A DUTY OF GOOD MANAGEMENT? PROTECTED INTERESTS AND THE EMPLOYMENT CONTRACT

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Do employers owe employees a duty to manage well? In the House of Lords decision in Spring v Guardian Assurance *Lord Slynn drew attention to:*[1]

> *… the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.*

This essay in honour of Gordon Anderson's contribution to employment contract law reviews the extent to which it is true to say that the law of the employment contract does in fact protect the employee's interests in a well-managed workplace, where the harm suffered is financial or psychological/psychiatric. It will be suggested that the law has evolved less radically than Lord Slynn's dictum might suggest.

I INTRODUCTION

In 2007, when Gordon Anderson selected the topic of his inaugural professorial lecture after accepting a chair in the Law Faculty at Victoria University of Wellington, New Zealand, he took as his theme the potential for the common law of the individual employment contract to provide adequate protection for employees in the (then) newly emerging world of highly "flexible" workplaces.[2] Towards the end of his address he opined:[3]

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1 *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) at 335.

2 This address was published as Gordon Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38 VUWLR 417.

3 At 432.

> Managing the negative consequences of the new "flexible" workplace – excessive workloads, the psychological and physical consequences of stress and workplace bullying – requires high standards of management competence. The failure to effectively manage such issues poses a significant risk to employees and considerable legal risk for employers. Cases involving serious stress affecting an employee's long term employability have resulted in very high levels of damages.

Professor Anderson expressed a cautious optimism that, in New Zealand at least, employers could be held to a standard of good management practice, because of the statutory requirement introduced in 2000 and reformulated in 2004, that parties to employment relationships should actively and constructively maintain good faith relationships.[4] This statutory intervention would reinforce a "more active judicial review of management practices impacting on employees".[5]

These New Zealand developments followed judicial statements made a decade earlier in the United Kingdom in *Spring*, recognising:[6]

> … changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.

Ten years on from Professor Anderson's address, and more than two decades since Lord Slynn's statement in *Spring*, we consider whether the law of employment has in fact evolved protections for employees from the kinds of harm (particularly psychiatric harm and purely economic loss) that may result from negligent management of the workplace. Does the law support an expectation of competent management practice sufficient to shift the risk of harm from incompetent management from employees to employers?

We leave aside claims based on psychiatric distress following as a consequence from the termination of employment. In both the United Kingdom (since *Johnson v Unisys Ltd*),[7] and in Australia,[8] the courts have declined to develop any common law entitlement to compensation for distress flowing simply from the fact or manner of dismissal. In the United Kingdom, such compensation will only be available under statute, and in Australia, even the statutory protection from

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4 Employment Relations Act 2000, s 4(1A), inserted by s 5(1) of the Employment Relations Amendment Act (No 2) 2004.

5 Anderson, above n 2, at 433.

6 *Spring*, above n 1, at 335.

7 *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL).

8 In Australia, compensation for the humiliating manner of dismissal in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (IRCA) was awarded under statute (Industrial Relations Act 1988 (Cth), s 170EE), but the statute has since been amended to prohibit such compensation: Fair Work Act 2009 (Cth), s 392(4).

unfair dismissal now prohibits any measure of compensation for hurt or humiliation as a consequence of the manner of dismissal.[9] Here we focus on the potential for an employer to be made liable to compensate an employee if the employer's own management procedures (or lack thereof) have contributed to an employee's psychiatric or financial harm.

II PSYCHIATRIC HARM

Where physical injury is concerned, a wide ranging scheme of protection now exists at common law which has evolved over time and benefited from the stimulus provided by statutory provisions. The position in respect of psychiatric harm is very different and, as we shall see, the same is true where pure economic loss is concerned. The law of the employment contract offers limited protection against psychiatric harm. The law of tort has historically been reticent about allowing recovery for claims of this nature, especially so in employment relationships. This is true to a significantly greater extent in the United Kingdom than Australia. In the United Kingdom, complaints concerning occupational stress encounter a restrictive set of rules ("practical propositions") set out by the Court of Appeal in *Hatton v Sutherland*,[10] and approved by the House of Lords in *Barber v Somerset County Council*.[11] For instance, the Court of Appeal said that "[a]n employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability."[12] Again, "[t]o trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it."[13]

Against this backdrop, the practical propositions emerge as an embodiment of common law policy on employer responsibility for occupational stress. The value judgement is made that "[s]ome things are no-one's fault."[14] The judiciary strives to achieve an acceptable balance between safeguarding the wellbeing of employees and not burdening employers with some of the risks which are inherent in working life. It is regarded as fair that some such risks are borne by employees since:[15]

> There is no such thing as a pressure free job. Every job brings its own set of tasks, responsibilities and day-to-day problems, and the pressures and demands these place on us are an unavoidable part of working

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9 Fair Work Act, s 392(4).

