IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S144 of 2017

BETWEEN

RYAN BRIGGS
Applicant

and

STATE OF NEW SOUTH WALES
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Did the Court of Appeal err in holding the primary judge erred in failing to identify a general instruction that would have been a reasonable response to the foreseeable risk of psychological injury to the appellant?

3 Did the Court of Appeal err in finding that the appellant's "struggling disclosure" was not such as to put the respondent on notice that the appellant had suffered psychological injury?

4 Did the Court of Appeal err in its approach to determining duty in respect of the appellant's psychological injury?

5 Did the Court of Appeal err in holding the primary judge was correct in finding that the respondent's conduct of a professional standards inquiry did not breach its duty of care to the appellant?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

6 Consideration has been given to the question whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Facts

7 The summary in the Appellant's Submission (**AS**) [8] - [12] is not contested.

8 However, the paraphrase of the Notice of Contention below, in AS [24], overstates the nature of the issue it raised. As noted by Lemming JA {AB 252.1-252.13}, the way in which the Procedural Standards Command (**PSC**) investigation was conducted was not linked to the appellant's injury.

Filed on behalf of the Respondent
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Part V: Legislation

9 The appellant's statement of applicable legislation is accepted.

Part VI: Argument

10 The respondent makes four principal submissions. First, in answer to ground 2 of the notice of appeal, the particulars to the appellant's statement of claim at first instance {AB 222-3} failed to identify the general system that should have been postulated, or the general instruction that should have been given, but was not. The primary judge erred in failing to identify a general instruction that would have been a reasonable response to the foreseeable risk of psychological injury and the Court of Appeal was not in error in holding that the primary judge had so failed {AB 248.59-249.2}

11 Second, also in answer to ground 2 of the notice of appeal, the Court of Appeal was not in error in finding the appellant's "struggling disclosure" {AB 219.50-.55} did not objectively convey, in the circumstances known to the supervisor to whom they were made, Detective Inspector Sipos, the meaning that the appellant was suffering psychological injury {AB248.49-53}. The disclosure is more properly characterised as a request for a break.

12 Third, in answer to ground 3 of the notice of appeal, the Court of Appeal was not in error in finding that the respondent had no duty to inquire for evident signs warning of the possibility of psychological injury, and was correct to find that it was not clear what the New South Wales Police Force (**NSWPF**) should have done after the "struggling disclosure" {AB248.35-39}.

13 Fourth, in answer to ground 4 of the notice of appeal, the imposition of a duty is inconsistent with the statutory command that complaints of police misconduct be investigated in an effective and timely manner. The statutory obligation to carry out an effective and timely investigation cannot be defeated by the guidelines for investigation.

Ground 2

14 Liability for an employee's psychological injury can only arise where, in all the circumstances, the psychological injury was reasonably foreseeable: *Tame v New South Wales* (2002) 211 CLR 317, [2002] HCA 35 and on a prospective analysis of the facts, the employer has failed to put into place precautions amounting to a reasonable response to the foreseeable risk of harm: *Wyong Shire Council v Shirt* (1980) 146 CLR 40, [1980] HCA 12 per Mason J at [14], *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [2005] HCA 62 at [128] *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, [2007] HCA 42 at [65]. In the case of sworn police officers, who are members of a disciplined service and who may be required to witness and attend distressing incidents, psychological injury is reasonably

foreseeable. However, the Commissioner of the NSWPF will not have breached the duty of care if he or she postulates a system or makes a general instruction reasonably designed to minimise the risk of the foreseeable psychological harm complained of. A plaintiff police officer may prove breach by demonstrating that he or she sustained psychological injury in circumstances where a system should have been postulated, or a general instruction given, to minimise the risk of the psychological harm complained of, but was not postulated or given. This requires the plaintiff police officer to identify the general system that should have been postulated, or the general instruction that should have been given, but was not: *State of New South Wales v Fahy* (2007) 232 CLR 486, [2007] HCA 20 per Gummow and Hayne JJ at [62].

15 The Court of Appeal did not err in holding that the particulars to the appellant's statement of claim at first instance failed to identify the general system that should have been postulated, or the general instruction that should have been given, but was not. The particulars of negligence alleged by the appellant at first instance were set out in full by the primary judge {AB 129.14-129.44}. Apart from generalisations {AB 129.30, .50, 130.21} none of the particulars articulated a general system that should have been postulated or a general instruction that should have been given by the respondent in performance of its duty of care to New South Wales police officers in the position of the appellant. The particulars are not prospective. His Honour stated the correct principle, that the court should apply a prospective analysis of precautions "amounting to a reasonable response' to the foreseeable risk of harm in respect of the particulars of negligence {AB 130.55-58} and appeared to remind himself of these principles throughout his judgement. However, his Honour did not apply the principle to the particulars of negligence before him by finding that they failed to particularise the prospective duty claimed to have been breached. Further, in finding that the respondent had breached its duty of care to the appellant by Detective Inspector Sipos failing to "initiate an inquiry' of the appellant as to his well being, {AB 146.40-48, 147.1-9} the primary judge himself failed to identify a general instruction that would have been a reasonable response to the foreseeable risk of the psychological injury complained of, whether particularised by the appellant or not.

