IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN

No. B51/2017

TONI MAREE GOVIER
(Appellant)

And

UNITINGCARE COMMUNITY (ABN 28 728 322 166)
(Respondent)

RESPONDENT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The issue in this appeal is whether an employer, investigating a potentially serious breach of contract of employment warranting dismissal if proved, owes to an employee involved a duty – founded in tort or contract - to take reasonable care in and about such investigation so as not to cause foreseeable psychiatric injury to that employee.

Part III:

3. I certify that the respondent has considered a notice in compliance with section 78B of the *Judiciary Act* 1903 (Cth), and concluded same is not required.

Part IV:

4. The respondent accepts the accuracy of the factual matters addressed in paragraphs 1 to 14 of the appellant's submissions and contained in the appellant's chronology. Further, the respondent accepts there was not adduced in evidence at trial any written contract of employment.

Respondent's Submissions
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5. There were two matters conceded below, and in this court, which bear emphasis. First, the appellant accepts that *New South Wales v Paige*[1] was correctly decided. Second, the respondent "was entitled under the contract of employment to require an account from its employee [the appellant] about the employee's conduct and was entitled to stand down the appellant on full pay during the investigation, pending a decision about the appellant's employment".[2]

Part V:

10 6. The respondent accepts the accuracy of the applicable statutes and regulations identified in the appellant's submissions.

Part VI:

7. The modern seminal statement is that of this Court in *Sullivan v Moody:*[3]

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. ... Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships.
> 20 The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle. ... The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care
> 30 would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. ...

8. Before *Sullivan* this court recognised that "the contents of a contract may militate against recognition of a relationship ... under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of

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[1] (2002) 60 NSWLR 371, [2002] NSWCA 235.
[2] [2017] QCA at [75].
[3] *Sullivan v Moody; Thompson v Connon* (2001) 207 CLR 562, [2001] HCA 59, at [50], [60], footnotes deleted.

care".[4] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[5] exemplifies application of this principle so as to exclude the existence of duty of care in contrast with confining the duty scope or content.

9. The exercise by a putative tortfeasor of a permitted right of investigation concerning the conduct of a person ordinarily does not ground a tortious duty to that person per se.[6]

10. Lack of necessary coherence obviating duty, or confining duty content, was taken up in *Paige*. That ensued not just on account of the existence of a statutory disciplinary scheme, but having regard to the content of the contract of employment – whether or not modified by statute – in respect of the issue of maintenance, including termination, of such contract:[7]

> Of particular significance for the present case is the need for coherence in the law, in view of the interaction and interrelation between the proposed duty in tort and the law applicable to termination of employment ie the law of contract as modified by statute. In my opinion, the possibility of incoherence in the system of law applicable in this State is such that the proposed duty should not be recognised. ... The expansion of the law of tort to matters concerning the creation and termination of a contract of employment, as distinct from performance under the contract, may distort the balance of conflicting interests found to be appropriate as a matter of contract or by intervention of statute. Where, as here, the courts are asked to create a novel duty of care, the courts should refrain from doing so where there is such a well developed alternative mechanism for adjusting the interests involved. Matters concerning the creation and termination of a contract of employment can, in my opinion, properly be left to the law of contract, subject to the extensive statutory modification that the parliaments have introduced into this specific area of contract law.

11. These passages were adopted and applied by the Court of Appeal in this case, which observed – it is submitted correctly – that the fact of the extensive statutory regime for investigation in *Paige* was not distinguishable having regard to contractual rights in this case.[8]

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[4] *Bryan v Maloney* (1995) 182 CLR 609, [1995] HCA 17, at CLR 621.
[5] (2014) 254 CLR 185, [2014] HCA 36.
[6] *Sullivan* at [62]; *Tame v New South Wales, Annetts v Australia Stations Pty Ltd* (2002) 211 CLR 317, [2002] HCA 35, per Gleeson CJ at [26] and Gaudron J at [57].
[7] *Paige* at [132], [155], emphasis added.
[8] [2017] QCA 12 at [73].

12. Apropos of termination of employment, statutory rights were prescribed by s 83 of the *Industrial Relations Act* 1999 (Qld):

> ***83 What employer must do to dismiss employee***
> (1) An employer may dismiss an employee only if—
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> (a) the employee has been—
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> (i) given the period of notice required by section 84; or
>
> (ii) paid the compensation required by section 85; or
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> (b) the employee engages in misconduct of a type that would make it unreasonable to require the employer to continue the employment during the notice period.
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> (2) Misconduct under subsection (1)(b) includes—
> (a) theft; and
> (b) assault; and
> (c) fraud; and
> (d) other misconduct prescribed under a regulation.
> (3) However, subsection (1)(b) does not apply if the employee can show that, in the circumstances, the conduct was not conduct that made it unreasonable to continue the employment during the notice period.
>
> ...