10 *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] 2 All ER 1 at [43].

11 *Barber v Somerset County Council* [2004] UKHL 13, [2004] WLR 1089.

12 *Hatton*, above n 10, at [43].

13 *Hatton*, above n 10, at [43].

14 *Hatton*, above n 10, at [15].

15 Health and Safety Executive *Stress at Work – A Guide for Employers* (HS(G)116, HSE, 1995) at 2, as cited in *Hatton*, above n 10, at [9].

> life. We are, after all, paid to work and to work hard, and to accept the reasonable pressures which go with that.

The position adopted in the United Kingdom is by no means inevitable and the application of general common law principles in Australia mean that employees face a less arduous path to recovery. One issue which may require further discussion in both jurisdictions is the significance of the terms of the contract of employment that the pursuer entered into; a point that troubled Lord Rodger, who asked in *Barber*:[16]

> … what steps did the Council have to take when, by reason of some individual vulnerability, Mr Barber was liable to suffer material injury to his (mental) health if he carried out the duties which were stipulated in his contract(s) and for which he was paid his salary?

The interaction of the laws of contract and negligence was explored by the High Court of Australia in *Koehler v Cerebos (Australia) Ltd.*[17] There the plaintiff was a merchandising representative who had her working hours reduced from five to three days a week. She repeatedly complained to her employer that she could not complete her duties satisfactorily in only three days, so either the work expected of her had to be changed, or she should be given more time or help to do it. No changes were made. The plaintiff was subsequently diagnosed as suffering from a psychiatric illness. At first instance, the trial judge found for the plaintiff, holding that her workload was excessive and that the employer needed no particular expertise to foresee that there was a risk of injury of the kind that ensued. By not increasing the plaintiff's hours of work or giving her assistance, the employer failed in its duty to ensure that all reasonable steps were taken to provide her with a safe system of work. The employer's behaviour prompted the trial judge to observe that:[18]

> … it was little short of callous on the part of the defendant to expect the plaintiff to continue to carry out her duties when they knew the plaintiff was a diligent and hard worker and that she would continue to try to achieve the results expected of her.

The steps required to have avoided a finding of breach of duty would not have been burdensome:[19]

> It was open to the defendant to increase the plaintiff's hours or provide her with assistance. This is particularly so in light of the evidence that the expense, difficulty and inconvenience of such a course of action and taking those steps was negligible.

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16 *Barber*, above n 11, at [26].

17 *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15, (2005) 222 CLR 44.

18 *Koehler v Cerebos (Australia) Ltd* [2002] WADC 108, (2002) 30 SR (WA) 258 at [169].

19 At [173].

Before the High Court the employer argued that, by entering into a contract, an employee warrants that he/she will be able to perform the job:[20]

> … the contract is voluntary. The employee undertakes to discharge certain jobs, to do certain work. In terms of the contract … it must be an egregious fallacy – ever to suggest that work within the contractual description could be overwork. It is by definition the work called for.

It was further argued that should the employee find that she has bitten off more than she can chew she should diminish the stress by resigning:[21]

> … when one undertakes to do something which proves to be too hard, there will be the usual common law recourse for both employer and employee. Because the common law does not permit contracts of employment to be bonds of slavery, one will be able to give notice or otherwise to bring to an end the employment relation without a court forcing you to carry it out.

The High Court found for the employer and took the view that the harm was not reasonably foreseeable. Of far greater interest was the judicial acceptance of the employer's arguments on the relationship between the contract of employment and the law of negligence. The High Court agreed that "you cannot have the law of tort driving the law of contract" and, therefore, one should calibrate the content of what is reasonable to the circumstances created by the employee's voluntary choice to do the work.[22] It was said that 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 High Court held that by accepting a job offer the employee warrants (in the same way that they warrant that they possess the requisite skills) that they are mentally fit for the job:[23]

> … her agreement to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the appellant's psychiatric health. It runs contrary to that contention because agreement to undertake the work not only evinced a willingness to try but also was not consistent with harbouring, let alone expressing, a fear of danger to health.

The High Court has recently affirmed the view that the extent of an employer's duty of care in tort cannot be determined without reference to the terms of the employment contract. In *Govier v The Uniting Church in Australia Property Trust (Q)*, the Court revoked an employee's special leave to appeal in a matter alleging a breach of the employer's duty of care (by incompetently managing a disciplinary process) on the grounds that the employee's contract of employment was not in

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20 *Koehler v Cerebos (Australia) Ltd* [2004] HCA Trans 412.

21 *Koehler*, above n 20.

22 *Koehler*, above n 20.