16 The Court of Appeal also set out the appellant's particulars of negligence in full {AB 222.55-223.50}. The court noted that the particulars failed to articulate a general instruction that should have applied to all New South Wales police officers comparable to the appellant, or the means by which that instruction should have been carried out {AB 224.11-.18} and that the deficiencies were not cured in the course of the primary hearing {AB 224.11-.18}. In

respect of the struggling disclosure, the Court of Appeal held that "the same errors as identified above" affected the primary judge's finding on this point {AB 243.26}. Those errors were identified by the Court of Appeal in its consideration of the period July 2003 – July 2011, which is not the subject of appeal to this Court {AB 284.13}. Those errors were held by the Court of Appeal to be that the primary judge had failed to identify the general instruction which should have been prescribed {AB 237.54-59}, leading to the conclusion that the primary judge had engaged in 'impermissible hindsight-based reasoning' {AB 243.9}.

17 The Court of Appeal did not err in holding that the primary judge erred in finding a breach of duty in respect of the struggling disclosure. The struggling disclosure of July 2011 made by the appellant to his supervisor, Detective Inspector Sipos, was given in oral evidence in chief by the appellant {AB 48.3-.5}. Detective Inspector Sipos, called by the respondent, had no more than a vague recollection of the conversation and gave evidence that he thought the conversation was about the appellant wanting to work regular hours and not work nightshifts {AB 49.41-.49}. Under cross examination, Detective Inspector Sipos could not recall the conversation, but conceded that if the appellant had made a disclosure that he was 'struggling', he would have had an obligation 'to investigate what it was he was struggling with' {AB51.16-.20}. The primary judge accepted the appellant's evidence that the struggling disclosure related to the issue of how the appellant was reacting to situations in the course of his work, and that the appellant expected, as a consequence of his conversation with Detective Inspector Sipos, that he would be given a non-operational role on his return from leave {AB 49.59-50.2; 51.24-28}. The primary judge found:

> ...that disclosure ought to have operated as a signal or a cue to his superior officer that something may be amiss with the [appellant] and this needed to be investigated or explored by discussion with him in accordance with the obligation conceded by Inspector Sipos {AB 51.42-46}.

18 In considering the primary judge's findings on the struggling disclosure, the Court of Appeal acknowledged that the appellant was applying for a theoretical demotion and had used the word 'struggling' to his supervising officer {AB 243.22-25}. But the court also referred to difficulties in the appellant's private life at the time of the struggling disclosure – the appellant's wife had unexpectedly fallen pregnant with twins, was unwell during the pregnancy and the appellant had taken 'a deal of' leave during the pregnancy, and the appellant was working twelve hour shifts two hours drive from his home {AB 243.29-.30, .49-53}. The Court of Appeal inferred that Detective Inspector Sipos knew of these matters when the appellant made the struggling disclosure, concluding:

I would readily infer that all those matters were known to Detective Inspector Sipos when he used the words struggling. Detective Inspector Sipos must have known of his lengthy commute, and must have been aware of the lengthy period of leave he had taken while his wife was in hospital. These matters were apt to have placed an important and non-work related context against which a statement that Mr Briggs was 'struggling' was to be considered {AB 243.57 - 244.9.

19 The Court of Appeal did not err in drawing the inference. Under cross examination, Detective Inspector Sipos stated he knew of the long distances travelled by the appellant to work {T234.40-.43}. As the appellant's supervisor at Rose Bay, Detective Inspector Sipos would also have been aware of the appellant's absences on leave during the time the appellant was stationed at Rose Bay. The primary judge found that Detective Inspector Sipos should have been aware that the appellant attended the Gap in cases of suicide and attempted suicide {AB 146.31-.38}. However, more importantly, the primary judge found that the appellant suffered 'cumulative stresses' related to his work before he was stationed at Rose Bay {AB 146.9-.13}. It is less likely that Detective Inspector Sipos would have been intimately aware of these stresses. As the primary judge made no express finding as to exactly what was reasonably known to Detective Inspector Sipos at the time of the struggling disclosure, the Court of Appeal was entitled to draw an inference that was not contrary to his Honour's findings of fact.

