SUPREME COURT OF QUEENSLAND

CITATION:	*Inghams Enterprises Pty Ltd v Kim Yen Tat* [2018] QCA 182
PARTIES:	**INGHAMS ENTERPRISES PTY LTD** ACN 130 793 609 (appellant) **v** **KIM YEN TAT** (respondent)
FILE NO/S:	Appeal No 5334 of 2017 DC No 2317 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 2 May 2017 (Martin SC DCJ)
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2017
JUDGES:	Gotterson and Morrison JJA and Bond J
ORDERS:	**1. The applicant is granted leave to appeal.** **2. The appeal is allowed.** **3. The judgment of the primary judge is set aside and in lieu thereof it is ordered that judgment is entered for the applicant on the respondent's claim.** **4. The respondent must pay the applicant's costs of the proceeding below, and of the application for leave to appeal.**
CATCHWORDS:	APPEALS AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – GENERALLY – where the respondent brought an action in negligence – where the respondent was employed by the appellant – where the respondent was attacked by a third party in the appellant's car park – whether the primary judge erred in finding the risk was reasonably foreseeable – whether the primary judge erred in finding the appellant breached its duty of care – whether the primary judge erred in finding the breach caused the injury APPEALS AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S

FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACT INVOLVED – GENERALLY – where the primary judge found the appellant's breached its duty of care by failing to educate staff as to security awareness – where the primary judge found that with proper education security would have intervened to prevent the injury to the respondent – where intervention turned on whether other employees would have reported suspicious conduct and identified the assailant – whether the primary judge erred in inferring that a different course of events would have occurred

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – GENERALLY – OTHER GENERAL FACTORS – where the primary judge found there was a not insignificant risk of third party violence to female employees in the appellant's car park late at night – whether the primary judge erred in concluding the risk met the "not insignificant" threshold

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the primary judge found the appellant breached its duty of care by failing to educate its employees to report suspicious behaviour and by failing to implement security measures geared towards addressing the risk of third party violence – where the primary judge made reference to a staff instruction issued immediately after the incident – where the primary judge found the appellant ought to have implemented certain security measures – whether the primary judge's findings involved the application of hindsight – whether the primary judge erred in finding the appellant breached its duty of care

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where the primary judge found the appellant breached its duty of care by failing to educate its employees to report suspicious behaviour – where the primary judge found the injury would not have occurred "but for" the breach – whether the primary judge erred in inferring that a different course of events would have occurred – whether the primary judge failed to provide adequate reasons

Civil Liability Act 2003 (Qld), s 9, s 10, s 11, s 12
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305C, s 305D, s 305E

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, cited
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009]

QCA 66, cited
Henderson v State of Queensland (2014) 255 CLR 1; [2014] HCA 52, cited
Hewitt v Count Financial Ltd [2017] VSCA 354, cited
Innes v AAL Aviation Limited [2017] FCAFC 202, cited
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319; [2012] QCA 315, cited
Re Day (2017) 340 ALR 368; [2017] HCA 2, cited
Robinson Helicopter Company Inc v McDermott (2016) 331 ALR 550; [2016] HCA 22, cited
Shaw v Thomas [2010] NSWCA 169, cited
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301, cited
Stokes v House With No Steps [2016] QSC 79, cited
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, followed
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: B F Charrington for the appellant
S L Abbott for the respondent

SOLICITORS: BT Lawyers for the appellant
Seymour Furlong for the respondent

[1] **GOTTERSON JA:** I have had the advantage of reading the draft judgment of Bond J. I agree with the orders proposed by his Honour and the reasons for them.

[2] The applicant's challenge to the finding by the learned trial judge on causation ought to succeed. That finding was based upon a breach of duty by the applicant to educate its staff to report suspicious behaviour in and about the carpark.

[3] As Bond J notes, the learned trial judge also appears to have found a breach of duty by the applicant in failing to gear its security measures in the carpark towards addressing the risk of third-party violence to employees late at night. The following conclusions, which are challenged by the applicant, were expressed with respect to security measures:

> "I am also of the view that the installation of duress alarms at reasonable intervals throughout the carpark was an obvious measure which ought to have been in place. That, too, would be a relatively inexpensive measure. An upgrade of CCTV monitoring so that the entire carpark can be monitored and having security officers actually monitor the carpark with a view to preventing offending, seems quite basic."[1]

[4] The process by which those conclusions were reached was not explained in the reasons below. No analysis within the framework of s 305B(2) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("*WCRA*") was set out to justify each conclusion. No specific findings were made as to how any of those measures

[1] Reasons at [39].

ought to have been implemented by the applicant in order to discharge its duty of care.

