IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B51 of 2017

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

BETWEEN:

TONI MAREE GOVIER
(Appellant)

and

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q)
(ABN 25 548 385 225)
(Respondent)

APPELLANT'S SUBMISSIONS

Part I:

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

Part II:

Whether the decisions of *Sullivan v Moody* (2001) 207 CLR 567 and *State of New South Wales v Paige* [2002] 60 NSWLR 371 preclude the existence of a duty owed by an employer to an employee to take care in doing acts that might injure an employee merely because the acts are done in the course of a workplace "investigation", whether or not the investigation is governed by obligations imposed by statute, and whether or not any other common law remedies are available.

Part III:

I certify that the appellant has considered that notice should not be given in compliance with section 78B of the *Judiciary Act* 1903.

Part IV:

Govier v UnitingCare Community [2016] QDC 056
Govier v Uniting Church in Australia Property Trust (Q) [2017] QCA 012

Part V:

1. The appellant had been employed by the respondent as a carer for persons under a disability. She cared for one of the respondent's clients, Tara. She

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shared that job with one MD.[1] On Thursday, 3 December 2009, without provocation,[2] MD violently attacked the appellant who suffered physical and psychiatric injuries as a consequence.[3] The appellant claimed damages for negligence against the respondent in respect of psychiatric injuries arising from that incident but failed at trial.[4]

2. Immediately after that incident, the appellant phoned her supervisor, Mr Blackett. She told him that she had been attacked by MD, had called the police and that she was going to hospital. Mr Blackett heard the appellant repeat that complaint to staff at the hospital. The client, Tara, also told Mr Blackett that MD had hit the appellant.[5]

3. On the same day, the respondent's regional manager prepared and had hand-delivered to the appellant's home a letter (which the appellant's flatmate took to her at the hospital) requiring her to attend an interview on the following day, Friday, as part of an "investigation into "your conduct [that] is currently being undertaken" on the following morning, directing her not to discuss the incident with any other employee and that she had been suspended on full pay.[6] Nobody from the respondent had come to the hospital.[7] Nobody had telephoned her or inquired of her or her family about her condition.[8] The appellant did not attend the interview; she was too ill. Mr Blackett sent her a text message on Sunday afternoon urging her to attend a re-scheduled meeting on Monday. The regional manager, Ms Evans, telephoned her on the same day strongly advising her to attend the Monday meeting. The appellant said that she was too ill. Ms Evans did not inquire into her condition until prompted to do so. Later the appellant rang Ms Evans and said she would attend to get it over with.[9] However, the appellant did not attend the meeting; she rang to say that she was still too ill. She was asked when she thought that she would be well enough to be interviewed and was required to furnish a medical certificate to prove that she was ill; the certificate certified that she was totally incapacitated for work from Monday 7 December to Monday 21 December.[10]

4. On Wednesday, 9 December 2009, Ms Evans and Mr Blackett's supervisor nevertheless interviewed MD who told them, falsely, that the appellant had, in fact, attacked her.[11]

5. On Friday, 18 December 2009, the appellant received a second letter from Ms Evans sent by express post. The letter asserted that the appellant had "refused" to attend the interviews on 3 and 8 December and that in the absence

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[1] Court of Appeal Reasons [2].
[2] Trial Judge's Reasons [102].
[3] Court of Appeal Reasons [3].
[4] Court of Appeal Reasons [5].
[5] Court of Appeal Reasons [6].
[6] Trial Judge's Reasons [99].
[7] Mr Blackett had left after staff began attending to the appellant: Court of Appeal Reasons [6].
[8] Trial Judge's Reasons [100].
[9] Trial Judge's Reasons [110].
[10] Trial Judge's Reasons [111]; Court of Appeal Reasons [7].
[11] Trial Judge's Reasons [112]; Court of Appeal Reasons [7].