20 The Court of Appeal did not err in stating that the proper question was what should an officer, in the position of Detective Inspector Sipos, have been expected to understand from what was conveyed to him by the appellant {AB 244.24-.27}. The appellant did not make a direct statement of his psychological distress and the reasons for it. The primary judge characterised the struggling disclosure as an 'intimation' {AB 55.43, 56.19}. It was open to the Court of Appeal to find that in the circumstances known to an officer in the position of Detective Inspector Sipos at the time the appellant made the struggling disclosure, the words used by the appellant did not reasonably convey that the appellant was suffering from a psychological disorder or that intervention was warranted {AB 244.40-.45}. The disclosure is more properly characterised as a request for a break. It is, with respect, not to the point to say that Detective Inspector Sipos should have reacted to the fact that the position of brief handling manager was not a Sergeant's position. Under cross examination, Detective Inspector Sipos stated that in some stations, brief handling managers were sergeants and that what the appellant said 'wouldn't have been a strange request' {T231.12-.13}. The appellant's request for an appointment as a brief handling manager was perfectly consistent

with his statement that he 'needed a break' {AB 219.3}, and Detective Inspector Sipos' understanding that the appellant was seeking a position with 'regular hours in the day shift' {AB 230.48-.49}.

21 The court did not err in finding that Detective Inspector Sipos' concession that he had an obligation to investigate a disclosure that an officer was 'struggling' was not determinative of the question. It was a legal question for the court to determine whether Detective Inspector Sipos had an obligation to investigate {AB 245.16-.24}. Detective Inspector Sipos' obligation in respect of the struggling disclosure is determined by reference to the construction of what the appellant's words would have reasonably conveyed to an officer in the position of Detective Inspector Sipos at the time they were uttered.

22 The Court of Appeal did not err in finding that, even if Detective Inspector Sipos had made an inquiry, it was likely that the appellant would have referred to domestic matters. The court referred to the application for a special circumstances transfer to the Central Coast of November 2011 - exhibit D set out in the reasons of the judge at first instance {AB 54.56-55.22} – in which the appellant disclosed that his reasons for requesting the transfer were the circumstances surrounding his wife's pregnancy and his long commutes to work {AB 243.48-56}. Exhibit D is evidence that was not created for the purpose of the appellant's proceedings against the respondent. It gives an objective account of what the appellant most likely would have said if pressed by Detective Inspector Sipos in July 2011.

Ground 3

23 Where a person is engaged to perform stated duties, the person is assumed to consider that he or she can do the job, unless he or she gives evident signs warning of the possibility of psychological injury. Information *later* acquired by the entity owing the duty about the vulnerability of the person to psychological injury does not qualify the duty of care *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44, [2005] HCA 15 per McHugh, Gummow, Hayne and Heydon JJ at [36] (italics in original). Although *Koehler* was concerned with a duty of care arising out of a contract of employment, there is no reason to think that the appellant's service relationship with the NSWPF made it any less likely that he would be assumed to consider that he could do the job.

24 In the absence of disclosure by the employee, an employer has a limited duty to inquire for evidence signs warning of the possibility of psychological injury. In *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports 81-919, [2007] QCA 366, Keane JA at [41]-[46], [97] commented on the limits of an employer's duty to inquire into its employee's psychological health, given employees' reasonable expectations of autonomy:

(See also *NSW v Fahy* (2007) 232 CLR 486 at 508-9 [69]). The autonomy of an individual is not absolute and *CAL No 14 P/L v Motor Accident Board* (2009) 239 CLR 390, [290] HCA 47 per Gummow, Heydon and Crennan JJ at [38] suggests categories of persons, including employees, to whom a greater duty may be owed than to others. However, in *Comcare v PVYW* (2013) 250 CLR 246, [2013] HCA 41 Haegler J in dissent at [151] held that the modern employment relationship respects the autonomy and privacy of an employee. His Honour's comment was aimed at the degree to which an employer, in characterising whether a worker is in the course of employment for the purposes of the workers compensation legislation, could enquire into "personal choices made by an employee, hour-by-hour or minute-by-minute".

25 The Court of Appeal did not err in holding that Detective Inspector Sipos had not acted unreasonably in not inquiring further. The court referred to the element of hindsight reasoning involved in the primary judge holding that he should have {AB 247.9-.19}. The hindsight reasoning carried with it the implication that Detective Inspector Sipos was obligated to expressly inquire as to the appellant's psychological health, a proposition that was expressly rejected by the Court of Appeal {AB 247.22-248.1}. The respondent was entitled to assume that the appellant considered that he could do his job unless he gave an evident sign warning of the possibility of psychological injury. In the absence of such a sign, considerations of autonomy in the modern employment relationship imposed no duty on the respondent to inquire. Whether the appellant gave such a sign turns on the quality of the struggling disclosure of July 2011. For the reasons submitted, the struggling disclosure would not have conveyed to a police officer in the positon of Detective Inspector Sipos a warning that the appellant may possibly be suffering from psychological injury. It followed there was no duty on the respondent to inquire further.