23 *Koehler*, above n 17, at [28].

evidence.[24] Gordon J stated: "one does not look at the tort in terms of the duty and scope without understanding what the contractual framework is".[25]

Focus on the contract disregards the fact that the employee will often have no choice but to enter into the contract on terms dictated by the employer, irrespective of whether or not he/she believes it will be prejudicial to their health. Economic realities will often mean that the employee has to accept the offer of employment, even where it is clear at the outset that the demands of the job are unreasonable and carry a real risk of harm. *Koehler* might be thought to be explicable on the basis (as in *Hatton*) that an employer could not be expected to foresee that the normal pressures of a job voluntarily entered into would give rise to a risk of harm. However, the underlying rationale appears to be based more on the acceptability of contracting out:[26]

> … notions of "overwork", "excessive work", or the like, have meaning only if they appeal to some external standard. … Yet the parties have made a contract of employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care.

The High Court drew attention to two situations which, in their view, would require further deliberation. First, the position might be different should the employer exercise a discretion conferred by the contract to unilaterally vary the employee's duties.[27] In our view, such a power would have to be exercised in a manner consistent with the implied term to take reasonable care for the employee's health and safety,[28] and indeed the High Court stated that:[29]

> The exercise of powers under a contract of employment may more readily be understood as subject to a qualification on their exercise than would the insistence upon performance of the work for which the parties stipulated when making the contract of employment.

Second, the Court pointed out that the express obligations of the contract may be restricted in the normal way through implication or construction.[30] This may diminish the burden on the employee. *Koehler* was, however, decided before *Commonwealth Bank of Australia v Barker*, where the High Court confirmed a very strict test of "necessity" before any new term would be implied by law into

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24 *Govier v The Uniting Church in Australia Property Trust (Q)* [2018] HCA Trans 65.

25 *Govier*, above n 24.

26 *Koehler*, above n 17, at [29].

27 *Koehler*, above n 17, at [37].

28 See *Johnston v Bloomsbury* [1992] QB 333 (QB).

29 *Koehler*, above n 17, at [37].

30 *Koehler*, above n 17, at [38].

an employment contract.[31] Any implication of some limitation on the employer's entitlement to extract performance according to the terms of the contract would need to be in fact.

Koehler operates on the premise that the employee accepts that he/she cannot complain should he/she be adversely affected by the normal pressures and stresses of the job. It appears that the employer is benefiting from a defence along the lines of *volenti non fit injuria*,[32] which seems very odd as *volenti* has played an almost invisible role in the workplace since the 19th century case of *Smith v Baker*.[33] In a case where an employee was physically injured it would be inconceivable that, truly exceptional circumstances aside, *volenti* would make an appearance nowadays. Lord Rodger's judgment in *Barber* was influential in *Koehler* and express reference was made to his view that:[34]

> When the contractual position, including the implied duty of trust and confidence, is explored fully along with the relevant statutory framework, your Lordships may be able to give appropriate content to the duty of reasonable care upon which employees, such as Mr Barber, seek to rely. But the interrelationship of any such tortious duty with the parties' duties under the contract of employment has not been examined in any depth in the cases to which we were referred and was not analysed in this appeal.

This suggests that the approach in *Koehler* cannot be dismissed out of hand as irrelevant to the law in the United Kingdom (though arguments based upon it were not accepted in *Garrod v North Devon NHS Primary Care Trust*).[35] A key concern for Lord Rodger was that the operation of the obligation of reasonable care may function to compel, in effect, a variation of the contractual terms and impose a more expensive burden on the employer:[36]

> … it is rather a different thing to say that the Council's duty of reasonable care to an employee requires them to provide him with assistance for an indefinite period even to the extent of employing a supply teacher so that he can do the amount of work he can cope with, but less than the amount for which he is being paid in terms of his contract.

There is no indication that the reasoning in *Koehler* is likely to become attractive to the judiciary in the United Kingdom, though it is possible that any retreat from *Hatton* might prompt renewed interest. Since *Hatton* was decided it has proved to be very effective in limiting claims stemming from occupational stress. However, more worryingly still, *Hatton* has proved to be influential in a wider range of situations where the policy considerations are clearly different. Thus we find that *Hatton* was

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31 *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169.

32 Voluntary assumption of risk.

33 *Smith v Baker* [1891] AC 325.

34 *Barber*, above n 11, at [35], as referred to in *Koehler*, above n 17, at [38].

35 *Garrod v North Devon NHS Primary Care Trust* [2006] EWHC 850 (QB), [2007] PIQR Q1.

36 *Barber*, above n 11, at [32].

applied by the Court of Appeal in *Yapp v Foreign Commonwealth Office* where the employer's complaint centred on an unfair disciplinary process.[37]

In *Yapp*, an action was brought against the employer after the claimant was removed from his post as High Commissioner to Belize. The claimant had been suspended pending investigation of allegations of misconduct. Subsequently, a disciplinary process was initiated and he received a written warning as some of the allegations were found to have been established. His suspension was lifted, though he did not return to Belize. The claimant developed a depressive illness and he raised an action in both contract and tort complaining both of his withdrawal from the post of High Commissioner and of the way in which the disciplinary process was conducted and its outcome. He said that the resulting stress had caused his depressive illness, which both constituted damage in itself and led, on account of his inability to return to work, to pecuniary loss.