of information from her, Ms Evans had made preliminary findings that the appellant had kicked, hit and pushed MD and that she had engaged in "violent and inappropriate" behaviour that had been witnessed by a client. Ms Evans said that in her view the appellant's "behaviour has damaged the employer/employee relationship to such an extent that [her] employment cannot be continued". The letter offered her an "opportunity to offer information or an explanation … and to advise [the respondent] why her employment should not be terminated" before a "final determination" was made. The appellant had "until close of business Wednesday 23 December 2009 to provide, in writing, … information or explanation about this incident, together with reasons as to why [her] employment should not be terminated". She would "not be able to return to work until [she] had complied with" these demands.[12]

6. On Monday 21 December 2009 the appellant received another workers' compensation certificate stating that she was totally incapacitated for work until 4 January 2010.[13]

7. In the action she claimed damages for the psychiatric injury caused to her by MD's attack; the learned trial judge found that as a consequence of the attack the appellant had suffered from post-traumatic stress disorder and a major depressive disorder.[14] However, he dismissed the claim, finding that the respondent had no reason to think that MD was likely to attack the appellant.[15]

8. The appellant also claimed damages for the aggravation of those injuries caused by her reading of the content of the respondent's two letters; the trial judge found that "the timing, manner and content" of the two letters had aggravated the appellant's injuries and that, had she not received them, her injuries would not have been so severe.[16]

9. The learned trial judge found that at all material times from 12.27pm on 3 December 2009[17] the respondent knew, or ought to have known, that the appellant had alleged that she had been the victim of an attack by MD, and knew that the client had corroborated her account, and knew that the appellant had been injured and hospitalised as a result of the incident, and that her injuries and hospitalisation may have been through no fault of her own.[18] He found that the risk of psychiatric injury from MD's assault was foreseeable.[19] He found that the respondent knew or ought to have known that the appellant was, or may have been, too ill to attend the meetings; and that the respondent actually knew that she had not refused to attend but, rather, had claimed to be too ill to attend.[20] He found that it was reasonably foreseeable that she would have been dismayed to read, in her hospital bed, that her own conduct, rather

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[12] Trial Judge's Reasons [116].
[13] Trial Judge's Reasons [119].
[14] Trial Judge's Reasons [151].
[15] Trial Judge's Reasons [151].
[16] *ibid.* and at [172].
[17] When Blackett prepared the Incident Report, Exhibit 18.
[18] Trial Judge's Reasons [173].
[19] Trial Judge's Reasons [174].
[20] Trial Judge's Reasons [176].

than the incident, or MD, was under investigation, that she was unwelcome at work, and that she was forbidden from speaking to colleagues who might have offered her sympathy and support.[21]

10. The learned trial judge found that it was reasonably foreseeable that, if the appellant had sustained a psychiatric injury (as in fact she had), the receipt of the letters would aggravate it. He held that, by the timing of delivery and the content of the two letters the respondent had failed to take reasonable care for the psychiatric health of the appellant. [22]

11. None of these findings of fact were challenged by the respondent on appeal.

10 12. However, the learned trial judge nevertheless dismissed the claim based upon these letters, holding, consistently with his view of the effect of *New South Wales v Paige,*[23] that the respondent owed no duty of care to the appellant "with respect to the conduct of the investigative process".[24]

13. The Court of Appeal dismissed an appeal, holding that the learned trial judge had been correct in his application of *Paige.*[25]

Part VI:

14. At trial and before the Court of Appeal, the appellant had contended that *Paige* is distinguishable and that it does not establish an absolute principle that conduct during any investigation, causing injury, is incapable of giving rise to
20 liability in negligence.[26]

15. In *Paige,* the plaintiff-appellant had been a principal of a school. In that capacity, he had dealt with certain allegations of sexual abuse involving children that had been levelled at a teacher at his school. Subsequently, the Department of Education of New South Wales conducted an investigation into the appellant's handling of those allegations and he was then charged with negligence in the discharge of his duties under s.83(e) of the *Teaching Services Act 1980* (NSW). At trial, it was held that the investigation and its *sequelae* had been conducted negligently and that that negligence had caused the plaintiff psychiatric injury. The Court of Appeal (Spigelman CJ, with
30 whom, relevantly, Mason P and Giles JA agreed) held that the State owed no duty of care to the appellant in how it conducted its investigation of him.[27]