[5] The learned trial judge did not make findings that a failure to take any of those measures was the cause of the respondent's injuries. Whether a failure to take any of them could have caused the respondent's injuries consistently with the principles in s 305D of the *WCRA* was not discussed in the judgment below.

[6] The respondent has not filed a notice of contention pursuant to r 757 of the *Uniform Civil Procedure Rules* 1999 (Qld) by which she proposes that the decision in her favour should be affirmed on a ground that the failures to take any of the security measures, in the above terms in which they were found, caused her injuries. It is therefore not necessary to determine the correctness of such a contention. I do, however mention that, in my view, the respondent would have had considerable difficulty in making good the contention had it been proposed.

[7] **MORRISON JA:** I agree with the reasons of both Gotterson JA and Bond J. I agree with the orders proposed by Bond J.

[8] **BOND J:**

Introduction

[9] The respondent was a shift worker at the applicant's chicken-processing factory. She suffered a significant post-traumatic stress disorder injury after being attacked late at night in the factory's car park. She alleged that her injury was caused by the applicant's negligence and sued the applicant in the District Court to recover damages.

[10] The learned primary judge gave judgment in favour of the respondent in the amount of $148,916.87, clear of the requisite refund to WorkCover Queensland. The applicant applied for leave to appeal pursuant to s 118(3) of the *District Court Act 1967* (Qld) and for an order that the judgment be set aside and the respondent's claim be dismissed with costs.

[11] For the reasons which follow, I consider leave to appeal should be granted and the orders sought should be made.

The incident

[12] In February 2013, the applicant employed around 600 to 650 shift workers on the afternoon shift at its factory at Murarrie. Many were female. Workers on that shift could finish anywhere between 9:30pm and 12:30am. However the majority – comprising 350 to 450 workers – would usually finish between 11:00pm and 11:45pm, their precise finishing times being staggered over that period.[2]

[13] At the end of their shift, all workers exited the factory through the factory car park. In the ordinary course, some would have parked in the car park and would walk to their cars and drive home. Some would have been dropped off and would be picked up in the car park by someone else. Others would walk through the car park to the train station, which was about a 15 to 20 minute walk away. There were people wandering out into the car park all the time. And, even though management liked to discourage it, there were always workers who liked to hang around in the car park after work to have a gossip, smoke or wait for their friends.[3]

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[2] Evidence of Mr Bissett, shift supervisor, T2-94 at lines 13-27: AR217.
[3] Exhibit 23: Statement of Ms Daniel, production supervisor, at [16]-[17]: AR986.

[14] The car park had some lighting and nine CCTV cameras on its perimeter. A security office with a security guard was located in an office at a gate between the factory grounds and the car park, but there was no security at the car park entrance. From the security office, the guard had an incomplete view of the car park and was assisted to some extent by vision from the CCTV monitors, though the CCTV coverage was not complete either.

[15] Prior to the night of 1 February 2013, there had not been an incident involving violence to a worker in the car park in the over 12 years that the factory had been open.

[16] Aaron Michael Brain had been dismissed from his employment with the applicant in early January 2013. At about 10:30pm on the night of 1 February 2013 Brain was standing in a garden bed in the car park in the rain when he was noticed by Ms White, a female worker known to him. Ms White had left work early for medical reasons but had returned to pick up her partner, Mr Morris, at the end of his shift. She called out to Brain and he walked over to her car. The two of them had a conversation in which he told her he was waiting for another worker, who she knew to be his friend. Mr Morris arrived and joined the conversation for a short time and then he and Ms White drove off. Before they left, Brain asked them not to tell anybody he was there, because he did not want to cause any trouble. They did not perceive anything untoward in their interaction with him.