In the High Court Cranston J found that the withdrawal of the claimant from his post was both a breach of contract and a breach of the duty of care which the employer owed at common law.[38] He dismissed the claims relating to the disciplinary process. Cranston J found that the employer had failed to conduct a preliminary investigation of the allegations before taking the decision to withdraw the claimant from the post. In addition, fair treatment obliged the employer to inform the claimant of the allegations and to take into account his critique of them. This had not happened either. It was held that damages were recoverable for the psychiatric harm incurred as it could have been reasonably contemplated when the claimant was appointed as High Commissioner that depression would be a not unlikely result of a "knee-jerk withdrawal" from his post.

The Court of Appeal upheld the trial judge's finding that the process had been defective. The employer's behaviour constituted a breach of both the express and implied terms of the contract, but the appeal was successful on the basis that the damage incurred was not foreseeable. The employer could not have been expected to anticipate "in the absence of any sign of special vulnerability, that [the claimant] might have developed a psychiatric illness as a result of its decision".[39] As a result the contractual claim was too remote. The claim in negligence also failed on this basis, though if it had been heard by the Court of Appeal it would have failed at the earlier stage of breach of duty given that the harm which arose was not reasonably foreseeable.

The approach in *Yapp* is very much open to challenge as the practical propositions set out in *Hatton* do not address situations where the employee's complaint is, at least in part, about bullying or harassment in the workplace or other such inappropriate behaviour. It is worth recalling that, for one

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37 *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] IRLR 112 [*Yapp* (CA)]. See Douglas Brodie "Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*" (2015) 44 ILJ 270.

38 *Yapp v Foreign and Commonwealth Office* [2013] EWHC 1098 (QB), [2013] IRLR 616.

39 *Yapp* (CA), above n 37, at [127].

of the employee claimants in *Hatton*, who was successful, the employer knew that the claimant was complaining of unreasonable behaviour by her immediate manager. Hale LJ stated:[40]

> Once it is concluded that the combination of the way in which she was being treated and her formal complaints about it made injury to her health foreseeable, it is not difficult to identify what might have been done to prevent the injury which in fact occurred. The judge was entitled to conclude that failure to do this caused her breakdown.

We would maintain that an employer can readily be found at fault where suspension takes place without reasonable cause or the requirements of a disciplinary process are not followed. The homogeneous approach put forward by *Yapp* is regrettable, as it is not apparent why the employer who is blameworthy should be protected from the natural application of common law rules.

A Harm Inflicted by Fellow Employees

It is implicit in *Yapp* that the guidelines in *Hatton* will apply to all situations where the employer owes a duty of care to avoid the occurrence of psychiatric harm. This would therefore include cases of failing to take reasonable care to prevent harassment. This does not reflect the Australian approach which is markedly different from that in the United Kingdom. In *Wolters v University of the Sunshine Coast* the claimant brought an action in which she alleged that the employer had failed to take adequate action in relation to the aggressive and distressing acts and conduct of a fellow employee within the workplace of which it knew or ought reasonably to have known.[41] As a result, the claimant sustained a personal injury in the form of a debilitating psychiatric illness. Her claim was successful, and it is worth noting the expert evidence given in the court below which supported:[42]

> … the commonsense conclusion that it was reasonably foreseeable that severe verbal abuse by [the fellow employee] of an employee over whom he has authority, accompanied by threatening physical actions, during which he unjustifiably attacks an employee's work performance, would threaten and frighten an employee, … and cause her acute psychological distress. It also supports the conclusion that such an incident might also cause such an employee to develop a psychiatric illness. It might do so to an employee of normal fortitude who took great pride in their work.

Limiting recovery of damages does not seem appropriate where the employer is at fault by failing to protect the employee from acts of harassment which result in psychiatric harm. The courts in both the United Kingdom and Australia are of the view that the employer may be required to put in place

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40 *Hatton*, above n 10, at [67].

41 *Wolters v University of the Sunshine Coast* [2013] QCA 228, [2014] 1 Qd R 571.