16. Spigelman CJ held that the application of the law of negligence to the conduct of the investigation in that case would intersect with the obligations imposed by the *Teaching Services Act,* the law of judicial review of administrative action, and the law of wrongful dismissal, in contract and under statute.[28]

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[21] Trial Judge's Reasons [175].
[22] Trial Judge's Reasons [178].
[23] (2002) 60 NSWLR 371.
[24] Trial Judge's Reasons [183].
[25] Court of Appeal Reasons [73], [77], [78].
[26] *cf.* Court of Appeal Reasons [77].
[27] (2002) 60 NSWLR 371 at [182], [330], [358].
[28] (2002) 60 NSWLR 371 at [86].

Consequently, there could be no duty of care that was irreconcilable with the duties and remedies associated with such law. The Chief Justice referred to dicta of the High Court in *Sullivan v Moody*[29] that supported the conclusions that he reached.

17. *Sullivan* concerned a claim for damages for negligence in conducting an investigation of child abuse. The action was struck out as disclosing no cause of action. Two appeals, *Sullivan* and *Thompson,* were heard together.[30] In *Sullivan,* the defendants were the (allegedly) careless doctor who opined that the plaintiff father had sexually molested his daughter, a social worker who also investigated the allegations, the hospital, or alternatively, the State Department of Community Welfare, that employed them. The investigations were based in a statute, the *Community Welfare Act 1972* (SA). Section 25 of the Act imposed upon a person dealing with a child under the Act (which included the doctor and social worker) a duty to regard "the interests of the child as the paramount consideration". Section 91 imposed an obligation upon such persons, in certain circumstances, to report suspected offences against children and provided a defence for actions undertaken in good faith.

18. The Court emphasised that the case did not concern any potential tortious liability to the child concerned.[31] Rather, it concerned a duty alleged to be owed to each father as a suspect. The appellants disavowed any suggestion that, in general, authorities who investigate and report upon possible offences owed a duty of care to suspected offenders.[32] The Court observed that the appellants sought to distinguish their own position from that of other suspected offenders by arguing that, as parents, they were in a different category from "a neighbour, or a stranger, who was suspected".[33] The appellants *relied upon* s.25, which provided that the interests of the child were the paramount consideration, and contended that the relationship between a parent and a child was an aspect of a child's welfare and that, accordingly, that consideration gave rise to the duty of care in the particular case.[34]

19. The Court regarded the asserted distinction to be "unconvincing".[35] In an almost identical case, *Hillman v Black,*[36] involving the same statute, the Full Court of South Australia considered the statutory scheme to be critical in denying the existence of a duty of care; the crucial question was whether the provisions of the statute were incompatible with the asserted duty. It was held that a duty of care owed to a suspected abuser would be incompatible with the provisions of the statutory scheme.[37]

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[29] (2001) 207 CLR 562.
[30] By Mr Sullivan and by Mr Thompson.
[31] [24].
[32] *ibid.*
[33] at [25].
[34] [26].
[35] [27].
[36] (1996) 67 SASR 490.
[37] *Sullivan* at [41].