[17] Later that night, on three separate occasions between about 11:00pm and 11:45pm, Brain approached different female workers as they left at the end of their shifts. He drove up to one worker, Ms An, twice in the car park shortly after 11:00pm. Again shortly after 11:00pm he approached two others – Ms Huang and Ms Song – first, whilst on foot at the exit of the car park when they were walking to the train station and, second, when he drove up to them again a little later after they had walked further towards the station. Finally, shortly after about 11:20pm, he walked up to another worker, Ms Fongrit, in the car park as she approached her car.

[18] Brain was not known to the women he approached. He spun each of them slightly different versions of the same line, namely that they should come with him because he needed assistance of some kind. On the first approach to Ms An said he needed help and on the second approach he asked her for directions to the train station. To the others he developed a story that his pregnant wife needed some help and he invited them to approach his car for that purpose. He was polite and not threatening, but they all found his behavior to be strange. They experienced differing degrees of apprehension. Each managed to disengage from the encounter without incident. None of them reported his conduct to the security guard that night.

[19] The respondent was not as fortunate as her co-workers.

[20] After the end of her shift, the respondent went into the car park at about 11:45pm and made her way towards her car. Brain, who was not known to her, drove his car near to her, walked over, and gave her the false story about having a pregnant partner who needed help. He sought to persuade her to accompany him in his car to show him where the train station was. She declined, and walked to her own car and got into the driver's seat. Before she could close the door, Brain approached and stopped her from doing so. He admitted that he had no partner, and said he had had a bad day and needed someone to talk to. Then:

> The [respondent] felt very scared and told him she had to go home. Brain kept talking and the plaintiff kept saying that she had to go home. He then said "Can I give you a hug?" He tried to put his hand on her neck. There was something in that hand which looked like a little red light. The

> [respondent] pushed his hand away and felt something stick into her hand. She pushed him away, got out of the car screaming and ran away. Other workers in the car park quickly came to her assistance and she ran behind them. Brain asserted to these rescuers that it was a "domestic" and soon got in his car and drove away. The workmates took the [respondent] directly to the security officer in the security hut and police were then called.[4]

[21] Overall, the length of the encounter from the time Brain first spoke to the respondent to the time he tried to grab her was less than five to seven minutes. The physical portion of the encounter where Brain tried to grab the respondent lasted approximately 20 seconds. As I have mentioned, as a result of the encounter the respondent suffered a significant post-traumatic stress disorder injury, which she attributed to the negligence of the applicant. She sued the applicant in the District Court to recover damages.

[22] At the trial the applicant denied liability, although it accepted –

(a) that it owed the respondent a duty to take reasonable precautions to avoid foreseeable risk of injury to her;

(b) that the duty encompassed the obligation to take reasonable steps to provide a safe place of work and a safe system of work; and

(c) that the obligation to take reasonable steps to provide a safe system of work could extend –

(i) to encompass the security of the personal safety of the respondent; and

(ii) to require the applicant to take reasonable steps to guard against the risk of criminal attack by third parties.

[23] The principal liability issues at trial were foreseeability, breach of duty and causation. In particular, the applicant contended:

(a) the incident was not foreseeable;

(b) even if it had been foreseeable on some general level, the response of the defendant to the relevant risk, or any similar risk, was reasonable and the alleged breaches of duty pleaded by the respondent were not measures required of an employer acting reasonably in order to discharge its duty of care; and

(c) even if the pleaded measures had been implemented, they would not have prevented the attack from occurring, and thus would not have prevented the injury suffered by the respondent.

[24] As I have mentioned, the learned primary judge found for the respondent.

[25] The applicant submitted that leave to appeal ought to be granted because it contended that an appeal was necessary to correct a substantial injustice, there were reasonable arguments that the decision was attended by error, and the decision was contrary to authority.

[26] Evaluation of the applicant's contention that the decision was attended by error may be carried out under headings addressing the three principal liability issues at trial. The applicant also impugned the sufficiency of the reasons given by the primary judge in support of his conclusions, but its complaints in that regard may be dealt with as they arise under the other headings. One point must first be emphasized.

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[4] Reasons of the learned primary judge at [10]: AR1218.