42 *Wolters v University of the Sunshine Coast* [2012] QSC 298 at [176]. See also *Sneddon v Speaker of the Legislative Assembly* [2011] NSWSC 508, (2011) 208 IR 255.

measures to guard against harassment.[43] However, the approach in the United Kingdom to recovery of damages for psychiatric harm means that the protection afforded by this obligation is undermined. By way of contrast, the Australian courts have differentiated their treatment of cases where psychiatric harm has resulted from inappropriate behaviour such as harassment from those where the cause has been excessive workload. A more restrictive approach is seen as merited in the latter compared to the former: "the plaintiff did not choose to work with a bully, or work in stressful conditions arising other than from the nature and extent of the tasks that she agreed to perform".[44] An employee may be expected to be sufficiently robust to deal with criticism where appropriate, but the position changes where, for example, criticism becomes excessive.[45] The Australian courts take a more holistic approach to protection against the range of harms that may arise from the working environment which is reflected in the treatment of questions of foreseeability. Whilst the law of negligence approaches reasonable foreseeability on an objective basis, it is clear that judges have a considerable degree of discretion. It is important to recall that recourse to foresight involves not simply a purely factual inquiry but invariably entails a value judgement as to what the defendant can reasonably be held responsible for. The court in *Yapp* was reluctant to concede that psychiatric harm would be likely to be foreseeable:[46]

> … it will in my view be exceptional that an apparently robust employee, with no history of any psychiatric ill-health, will develop a depressive illness as a result even of a very serious setback at work.

However, in the Australian decision of *Bau v State of Victoria*, it was said to be reasonably foreseeable that an employee who is exposed to sexist, bullying or demeaning workplace behaviour may suffer injury because of the cumulative effect of a series of minor events, or because of harassment or bullying which they have observed but is not directed at them.[47] Again in *Keegan v Sussan Corporation* it was held to be reasonably foreseeable that a failure to investigate would lead to both emotional upset and psychiatric harm:[48]

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43 *Waters v Commissioner of Police for the Metropolis* [2000] 1 WLR 1607 (HL); and *Bau v State of Victoria* [2009] VSCA 107.

44 *Swan v Monash Law Book Co-operative (t/as Legibook)* [2013] VSC 326, (2013) 235 IR63 at [163].

45 See *Keegan v Sussan Corp (Australia) Pty Ltd* [2014] QSC 64.

46 *Yapp* (CA), above n 37, at [125].

47 *Bau*, above n 43. See also *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 at [410] where Jagot J said that "[i]t seems to me that if the relevant conduct is characterised as the investigation of a potential disciplinary matter then the College ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken in the investigation. Disciplinary matters are inherently stressful for those involved. A person of normal fortitude under disciplinary investigation will inevitably feel highly anxious."

48 *Keegan*, above n 45, at [127].

> A reasonable person in [the employer's] position would have realised its ongoing failure to properly address [the] complaint considerably heightened the prospect of [the claimant's] emotional distress worsening. That is not only because the bullying would likely continue, as it did, but also because [the employer's] failure would of itself distress the employee who in her time of crisis had looked to it for help. Against that background the risk of [the claimant's] mental state being so affected that she may suffer a psychiatric illness was reasonably foreseeable.

Behaviours such as bullying and harassment are now seen as utterly unacceptable in the workplace and employers' policies will often reflect this. In Australia, contemporary standards of conduct are underpinned by legal obligations.[49] Bullying and harassment will often lead to upset and, on occasion, psychiatric harm. The Australian courts provide protection by allowing recovery on the basis of general common law principles: an employer owes a duty of care to provide a safe system of work, which precludes tolerance of bullying. Consequently, an employer will be liable to compensate an employee if a failure to take reasonable steps to prevent bullying results in foreseeable harm.[50]

Claims based only on the employer's management of a disciplinary investigation, however, have not proved so successful. State courts in New South Wales and Queensland have not been prepared to develop the duty of care to encompass a duty to provide a safe system for conducting workplace investigations, although this question has not yet been resolved by the High Court.[51] Two cases which might have provided the High Court an opportunity to review the extent of an employer's duty of care to avoid psychiatric harm as a consequence of how workload or workplace investigations have been managed, have escaped the scrutiny of the Court: one (*State of New South Wales v Briggs*) because the parties settled after the High Court granted leave to appeal to the employee;[52] and the other (*Govier v The Uniting Church in Australia Property Trust (Q)*),[53] because the High Court revoked special leave granted to the employee upon discovering the absence of evidence of the terms of the employment contract.

In the United Kingdom at present, the courts are much less sympathetic to claims of this nature and primary obligations are rendered less effective by the approach taken to remedies. *Yapp* is consistent with a generally restrictive approach in the United Kingdom to claims by employees for

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49 The Fair Work Act now contains powers for the Fair Work Commission to intervene to make orders that bullying behaviours cease: see pt 6-4B.

50 See *Hayes v State of Queensland* [2016] QCA 191, [2017] 1 Qd R 337. Where an employer has taken reasonable steps, there will be no breach of duty just because some harm eventuates: see *New South Wales v Fahy* [2007] HCA 20, (2007) 232 CLR 486.