26 McColl JA's concurring judgement {AB 9.40-19.31} rises no higher than a disagreement on a policy issue that was peripheral to the outcome of the appeal. Her Honour's remarks indicate the tension between employees' dignity and 'entitlement to be free of harassment', and the proper discharge of an employer's duty where it employs foreseeably traumatised employees. However, although she holds that the courts should, in general, 'not be timid about the need to ameliorate the risk' which may involve some intrusion into employees' private affairs, {AB 191.1-5} her Honour does not suggest what the limits of the mutual obligations are, the limit of the employer's duty to ameliorate the risk on the one hand, and the limit of the employee's tolerance of loss of autonomy on the other. Still less does her

Honour indicate the respective limits of the obligations of the NSWPF and officers in the position of the appellant.

Ground 4

27 The duty of care owed by the Commissioner of the NSWPF to the New South Wales police officers arises from legislation, delegated legislation and, if there is one, the contract of employment: *State of New South Wales v Fahy* (2007) 232 CLR 486, [2007] HCA 20 per Gummow and Hayne JJ at [18]. The appellant had no contract of employment. Rather, his service relationship with the NSWPF arose out of his oath under s 13 of the *Police Act* 1990 and his consequent obligation under s 14 of the Act to carry out his common law and statutory duties as a police officer. The appellant was obligated to carry out duties as determined by the Commissioner of the NSWPF pursuant to s 8 of the Act, and obey lawful orders and directions given to him to perform such duties. As the duties owed by and to the appellant arose out of legislation and delegated legislation, the scope of the duty of care owed by the Commissioner of the NSWPF to the appellant must be determined by reference to the relevant legislation. Consequently, duties imposed by the common law in respect of the appellant must also be subject to, and may be modified by, the primary and delegated legislation creating the service relationship between the appellant and the NSWPF. Of particular relevance to ground 4 of this appeal are statutory provisions for the investigation of complaints of police misconduct, which are inconsistent with the imposition of a duty on the NSWPF when investigating a police officer in the public interest: *Sullivan v Moody* (2001) 207 CLR 562, [2001] HCA 59 at [60].

28 The test for steroids of 5 December 2012 was subject to s 211AA of the *Police Act* 1990 allowing police officers to be selected for testing on a targeted basis as determined by the Commissioner. Division 5 of Part 5 of the *Police Regulation* 2008, as amended by the *Police Amendment (Targeted Tests) Regulation* 2012, entitled "Conduct of Testing" expressly does not apply to targeted testing for steroids. Consequently, by regulation the appellant had only the right to request part of the sample. Although the primary judge made findings that the arrangements for testing and the testing itself were 'insensitively undertaken' he found there was no breach of duty {AB 149.5-.8}.

29 The interviews of 24 December 2012 and January 2013 were conducted by the PSC and were subject to s 145 of the *Police Act* 1990 which imposes a requirement of effectiveness and timeliness. The guidelines lay down detailed procedures for interviewing officers on sick leave, subject to the overriding obligation to complete the investigation in a timely and effective manner {AB124.39-.44}.

The respondent was interviewed, at his election, according to civil, rather than criminal procedure {AB 79.50-.56}. The primary judge found the interviews may have been 'inept' and may have added to the appellant's distress. Nevertheless he was unable to form a 'concluded view' as to whether there had been a breach of duty {AB 149.24-.55}

30 The Court of Appeal did not err in accepting NSWPF's submission that the statutory obligation to carry out an investigation in a manner that is effective and timely cannot be defeated by the guidelines for investigation {AB 252 .50-.58} nor did the Court of Appeal err in dealing with the four alleged breaches relating to the investigation. For the first (AB 253.1} and third {AB 255.32} alleged breaches, the Court of Appeal had regard to the transcript of oral evidence at first instance and the guidelines. It was as well placed as the primary judge to apply the facts of what happened to the requirements of the guidelines. For the second alleged breach {AB 254.23} the court's analysis of the inapplicability of the guidelines to an investigation authorised by s211AA is a correct construction of the statute. For the fourth alleged breach {AB 257.41}, the Court of Appeal found that part of this aspect of the notice of contention was inconsistent with Mr Briggs' own evidence {AB 257.54}.

Part VIII: Time estimate

31 The respondent would seek no more than 1.5 hours for the presentation of the respondent's oral argument.

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