20. In *Sullivan,* the Court observed that proof that harm is reasonably foreseeable is an insufficient basis to support a duty of care.[38] The Court said that different categories of case throw up different problems for the determination of the existence and scope of a duty of care, such as when the injury is caused by the criminal act of a third party, or the defendant is the repository of a statutory power or discretion, or the potential class of defendants is difficult to confine, or where the asserted duty may collide with established legal principles, or a statute which governs a relationship,[39] or where such a duty might "so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted".[40]

21. In *Sullivan,* the relevant acts concerned communications to the appellants and to third parties and the allegedly incompetent examinations of the children and the other procedures that led to consequences harmful to the appellants.[41] The complaint about communications to third parties (of alleged child molestation) intersected "with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like".[42]

22. Moreover, persons who reported suspicions had responsibilities under the Act and a duty of care to the suspected offenders could not be held to exist if it was incompatible with those responsibilities.[43] It was held that the existence of inconsistent obligations would ordinarily be a reason to deny that a duty of care exists.[44]

23. In *Sullivan,* the duty alleged could not be reconciled "either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount".[45]

24. *Paige* also involved a statutory scheme for investigations with which the alleged duty to take care was incompatible.[46] In addition, there was a claim for damages arising from the appellant's termination of employment, and Spigelman CJ held that the alleged duty to take care was incompatible with the statutory scheme in New South Wales relating to unfair dismissal,[47] and with the law concerning remedies by way of judicial review to which the State was amenable.[48]

25. Here the injury was caused by the respondent's provision to the appellant of two letters containing matter that, the trial judge found, the respondent should have foreseen would cause psychiatric injury to the appellant and which did in fact cause injury. It is commonplace that injury caused by the negligent

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[38] [42].
[39] [50].
[40] [53].
[41] [54].
[42] *ibid.*
[43] [55].
[44] [60].
[45] [62].
[46] (2002) 60 NSWLR 371 at [123].
[47] [154], [155].
[48] [177]; there was also a claim for wrongful dismissal in contract, which is irrelevant here.

communication of "distressing" news is actionable.[49] The appellant was also the respondent's employee to whom it owed a duty of care in respect of the incidents of employment. There is no reason why in accordance with 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.

26. There was no evidence before the learned trial judge as to any written terms of the appellant's contract of employment which related to the respondent's investigative or disciplinary procedures and which may have entitled the respondent to submit, for example, that its conduct and timing in sending the two letters in the circumstances then known to it, and containing such terms and in the manner that it did, was permissible conduct under the contract. In the absence of any such evidence, it should be inferred that there was no such contractual entitlement.

27. On appeal,[50] the appellant did not contest the respondent's submission that the respondent was entitled (impliedly) under the contract of employment to require an account from its employee about the employee's conduct, and to stand the appellant down on full pay during the investigation, pending its decision about the appellant's employment. But at no stage did the appellant concede that the respondent was entitled to act as it did in relation to the "timing, manner and content" of the two letters.

28. Here, there is no principle of law or statutory scheme conflicting with the duty of care. There is no applicable statute that intrudes. There is no administrative law remedy for sending the letters because the respondent is not the State. The appellant did not sue for damages for injury caused by the termination of her employment.[51] She did not sue in respect of defamatory communications made about her to third parties. The action was based simply upon the offensive communication directed to her of matter that the respondent should have foreseen (as was found at trial) would be likely to injure her if she read them.

29. It is commonplace that an employer owes an employee a duty to support an employee whose conduct is under investigation, and that duty will not always conflict with other duties connected with the subject of the investigation.[52]

30. In this case, it is submitted that the only question was whether some imperative obligation imposed *aliter* upon the respondent, and pertaining to the respondent's duties associated with dealing with the appellant's complaint of assault by MD and with MD's counter-complaint, meant that there could be

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[49] *Hancock v Nominal Defendant* (2002) 1 Qd R 578; *Petrie v Dowling* (1992) 1 Qd R 284 at 286-287 per Kneipp J; *Reeve v Brisbane City Council* (1995) 2 Qd R 661 at 675 per Lee J; *Bunyan v Jordan* (1936) 53 WN (NSW) 130 at 131 per Jordan CJ; affirmed (1936) CLR 1; *Jaensch v Coffey* (1984) 155 CLR 549 at 551-552, 555, 577, 608-609.

[50] Court of Appeal Reasons [75].