51 See *New South Wales v Paige* [2002] NSWCA 235, (2002) 60 NSWLR 371; and *Govier v The Uniting Church in Australia Property Trust (Q)* [2017] QCA 12 [*Govier* (QCA)].

52 *State of New South Wales v Briggs* [2016] NSWCA 344, (2016) 95 NSWLR 467.

53 *Govier* (QCA), above n 51.

psychiatric harm. *White v Chief Constable of South Yorkshire Police* held that the law does not recognise a duty to guard employees against such harm suffered as a result of witnessing injury to others.[54] The approach in *White* gives rise to difficulties. On the one hand, the employer who exposes the employee to a stressful working environment may be liable, provided the practical propositions can be overcome. On the other, the employer who, by failing to provide an adequate system of work puts the employee in a position where he/she witnesses appalling human suffering of the sort encountered in *White*, will not. Viewed purely from the perspective of the employment relationship such a distinction seems arbitrary. Such considerations prompted the Supreme Court of New South Wales to elect not to follow *White*.[55]

III ECONOMIC LOSS

What of the employer's obligation to avoid management decisions that cause employees economic loss? We have seen in the preceding section that the employer's obligations are limited where the prevention of psychiatric harm is concerned. It is therefore not particularly surprising to learn that employee's rights are also weak where an employer's management decisions result in purely economic loss for an employee. The approach to risk allocation adopted by the contract of employment is supportive of the employer's interests. The judicial framing of the common law obligation of reasonable care is pivotal here – an obligation which, whilst owed by both parties and appearing symmetrically fair, impacts employees and employers very differently. If an employee breaks the obligation to perform his/her duties with care (irrespective of the nature of the harm which arises) and the employer suffers loss as a result, then the employee will be liable in damages. The employer's obligation is much more limited. The present allocation of risk may be regarded as unfair in that the employee is likely to be much less well-equipped than the employer to meet the burden should the risk materialise. Nevertheless, it may be defended to some extent on the basis of the symmetrical nature of the obligation. Both sides must take reasonable care and as a consequence a position of formal equality is established. Where the loss suffered is purely economic however, any notion of even formal equality largely evaporates. This is because, traditionally, the employer is not under a duty to protect the employee from suffering such loss. Over the last thirty years the position has changed somewhat in the employee's favour. This has been more marked in the United Kingdom than Australia, though the change in position has been less than dramatic.

The current law operates particularly harshly where the employee suffers physical injury but the claim against the employer is purely financial. In *Reid v Rush & Tompkins Group plc* the plaintiff suffered injury abroad whilst in the course of his employment.[56] He alleged that his employers were in breach of their duty of care in failing either to insure him or to advise him to obtain such insurance

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54 *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1 (HL).

55 *New South Wales v Seedsman* [2000] NSWCA 119, (2000) 217 ALR 583.

56 *Reid v Rush & Tompkins Group plc* [1990] 1 WLR 212 (CA).

cover for himself. It was held that there was no breach of duty on the employer's part. A case like *Reid* might be thought to be particularly meritorious as the underlying problem was the occurrence of personal injury. The claim was analysed as one of pure economic loss because the employer was not at fault for the occurrence of personal injury but was arguably to blame for the employee not being protected against the economic consequences of such harm arising in the course of employment. Given the employer's greater access to information and advice it was argued that the employer should be responsible for providing information to the employee about the risks of working abroad. This would then allow the employee to "make a properly informed decision whether to take the job and, if he decides to take it, whether there are many steps which he needs to take for his own protection".[57] Had the plaintiff been successful on the basis that there was an obligation to warn, the impact on employers would have been minimal. The obligation mooted was very much circumscribed and confined to the giving of advice. This dimension of the claim (whilst ultimately rejected) was seen as worthy of serious consideration. Crucially, the plaintiff's claim was for financial loss related to personal injury suffered in the course of the plaintiff's employment. It is now less clear that *Reid* would be decided in the same way today.[58]

A Exceptions Emerge

Whilst the protection afforded to employees in respect of pure economic loss remains limited, there have been a number of positive developments in the United Kingdom. The Court of Appeal has acknowledged that there are now certain restricted circumstances where the court will imply a term with the effect of imposing on the employer a duty to regard the employee's economic interests.[59] In *Scally v Southern Health and Social Services Board* the employer was held to be under a duty to provide information about the rights of employees to purchase "added years" of pensionable service.[60] The employees had no way of knowing about this opportunity without the employer's advice. A traditional approach would nevertheless have held that it was up to each party to protect his/her own position. Whilst the outcome in *Scally* itself can be viewed as radical, the House of Lords also displayed a clear element of caution. The term was implied in fact rather than law and was inserted on the basis of the business efficacy test.[61] The obligation implied was defined narrowly and in a manner which owed a great deal to the specific circumstances in *Scally*. In the subsequent decision in

57 At 219.

58 *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] ICR 1615.