The proper starting point

[27] The proper starting point for examination of liability issues in a case such as the present is a consideration of the relevant provisions of ss 305B–305E of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

[28] These provisions broadly correspond to ss 9–12 of the *Civil Liability Act 2003* (Qld) and are provisions which are largely replicated in a number of statutes *in pari materia* throughout Australia. As the High Court observed in *Adeels Palace Pty Ltd v Moubarak* "[i]f attention is not directed first to [such provisions], there is a serious risk that the inquiries about duty, breach and causation will miscarry".[5]

[29] Sections 305B – 305E of the *Workers' Compensation and Rehabilitation Act 2003* provided:

> **Part 8 Civil Liability**
>
> **Division 2 General standard of care**
>
> **305B General Principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury.
>
> **305C Other Principles**
>
> In a proceeding relating to liability for a breach of duty—
>
> (a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
>
> (b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.
>
> **Division 3 Causation**
>
> **305D General Principles**
>
> (1) A decision that a breach of duty caused particular injury comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);

[5] (2009) 239 CLR 420, 432 [11].

(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.

305E Onus of proof

In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

[30] Against that background, I turn to a consideration of the principal liability issues.

Foreseeability

[31] The reasons for judgment of the learned primary judge:

(a) noted, correctly, that it did not matter that the precise manner in which the respondent received her injuries was not foreseeable;[6]

(b) acknowledged, correctly, that the essence of the applicant's argument was to rely on the practical absence of any prior incidence of violence by a third party to an employee as justifying the conclusion that the risk was not foreseeable and could not be regarded differently than the level of risk which applied anywhere else in the community;[7]

(c) rejected as without merit the applicant's reliance on factually distinguishable cases[8] because of the significance he placed on the evidence before him that, in the case before him, many female workers left the workplace late at night five times a week through a large, open car park in an industrial area;[9]

(d) noted, correctly, that he was required to bring a prospective, rather than a hindsight, analysis to bear on the question of foreseeability;[10]

(e) concluded that the applicant, as an employer of workers in the circumstances described, should have engaged in a proactive assessment of the risk of third party violence to its employees and how it should respond, which assessment should have taken into account both the factors mentioned and the fact that as

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[6] Reasons at [20]: AR1220. For confirmation that this is the right approach to the statutory regime, see *Shaw v Thomas* [2010] NSWCA 169 per Macfarlan JA at [43].
[7] Reasons at [21]: AR1220.
[8] Namely, *Lusk v Sapwell* [2012] 1 Qd R 507 and *Love v Lindsay Brothers Management Pty Ltd* [2013] QDC 174.
[9] Reasons at [22]: AR1220.
[10] Reasons at [25]: AR1221.

an employer it would be aware that it employed a large workforce, including persons with criminal histories, who, when they left employment, would have knowledge of the layout of premises and of employee movements;[11] and

(f) concluded that a reasonable person in the position of the defendant would have foreseen a not insignificant risk of third-party violence to female employees in that car park late at night.[12]

[32] His Honour did not specifically advert to the provisions of s 305B when considering the foreseeability issue, but his reasons had earlier acknowledged that the *Workers' Compensation and Rehabilitation Act* 2003 applied,[13] and his use of the language "not insignificant risk" revealed that he had applied the statutory test rather than the common law test for foreseeability.[14]

[33] The applicant contended –

(a) his Honour erred in not concluding that the probability of assault by a third party in the applicant's car park was so low as not to meet the "not insignificant" threshold, because the risk should have been regarded as probably lower than that associated with ordinary domestic life; and

(b) His Honour should have concluded that the risk did not meet the "not insignificant" threshold having regard to –

(i) the fact that the incident occurred in a lit car park with nine CCTV cameras and a nearby security guard; and

(ii) the fact that there had been no comparable prior incidents at the applicant's premises and it had been in operation for more than a decade in the same manner it had operated in the night in question.[15]

[34] In my view there is no substance to the applicant's argument. The evaluation which the learned primary judge reached was justified on the evidence before him and for the reasons which he gave. The cases on which the applicant relied were factually distinguishable for the reasons[16] which his Honour gave. The judgment which his Honour formed about the risk to female workers in the circumstances revealed by the evidence before him was unremarkable. Indeed, as the respondent correctly pointed out, there was evidence before the learned primary judge from Mr Bissett that Ms Daniel, who had been the supervisor involved in the termination of Brain, was sufficiently concerned for her own safety that she would not walk to her own car alone after her shift.

