s 275(2)(a). Notwithstanding that oddity, it seems to me to be clear enough upon the legislation that a distinction is to be drawn between the documents accompanying the Notice of Claim for Damages and the Notice of Claim for Damages itself.

[39] The consequence of this is the confusion brought into the claim by the recitation of the nature of the claim as set out on page 2 of Dr Mathew's report (and the subsequent correspondence) cannot be used to demonstrate that the Notice of Claim for Damages is not compliant. In this case, the identified non-compliance is in respect of the answer to Question 40 as a complete description of the event resulting in the injury.

[40] As set out above, s 31(2) of the WCRA specifically defines an event to include a continued or repeated exposure to substantially the same conditions that result in injury to a worker. In my view the answers to Questions 37 and 38, that is the framing of the nature of the events causing the injury as being an over period of time claim from 1 November 2019 to 1 December 2020, with symptoms commencing 2 April 2020 makes it sufficiently clear that the type of claim being brought by Mr Graham is of the type mentioned in s 31(2), that is, of a continued or repeated exposure to the same conditions. The lack of the identification of any incident in the answer to Question 40 further promotes this conclusion.

[41] In terms of reg 120(b) of the WCRR, it is the claimant's description of the facts and circumstances surrounding his suffering of the injury which is relevant. It is plain that the description required in the answer to Question 40 would be woefully inadequate in a pleading as a description of the facts necessary to prove the nature and extent of the work being done by the applicant, and signs given by the applicant to his employer. That is not the test. The test is whether Mr Graham, as the

applicant has, in the terms of reg 120(b) described the facts of the circumstances surrounding his injury.

[42] It may be observed by Mr Graham's answer to Question 40 that he alleges that:

(1) He was transferred into the correctional response team on or about 16 October 2019;

(2) The role of the correctional response team was to be the first responders to critical and acute prisoner situations;

(3) There was no rotation in and out of the correctional response team; and

(4) He received inadequate training.

[43] It is true that Mr Graham has not alleged that he in fact, at any stage, let alone regularly, attended to critical and acute prison situations, but, from his perspective, such an allegation of fact would seem absurd.

[44] The claimant, would know, as every officer employed at the Maryborough Correctional Centre would know, that critical and acute prisoner situations did occur. Of course, if they did not, and the prison was a placid place, there would be no need for a team called the "correctional response team". The claimant has, in his responses to Question 40, provided his, and not his solicitors, description of the facts of the circumstances surrounding his injury by identifying his work as a member of the correction response team in attending as a first responder to critical and acute prisoner situations, without proper training and without rotation of duties, as the cause of his injury.

[45] As *Koehler's* case, *Kozarov*'s case and antecedent cases[19] show, the pleading and proof of a pure psychiatric injury claim is a difficult and fact heavy matter. It requires expert (and therefore expensive) pleadings. As the plurality of the High Court said in *Koehler's* case,[20] particular attention is paid to the nature and extent of the work being done and so that will require a full description of the duties of the worker said to subject the worker to a stress which may accumulate, and that can

---

19 Midwest Radio Ltd v Arnold [1999] QCA 20; QLD Correction Services Commission v Gallagher [1998] QCA 426.

20 at [30].

only occur by reference to the incident or incidents which are said to have occurred during the course of the employment.

[46] Particular attention is also then brought upon the factual allegations which must be particularised as to the signs given by the employee said to be subject to those stressors. This type of case therefore requires a carefully particularised statement of claim in order to properly commence a court proceeding. The Notice of Claim for Damages does not meet this level of care, indeed it is far from it. However, as Douglas J concluded in *Scott,* such a level of care and particularisation differs from the statutory requirement for a Notice of Claim for Damages required to in reg 120(b) of the WCRR, which merely requires the claimant's description of the facts of the circumstances surrounding the injury. As the test is not to require a properly particularised statement of claim, but rather to satisfy the requirement by reg 120 (b), I consider, in fairness, as it was put by Demack J, that the Notice of Claim for Damages is compliant as it has satisfied the required at reg 120(b) of the WCRR.

[47] I will hear from the parties as to costs.