59 *Crossley*, above n 58.

60 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (HL).

61 At 307.

Hagen v ICI Chemicals and Polymers Ltd, Elias J was at pains to delimit the scope of the duty, stating:[62]

> … there is no justification for applying *Scally* here so as to impose a general duty to make employees aware of their pension rights (or indeed the other terms and conditions of their employment).

Since *Scally* there have been several claims of a similar nature, though it must be said that the law has not evolved a great deal.[63] This may be due, in part, to the difficulties that a more general obligation of disclosure would present.[64] The Australian courts have been restrained in their support for *Scally*. It was not applied, for example, in *Mulcahy v Hydro-Electric Commission*.[65] While the facts were somewhat different, little enthusiasm seems to have been shown for *Scally* and the narrow terms in which it is framed rendered it readily distinguishable. Raising a *Scally* type claim in tort would be likely to be even more challenging.

There also have been relevant changes in the law of tort. In *Spring*, the plaintiff claimed damages in negligence against his former employer for supplying an unfavourable reference to a third party.[66] The claim was successful and it was held that employers must take reasonable care to ensure the accuracy of any reference given, that obligation encompassing both the factual content and any opinions expressed. The decision involved an imaginative extension of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* in that the duty was owed to the person who was the subject of the misrepresentation rather than the recipient of the reference.[67] The outcome was driven by judicial recognition that an adequate protection of the employee required a more holistic approach:[68]

> … just as in the earlier authorities the courts were prepared to imply by necessary implication a term imposing a duty on an employer to exercise due care for the physical wellbeing of his employees, so in the appropriate circumstances would the court imply a like duty as to his economic well-being, the duty as to his economic wellbeing giving rise to an action for damages if it is breached.

Spring does not give rise to a right to a reference, though that position may well change. The House of Lords was not deterred by arguments that the law of defamation provided an adequate

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62 *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 (QB) at 68.

63 See *University of Nottingham v Eyett* [1999] 1 WLR 594 (Ch); and *Outram v Academy Plastics* [2001] ICR 367 (CA).

64 See D Brodie "Mutual Trust and the Values of the Employment Contract" (2001) 30 ILJ 84 at 96.

65 *Mulcahy v Hydro-Electric Commission* [1998] 85 FCR 170 (FCA).

66 *Spring*, above n 1.

67 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

68 *Spring*, above n 1, at 353.

remedy and that the creation of a duty of care would lead to a lack of coherence at common law.[69] A more conservative court would have been likely to have accepted such arguments and, in the minority, Lord Keith was indeed so persuaded. Lord Keith's position has also found favour in New Zealand where the court in *Bell-Booth Group Ltd v Attorney-General* adopted the reasoning in the old English case of *Foaminol Laboratories Ltd v British Artid Plastics Ltd*: "a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action".[70] In Australia it is far from clear that *Spring* would be followed.[71]

B A Further Exception?

Reid may be seen as pointing towards an exception should the employer fail to protect the employee against the financial consequences of physical injury. The recent decision of the Supreme Court in *Dryden v Johnson Matthey plc* is also of interest.[72] There, the claimants were employed by the defendant at chemical plants on processes resulting in exposure to platinum salts. Due to the fault of the employer plutonium sensitisation developed. The Court of Appeal denied recovery on the basis that actionable physical injury had not arisen. The Supreme Court disagreed:[73]

> What has happened to the claimants is that their bodily capacity for work has been impaired and they are therefore significantly worse off. They have, in my view, suffered actionable bodily damage, or personal injury, which, given its impact on their lives, is certainly more than negligible.

Greater interest lies in the alternative ground of claim. This did not need to be considered by the Supreme Court given its conclusion on the nature of the harm suffered, but the employees had also framed their claim as one for pure economic loss. On the hypothesis that physical harm had not arisen, it was maintained that financial loss arose because, to safeguard the claimants' health and protect them from suffering the physical injury which would have arisen if they had become allergic to platinum salts, they were removed from their higher paying jobs working in an environment with platinum salts and would be prevented from working in such an environment elsewhere. In other words, ameliorating the risk of physical injury resulted in the creation of loss of a different nature. The Court of Appeal took the view that the alternative basis of claim failed as what had occurred "was a sort of mitigation of loss in advance of injury" but that "… [a] right to claim damages covering the expenses of mitigation only arises where there is a right to sue for a wrong in the first place. There is no right to

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69 Compare *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562 at [54].

70 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA); and *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393 at 399. See also *Balfour v Attorney-General* [1991] 1 NZLR 519 (CA) at 529; and *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.