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[11] Reasons at [25]-[28]: AR1221.
[12] Reasons at [29]: AR1221.
[13] Reasons at [2]: AR1216.
[14] The common law rule, established in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, is that a foreseeable risk is one that is not "far-fetched or fanciful". The differently worded statutory test brought about a slight increase in the degree of probability of harm which is required for a finding that a risk was foreseeable: see *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 per Fraser JA (White JA and Mullins J agreeing) at 333 [26].
[15] The applicant had operated out of its current premises for over 12 years. The only possibly comparable incident which had occurred was a domestic dispute between husband and wife which did not involve any violence. There was some evidence that there had been another incident in the applicant's previous premises in the 1960s.
[16] Reasons at [22]: AR1221.

Breach of duty

[35] The learned primary judge approached the question of breach by stating that the following passage in *Wyong Shire Council v Shirt* remained relevant:

> ... The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.[17]

[36] That his Honour made no specific reference to s 305B is not critical, because the *Wyong Shire Council v Shirt* calculus is in fact reflected in s 305B(2). However, it is appropriate to note that the source of the applicable law is the statute, not the common law.

[37] The learned primary judge identified the following breaches of duty:

(a) the applicant failed to educate its employees properly to report suspicious behavior in and about the car park;[18] and

(b) the applicant failed to gear its security measures in the car park towards addressing the risk of third-party violence to employees in that car park late at night.[19]

[38] So far as the first breach of duty was concerned, the primary judge concluded[20] that –

(a) satisfactory instruction to staff would include giving a notice "in terms somewhat similar" to the notice which the applicant in fact issued to its workers immediately after the events on 1 February 2013, namely:

> On Friday night, the 1st February 2013, some of our employees were approached in the carpark and on their way home by a male in a white car.
>
> In light of these events please insure (sic) that you:
>
> - Be aware of your surroundings at all times and if there is anyone acting suspiciously, **NOTIFY SECURITY IMMEDIATELY**.
> - Do not walk to your car alone. Ensure that there are other people in the carpark with you.
> - Do not walk to the train station alone. Find other people that are walking to the train and go in groups **OR** ask another employee for a lift to the train station.
> - Do not loiter in the carpark. Ensure that you head straight to your car and go home.

(b) satisfactory instruction to staff would also have included the provision of a phone number to contact the security officer and emphasis that compliance with instruction was not merely for self-protection, but also for the protection of fellow employees; and

(c) satisfactory instruction to staff would involve regular verbal and written instruction which was regularly reinforced with a view to teaching employees to follow instructions.

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[17] Reasons at [30]: AR1221; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.
[18] Reasons at [24], [25], [31] and [33]-[37]: AR1220-1223.
[19] Reasons at [39]-[40]: AR1224.
[20] Reasons at [33]-[37]: AR1222-1223.

[39] So far as the second breach of duty was concerned, the learned primary judge found that none of the security measures at the car park were "geared towards protecting employees from third-party violence" because that was not a risk which the applicant had foreseen.[21] Any deterrent effect which the existing security measures had was entirely coincidental. The applicant ought to have had[22] –

(a) duress alarms installed at reasonable intervals throughout the car park;

(b) upgraded CCTV monitoring so that the entire car park could be monitored; and

(c) security officers who actually monitored the car park with a view to preventing offending.

[40] The applicant sought to impugn these findings on the basis that –

(a) the findings were made without reference to the submission which the applicant had made (and which should have been accepted) that reference to the events after the incident would be contrary to s 305C(c) because it would treat the instruction which had been given to the staff as an admission of liability;

(b) the findings erroneously involved the application of hindsight, because they were inherently specific to the unusual facts of the present case, which did not involve a single assault, but a protracted course of abnormal conduct prior to an assault.

[41] Those contentions cannot be accepted.

[42] The findings made by the learned primary judge reflected his acceptance of aspects[23] of the expert opinion evidence which had been adduced by the respondent from engineers experienced in risk management and security assessments.[24] As a general proposition, the expert reports had emphasized that preserving the security and safety of workers from violence and assault was an occupational health and safety issue which could, and should, be assessed and managed proactively, and recommended improvements in the areas identified by the primary judge.[25] The conclusions which his Honour reached concerning security awareness training, duress alarms and upgraded CCTV monitoring were specifically supported in the reports[26] and that support not diminished by the oral evidence of the engineers,[27] which his Honour evidently accepted. The conclusion which his Honour reached, that the security measures in place were not aimed at protecting employees from

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[21] Reasons at [24]-[28] and [39]-[40]: AR1220-1221 and AR1224.