13. As to the conceded right of investigation and suspension, the obligation of an employee to an employer, on request, to state facts concerning his or her own actions performed as an employee, is of long pedigree and often decisive in claims for wrongful dismissal or reinstatement. [9] In *Associated* Dominion, Herron J wrote:

> [A] duty lies upon an employee in general terms to give information to his employer such as is within the scope of his employment and which relates to the mutual interest of employer and employee. If an employee is requested at a proper time and in a reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee, provided that these relate to the master's business, the employee is bound, generally speaking, to make such disclosure....Questions asked relating to the employee's activities could be so reasonable and fair that to refuse the information may well be disobedience justifying dismissal. Such conduct may be inconsistent with duty and may impede the

[9] *Associated Dominion Assurance Society Pty Ltd v Andrew* (1949) 49 SR (NSW) 351 at 357; *Murray Irrigation Pty Ltd v Balsdon* (2006) 67 NSWLR 73, [2006] NSWCA 253, at [19]-[20].

> employer's legitimate business associations. It certainly could destroy all confidence between master and servant which is an essential feature of such contracts.

14. This obligation has its genesis in the term implied in every contract of employment to the effect that the employee owes a duty of trust and confidence (cf the now scotched implied term of mutual trust and confidence). That has a long pedigree in this court.[10]

15. We now address the three core submissions made by the appellant.

16. *There is no reason why, in accordance with the decided cases, the respondent should not have been held liable for its carelessness, except for the possible effect of a legal or statutory duty or obligation which is incompatible with that liability.*[11]

17. There are two premises for this submission. First, the ratio of *Paige* is founded upon a tortious duty of care being inconsistent with a statutory scheme. Secondly, there was no legal or statutory obligation in the present case which was inconsistent with a duty of care. Each premise is false.

18. While in *Paige* the statutory scheme was salient, what it served to do was modify the obligations of the parties there otherwise extant in contract. Moreover, the outcome in *Paige* was but an application of the principle in *Sullivan.*

19. Here, in light of the assault incident which occurred involving the appellant and her fellow employee - with the contrasting versions afforded the respondent even short of securing the appellant's version – the said statutory and contractual rights were triggered. Coherence obviated the grounding of any duty of care.

20. The contractual rights and obligations, implied into the contract of employment, consisted in the aforesaid right of investigation and suspension

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[10] *English & Australian Cooper Co Ltd v Johnson* (1911) 13 CLR 490, [1911] HCA 65, at CLR 497 and 500; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, [1933] HCA 8, at CLR 72-3, 81-2; see also *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, [2014] HCA 32, at [63] – [66] per Kiefel J.

[11] Appellant's submissions at [25].

and the cognate right of enjoyment of trust and confidence. The statutory right, to which investigation was a precursor, was that under s 83 of the *Industrial Relations Act*. Each bore upon the issue of termination of employment referred to in *Paige*. None of these related to the system of work.

21. Moreover, behind those contractual rights and obligations existed obligations to others. Relevantly they included the respondent itself in respect of the conduct of its enterprise, the other employee involved in the assault incident, other employees who may be impacted by a repetition of the assault and the respondent's clients who may similarly be impacted.

22. Undoubtedly, as the Court of Appeal recognised,[12] a person in the appellant's position may well be vulnerable to psychiatric injury or psychological distress irrespective of whether reasonable care is taken in and about the respondent's investigation and decision. That, however, is a reality of disciplinary action, including investigation, howsoever undertaken.

23. While not a statutory authority (eg police or other regulatory authority), the respondent, in proper management of its enterprise workforce, was obliged to undertake an investigation in respect of a serious wrongdoing, namely an assault in the workplace. A duty of reasonable care, if operative, could not be confined to the enquiry stage of investigation but would extend to any investigation report yielded. The investigation cases[13] militate against a duty of care being grounded apropos of such investigation report, in part by dint of the lack of coherence with the law of defamation.

24. Import of a duty of care jurisprudence into the realm of maintenance and termination - in contrast with performance - of employment contracts carries a significant risk of distortion of investigation and report undertaken by an employer in conduct of its enterprise. That ensues because investigation of a workplace incident or event of any kind, which may touch or concern the reputation or maintenance of employment of any employee or group of employees, will require added caution, and often protraction, to account for a

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[12] [2017] QCA 12 at [73].
[13] *Sullivan, Tame.*

duty of care to any individual known (actually or constructively) or claiming to suffer a vulnerability to psychiatric decompensation. Inconvenience and economic consequences aside, this is likely to augment, inaptly, industrial law litigation.

25. In this regard, the policy considerations which informed denial of an implied contractual term of mutual trust and confidence inter se employer and employee, apply, by parity of reasoning, to deny a duty of care in this sphere:[14]

> That extension was said to reflect a broader functional view, essentially a tribunal's view, of good industrial relations practice, embracing not only the material conditions of employment such as pay and safety, but also the psychological conditions which are essential to the performance by an employee of his or her part of the bargain.... Importantly, the implied duty of trust and confidence as propounded in *Malik* is directed, in broad terms, to the relationship between employer and employee rather than to performance of the contract. It depends upon a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law. It should not be accepted as applicable, by the judicial branch of government, to employment contracts in Australia....The above conclusion should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts. Nor does it reflect upon the related question whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in the sphere of public law. Those questions were not before the court in this appeal.