71 See Carolyn Sappideen and others *Macken's Law of Employment* (8th ed, Thompson Reuters, Sydney, 2016) at 187.

72 *Dryden v Johnson Matthey plc* [2018] UKSC 18, [2018] 2 WLR 1109.

73 At [40].

sue for a wrong in this case."[74] The reasoning employed here is very similar to that adopted by the House of Lords to deny recovery in respect of pure economic loss where defective buildings are concerned.[75] It is far from clear, though, that categorising a claim as one for "advance mitigation of loss" should stand in the way of recovery in other contexts. This is particularly so in employment where it has long been accepted that the employer has a protective role.

It is submitted that the Court of Appeal was wrong to reject the alternative ground of appeal in *Dryden* and it is unfortunate that the Supreme Court was not required to consider the issue. Where the employee suffers financial loss because the employer has breached his/her duties in respect of protection against physical harm we would suggest that recovery should be allowed. The employer should not be permitted to escape liability as the employee is then left with bearing the cost of avoiding a risk carelessly created by the employer. The jurisprudence of courts outside the United Kingdom does provide grounds for optimism. The Canadian courts have taken a diametrically opposed view on the "advance mitigation of loss" point, the key decision being that of the Supreme Court in *Winnipeg Condominium Corp v Bird Construction Co Ltd*,[76] which owed a great deal to the judgment of Laskin J in *Rivtow Marine Ltd v Washington Iron Works*.[77] In *Winnipeg*, a duty of care arose where a failure to take reasonable care in constructing a building created defects that posed a substantial danger to the health and safety of the occupants. The Supreme Court went on to hold that, where negligence is established and such defects manifest themselves before any damage to persons or property occurs, the defendant can be held liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state. The decision in *Winnipeg* is very much one based on policy considerations. At its very core the law of tort aims to protect bodily integrity and the decision in *Winnipeg* adds to the deterrent effect of the law by discouraging negligent behaviour: defendants may be more concerned to take precautions if they will be found liable not only where a risk materialises, but also where one is created. The Supreme Court observed that allowing recovery served "an important preventative function by encouraging socially responsible behaviour".[78] The Australian and New Zealand courts have adopted the approach contained in *Winnipeg*.[79] It is suggested that policy concerns centering upon "socially responsible behaviour" are hugely relevant in the employment context.

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74 *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408, [2016] 1 WLR 4487 at [32].

75 See for example *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL).

76 *Winnipeg Condominium Corp (No 36) v Bird Construction Co Ltd* [1995] 1 SCR 85.

77 *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189.

78 *Winnipeg Condominium Corp*, above n 76, at [37]. See also *Janata Bank v Ahmed* [1981] ICR 791 (CA).

79 *Bryan v Maloney* (1995) 182 CLR 609; and *Bowen v Paramount Builders* [1977] 1 NZLR 394 (CA).

C Incompetent Employers

As we have seen, the careless employee will undoubtedly be liable in damages for economic losses caused through incompetent performance. However, *Malik v Bank of Credit and Commerce International SA (in liq)* strongly suggests that where the employee's loss arises through the employer's incompetent running of the business, recovery will not take place.[80] The decision of the Lords permitted the plaintiffs to proceed to try to show that the corrupt running of the business had stigmatised them and caused them loss. However, had the allegations been that incompetent running of the business had led to the workers being stigmatised then they would have been regarded as irrelevant. By running a business badly an employer does not breach the obligation of mutual trust and confidence:[81]

> … there are many circumstances in which an employee's reputation may suffer from his having been associated with an unsuccessful business, or an unsuccessful department within a business. In the ordinary way this will not found a claim of the nature made in the present case, even if the business or department was run with gross incompetence. A key feature in the present case is the assumed fact that the business was dishonest or corrupt.

In *Malik*, recoverable reputation damages are based on the premise that employees take the risk of being associated with a badly run business but not with a corrupt one. Should the employer be in breach of the employment contract by running the business incompetently? If the answer is no then the current position of the employee seems inequitable.

IV CONCLUSIONS

In the 20 or so years since Lord Slynn's comments in *Spring* there has been little development of the common law of employment in terms of any extension of an employer's obligations to avoid harm of a psychological or financial nature through inept management decisions. Even in New Zealand, where the hope of such development is underpinned by a "legislative requirement for good faith behaviour",[82] Professor Anderson has expressed only faint enthusiasm for the potential for development of a legally enforceable expectation of good management practice. Ten years later, we would have to agree that the conclusions of his inaugural professorial address remain sound:[83]

> The most effective protection for employees is, and always has been, though collective organisation. Collective representation provides the strength for employees to influence their terms of employment, the

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80 *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (HL).

81 At 42.

82 Employment Relations Act, s 3(a)(i).

83 Anderson, above n 2, at 434.

strength to ensure some joint management of the relationship day to day, and most importantly the resources to effectively enforce their rights.