[22] Reasons at [39]: AR1224.

[23] The learned primary judge did not accept all the recommendations which had been supported by the experts. He specifically rejected their suggestion concerning controlled access to the car park on the basis that it was "excessive, impractical and unlikely to be successful when confronted by an offender such as Brain": see reasons at [31]-[32]: AR1222.

[24] At trial the applicant failed in its objection to the admissibility of the reports. It did not seek to contend on appeal that admission of the reports was erroneous.

[25] Exhibit 17: InterSafe Reports dated 22 February 2016 (AR374-424) at 19-20 (AR394-395) and 24-31 (AR399-406); dated 9 August 2016 (AR949-965) at 5-12 (AR955-963).

[26] Exhibit 17: InterSafe Reports dated 22 February 2016 (AR374-424) at 24 (AR399), 28-31 (AR403-406); dated 9 August 2016 (AR949-965) at 5 (AR955), 8-9 (AR958-959) and 11-12 (AR961-962); and dated 15 August 2016 (AR966-977) at 2-3 (AR969-970).

[27] Evidence of Roger John Kahler, consultant, T2-30 at lines 1-25 (AR153), T2-43 at lines 21-33 (AR166) and T2-60 at lines 43-47 and T2-62 at lines 19-24 (AR183-184); evidence of Adam Gary Dargusch, senior engineering consultant, T2-83 at lines 13-19 (AR206).

third party violence and that the security officers should actually be performing their duties with that risk in mind, was also supported by the evidence to which his Honour referred and cannot be criticized.[28]

[43] The applicant's criticisms of his Honour's findings pay insufficient regard to the content of that evidence and his Honour's acceptance of it. Although his Honour did make reference to the notice which the applicant gave to its workers after the incident had occurred, that reference was as an exemplar of the sort of proactive response which he thought should have been adopted before the incident and, consequent upon an appropriate examination of risk, as a response to risk. His Honour did not make the errors suggested by the applicant. Given that he did not treat the post-incident conduct as an admission, it was unnecessary for him specifically to advert to the applicant's submission that he should not do so.

[44] The applicant also put other arguments criticizing the methodology employed by the learned primary judge in reaching and expressing some of the conclusions he reached.

[45] First, the applicant contended that the conclusion that instruction of the workers should have included a phone number for employees to call for the security officer was in error because there was no evidence about the practicability of such a system, from the perspective of either the applicant's security staff or its employees generally. I reject that argument. No such evidence was required. The ubiquity of mobile phones is sufficiently well-known to justify the conclusion expressed at the level of generality used by the learned primary judge. The point has greater relevance, however, in relation to causation and I will come back to it in that context.

[46] Second, the applicant criticized the findings concerning duress alarms and CCTV upgrade on the basis of the paucity of analysis expressed in the reasons as to exactly what was requisite in each instance. It is not necessary to consider the merit of that criticism further because, as will appear, the learned primary judge did not find that either omission was relevantly causative of loss.

[47] Finally, the applicant criticized the finding concerning failing to have security officers who actually monitored the car park with a view to preventing offending on two bases. That criticism was advanced, first, on the basis that the finding did not state whether the monitoring was to be by constant viewing of surveillance images, or patrolling of the area, and, second, because whichever method was intended, the requisite calculus analysis was not performed, either in terms of cost, or the practicability of such a measure having regard to the security guards' other tasks. Again, it is not necessary to consider that criticism further because the learned primary judge did not find any such omission was causative of loss.

Causation

[48] The findings of the learned primary judge on the question of causation were expressed in only three paragraphs as follows:[29]

> [41] In my view, the defendant's failure of duty caused the plaintiff's injuries. It is likely that with proper education of employees to report suspicious behaviour in the carpark, the plaintiff would not have sustained her injuries. With proper education, it is likely that at least one of the four women who regarded Brain's behaviour as suspicious and frightening, would have alerted security and it is

[28] Reasons at [40]: AR1224.
[29] Reasons at [41]-[43]: AR1224.