26. The posited duty of care could not be confined to direct liability in the employer. Employees engaged in the investigation – both enquiring and enquired of - would also owe a duty of care in relation to their involvement and its product, with litigious exposure to any psychiatrically vulnerable employee. Employers, having authorized the enquiry, most likely would be vicariously liable for any proven negligence on part of such employees.

27. *[T]he decision of the Court of Appeal stands as authority for the proposition that an employer owes no duty not to injure an employee provided the injurious act is done in the course of an investigation – whether or not the*

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[14] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, [2014] HCA 32, at [39] -]42] per French CJ, Bell and Keane, emphasis added.

investigation is governed by obligations imposed by statute and whether or not any other common law remedies are available.[15]

28. The proposition begs the question. Either a duty of care exists (or extends) or it does not. *Sullivan* and *Paige* – accepted by the appellant as good law – are against the grounding of a duty of care where the same does not cohere, or is inconsistent with, extant rights and obligations. As submitted above, those existed here.

29. Contrary to the appellant's submission, the respondent could not act with impunity in or about the investigation. Inapt investigation leading to unlawful termination inexorably would attract a right of reinstatement and compensation under the *Industrial Relations Act* or cause of action for wrongful dismissal. Further, any intentional tort by the respondent, including intentional infliction of mental harm,[16] would be actionable.

30. *[T]he decision of the Court of Appeal creates an unexplained lack of accord between an employer's duty to "support" an employee during an investigation ... and any lack of duty in conducting an investigation.*[17]

31. The appellant relies upon the decision of the Court of Appeal in *Hayes v State of Queensland.*[18] The Court of Appeal in the case at hand properly distinguished *Hayes:*[19]

> This is not a case in which the claim was based upon a duty by the employer to supply a safe system of work in the workplace by providing support for an employee during the course of investigation, as was the case in *Hayes.*

32. The reasons for judgment in *Hayes*, adverted to in the Court of Appeal's reasons, were at pains to point out that nothing in their reasons should be taken as entailing that the duty of care under consideration extended to the

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[15] Appellant's submissions at [37]
[16] *Bunyan v Jordan* (1937) 57 CLR 1.
[17] Appellant's submissions at [38].
[18] [2017] 1 QdR 337, [2016] QCA 191.
[19] [2017] QCA 12 at [75].

investigation by the employer defendant.[20] If *Hayes* went further then it ought not be followed.

33. In the event the appeal were successful, the appellant contends she ought have judgment for $85,348.51. The respondent understands that the appellant arrives at that sum this way:

(a) deducting the WorkCover Queensland refund of $196,911.20 from $765,901.26; ie the amount of the damages assessed on the basis that the respondent was liable for the assault;

(b) giving a balance of $568,990.06;

(c) allowing 15 per cent of that – reflecting the trial judge's view of the relevant contribution of the alleged post-assault negligence - namely $85,348.51.

34. The amount to be deducted is prescribed by ss 270 and 271 of the *Workers' Compensation and Rehabilitation Act* 2003 as follows:

> **270 When damages are to be reduced**
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> (1) The amount of damages that an employer is legally liable to pay to a claimant for an injury must be reduced by the total amount paid or payable by an insurer by way of compensation for the injury.
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> (2) [not relevant]
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> (3) This section does not limit the reduction of the amount of the damages by any other amount that the insurer or the claimant is legally liable to pay on account of the worker under another law.
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> **271 Assessment by court of total liability for damages**
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> (1) This section applies if—
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> (a) damages are awarded for an injury; or

[20] *Hayes* at [99] per Mullins J: "The [plaintiff] appellants accepted that they could not hold the [defendant] respondent liable for any negligence from the fact that there was an investigation of the complaints ...and in connection with the process of investigation of the complaints".

(b) damages are to be paid in settlement of a claim for an injury.

(2) To establish the reduction under section 270(1) in damages for compensation paid, the claimant or insurer may apply to—

(a) the court in which the proceeding is brought; or

(b) if a proceeding has not been started—the Industrial Magistrates Court.

(3) The court's decision is binding on the insurer and all persons entitled to payment by the insurer for the injury.

35. The respondent submits the approach of the appellant proceeds on the erroneous basis that in circumstances where the employer was only liable on the basis of the post assault conduct, but not for any loss flowing from the assault itself, the damages would be assessed as if the employer were liable for damages flowing from the assault itself.

36. The correct position is that the damages flowing from the tortious conduct of the employer (hypothetically the post-assault negligence) should be assessed at $114,885.18 (15 per cent of $765,901.26). That is the amount of the damage which flows from the tortious conduct.

37. The refund of $196,911.20 is then deducted, yielding a negative sum. In consequence, a verdict ought be entered for the respondent. Thus the result is that even if the appellant succeeds on her arguments she still loses the proceeding.

38. Plainly the issue is contentious. In the event the appeal was successful, the matter ought be remitted to the Court of Appeal to determine this issue. If the court requires detailed submissions on the point they can be provided.

Part VII:

Not applicable.

Part VIII:

The respondent estimates three hours to present its case.

Dated this 15th day of November 2017.

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