[51] Her employment was not terminated until two years later on 28 March 2012 (Trial Judge's Reasons [128]).

[52] *Hayes v Queensland* [2016] QCA 191 at [100] per Mullins J, [121]-[122], [125], [145] per Dalton J; *Gogay v Hertfordshire County Council* [2000] Fam Law 883.

no co-existing duty requiring the respondent to be careful not to cause harm when communicating with its sick employee.

31. At trial, the respondent did not argue that there were obligations imposed upon it that were inconsistent with the duty. Instead, it begged the question, contending that standing down the appellant was not "unlawful"[53] and that the respondent was "entitled to require an account by an employee".[54] It repeated these submissions on appeal,[55] saying merely that the "short point is that the Defendant was entitled to do as it did".[56]

32. The Court of Appeal did not identify any competing obligations or legal principles with which the duty was inconsistent.

33. The injury in this case was physical, albeit psychiatric. Nothing turns on the difference[57] but if the decision of the Court of Appeal is right, a careless act done while investigating that causes an entirely *physical* injury would give rise to no liability.

34. Further, it is submitted that the decision in this case is inconsistent with the reasoning that justifies the existence of a duty to "support" an employee who is being investigated.[58] Such a duty arises from the relationship of employer and employee; it has no application to other kinds of investigations by official bodies. It is not regarded as inconsistent or irreconcilable with a desire by an employer, unaffected by statute, to investigate a workplace incident. The decision of the Court of Appeal raises a tension with the duty referred to in *Hayes.*

35. This case raises for the Court's consideration whether, together, *Sullivan v Moody* and *New South Wales v Paige* preclude the existence of a duty owed by an employer to an employee to take care in doing acts that might injure an employee *merely* because the acts are done in the course of a workplace "investigation".

36. It is submitted that the decision of the Court of Appeal is ultimately based upon Fraser JA's conclusion that the *ratio* of *Paige* was that any duty owed by an employer to "supply a safe system of investigation … would involve a novel category of duty of care".[59] It is submitted that the *ratio* of *Paige* is actually that a duty owed to the object of an investigation who was dismissed would be irreconcilable with the obligations imposed upon the defendants by the *Teaching Services Act 1980* (NSW), with statutes governing employment in New South Wales, and with administrative law regulating the exercise of powers by the State.[60]

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[53] Defendant's trial submissions [120].
[54] *Ibid.* at [128]-[131].
[55] Respondent's submissions on appeal [52] – [58].
[56] *Ibid.* [59].
[57] *cf. Mt Isa Mines Ltd v Pusey* (1970) 125 CLR at 389 per Barwick CJ and at 395 per Windeyer J.
[58] *Hayes, supra.*
[59] Court of Appeal Reasons [77].
[60] *Paige* at [123], [129], [131], [154] and [182].

37. However, the 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 investigation is governed by obligations imposed by statute and whether or not any other common law remedies are available.

38. Further, the decision of the Court of Appeal creates an unexplained lack of accord between an employer's duty to "support" an employee during an investigation (a duty affirmed by a decision of the Court of Appeal itself[61]) and the lack of any duty of care in conducting an investigation.

10 **Part VII:**

Not applicable.

Part VIII:

1. That the orders of the Court of Appeal of 10 February 2017 be set aside.

2. That in lieu thereof, the appeal be allowed and that there be judgment for the appellant against the respondent for $85,348.51 damages to be assessed in accordance with the reasons of the Court.

3. That the respondent pay the appellant interest on the judgment sum from 8 April 2016, being 21 days from the date of the judgment in the District Court, pursuant to s 59 of the *Civil Proceedings Act* 2011 (Qld).

20 4. That the respondent pay the appellant's costs of and incidental to the trial to be assessed on the District Court scale, and of the appeal to the Court of Appeal, and of the application for special leave to appeal, and of this appeal.

Part IX:

Two hours.

Dated: 20 October 2017

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[61] *Hayes, supra.*