> likely then that security would have intervened to prevent the assault on the plaintiff. There was certainly ample time within which to intervene.
>
> [42] Whilst I made plain in [40] above that none of the security measures at the carpark was geared towards protecting employees from third-party violence, nonetheless, even with the obvious lack of education of the security officers, it is likely that had any of the four women reported Brain's suspicious behaviour to Mr White, he would have approached Brain, queried him and had him move on.
>
> [43] The general particular of negligence pleaded that the defendant failed to take reasonable precautions to avoid foreseeable risk of injury, clearly encapsulates the breach of failing to provide proper education to employees to report suspicious behaviour in the carpark. This matter was fully litigated at trial.

[49] It is apparent, therefore, that the only breach of duty which the learned primary judge found to be causative was the failure to educate staff as to security awareness. His Honour's hypothesis was that with training and instruction along the lines of that summarized at [38] above, the injury to the respondent would not have happened. Rather the course of events posited at reasons [42] would have occurred.

[50] The applicant was justifiably critical of the paucity of his Honour's reasons on this critical issue. There was no engagement with the statutory provisions, which require an approach to causation different to that which is the subject of the common law: see *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18]-[27], cited in a similar context by Jackson J in *Stokes v House With No Steps* [2016] QSC 79 at [142] and see also *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 at [38]-[41]. Nor was there any engagement with the evidence of the individuals who had been approached. Finally, there was no engagement with the applicant's argument at trial that, on the evidence, the proper conclusion was that the respondent had not proved the injury to her would have been avoided had the alleged negligence not occurred. Although his Honour plainly rejected that argument, he did not explain why. The failure to provide adequate reasons is an error of law: see *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [57].

[51] The applicant further contended that, even if one assumed that the learned primary judge had applied the correct test for causation, his conclusion was in error because on the evidence it was not open to the learned judge to reach the conclusion he did.

[52] In *Robinson Helicopter Company Inc v McDermott* the High Court recently restated the fundamental principle that an appellate court:

> … is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".[30]

[53] However, deference to a trial judge's assessment of evidence does not preclude the possibility of disturbing his or her ultimate conclusions where those conclusions are based on inferences drawn from accepted facts: *Innes v AAL Aviation Limited* [2017] FCAFC 202 (Bromberg J) at [202]; *Hewitt v Count Financial Ltd* [2017] VSCA 354 (Tate and Kyrou JJA) at [33]; *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 301 (Santamaria, Kaye And Ashley JJA) at [78]. In such a case:

> … an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the

[30] *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550 at [43], citations omitted.

> findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.[31]

[54] The question here is whether it was correct for the learned primary judge to infer the existence of a particular state of affairs, namely that particular omissions may be regarded as a necessary condition of the occurrence of injury and, therefore, as satisfying the requisite standard of factual causation, because if the omissions had not occurred, it is more probable than not that the injury would have been avoided because a different course of events would have occurred.

[55] The approach which must be taken to the process of inferential reasoning required in this case is clear: see per Gageler J in *Henderson v State of Queensland* (2014) 255 CLR 1 at [87]-[91] and Gordon J in *Re Day* (2017) 340 ALR 368 at [18], and the authorities which their Honours cite. Whether the subject of the inference is a particular fact, or the existence of a state of affairs:

> …where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise.[32]

[56] The applicant submitted, correctly, that it was either expressed or implied in the conclusion reached by the primary judge that he made a finding on the balance of probabilities in favour of each of the following four conclusions concerning the events which would have occurred had reasonable steps been taken to give workers security awareness training:

(a) Conclusion 1: at least one of the workers involved in the three encounters which took place between 11:00pm and 11:45pm would have been sufficiently concerned about Brain that they would have called security and reported the details of the encounter they had had with Brain;

(b) Conclusion 2: the security guard receiving the report would have left the security office and would have found Brain;

(c) Conclusion 3: the interaction between the security guard and Brain would have had the outcome that the guard required Brain to leave the car park; and

(d) Conclusion 4: Brain would have complied, and, critically, would not have returned in time to encounter and injure the respondent.

[57] The applicant challenged those conclusions. It submitted that a proper evaluation of the evidence did not permit the finding that they had been established on the balance of probabilities. For the reasons which follow, I agree that the evidence did not give rise to a reasonable and definite inference in favour of the conclusions.

Conclusion 1

[58] The question is whether at least one of the workers involved in the three encounters which took place between 11:00pm and 11:45pm would have would have been sufficiently concerned about Brain that they would have called security and reported the facts justifying that concern.

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[31] *Warren v Coombes* (1979) 142 CLR 531, 551.

[32] *Henderson v State of Queensland* (2014) 255 CLR 1 per Gageler J at [88] citing *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 per Dixon, Williams, Webb, Fullager and Kitto JJ at 5.

[59] It may be accepted (as the respondent submitted) that a likely outcome of the applicant taking reasonable steps to give workers security awareness training is that workers would take steps to report suspicious conduct to security. But the report would not occur unless the worker perceived the conduct as suspicious and had the means and opportunity to make the report in a timely manner.

[60] The evidence of the female workers Brain approached was that Brain's conduct caused each of them to experience a degree of apprehension. However the degree to which that occurred varied and the level of apprehension which they say they experienced must be thought to have been expressed by them through the prism of hindsight and with the knowledge that Brain had actually posed a danger to them.

[61] As to Ms An:

(a) Ms An gave evidence at the trial. She did not report anything to the security guard even though after Brain's approaches to her she returned to the security office to pick up the car key which her husband had left for her there. She plainly had the means and opportunity to make a report.

(b) She thought that when she started work with the applicant in 2012 she had been told to report to security anything unusual.[33] The following question and answer is telling:

> Is there any reason why you didn't report this incident to the security guard that night?---I was finishing work and I was just - I thought it was just strangers come in and ask direction for the train station.
>
> But you were scared?---Yes. But - yeah, it was - I was just trying to find my parking - my car to go home.[34]

(c) There is no evidentiary basis to conclude that security awareness training would have changed the nature of Ms An's perception of Brain. The result is that it seems to me to be speculative to conclude that Ms An would have reported Brain to security had she received security awareness training.

[62] As to Ms Huang and Ms Song:

(a) Ms Huang's evidence was only in the form of the written statement given to police. Ms Huang had found the initial approach to be strange. She found that Brain's approach on the second occasion as he pulled up in his car next to she and Ms Song once they had walked closer to the train station also made her feel strange and caused she and Ms Song to walk away faster to the train station. However her statement only recorded her saying she felt fearful and scared later, once she had found out what happened to the respondent. Further, there was no evidence as to whether she had a mobile phone with her that night or any other evidence to suggest she would have had access to a phone within a timeframe after the event which would have enabled her to call security in time to make a difference.

(b) Ms Song's evidence was also only in the form of the written statement given to police. She experienced a greater degree of apprehension than did Ms Huang. She said that once Brain approached them the second time and was insistent on their approaching the car to assist his wife, she was feeling very scared and afraid, and that was why she insisted on her and Ms Huang moving swiftly to the train station. There was no evidence as to whether she had a

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[33] T3-45 at lines 33-40: AR274 and T3-47 at lines 34-46: AR276.
[34] T3-45 at lines 42 to 47: AR274.

mobile phone with her that night or any other evidence to suggest she would have had access to a phone within a timeframe after the event which would have made enabled her to call security in time to make a difference.

(c) The circumstances of the encounters between Brain and Ms Huang and Ms Song and the degree of apprehension which at least Ms Song had expressed are sufficient to warrant the conclusion that if at the time of the event she connected the conduct of Brain with the applicant and its car park, it is likely that she would have been motivated to report the conduct. That is so even having regard to the possibility of hindsight bias. However, it is imponderable whether she would have made the connection with the applicant's car park because the conduct that really troubled her was the conduct which occurred once she and Ms Huang had left the car park and were walking towards the train station and Brain drove up next to them. A further obstacle is the lack of evidence that either of them had the means or opportunity to call security in time to make a difference in relation to the eventual attack on the respondent.

(d) Overall it seems to me to be a mere matter of conjecture that even with security awareness training, circumstances would have worked out such that one of them would have contacted security on the night in question in time to make a difference in relation to the eventual attack on the respondent.

[63] As to Ms Fongrit:

(a) Ms Fongrit's evidence was in the form of the written statement given to police and oral evidence given at trial.

(b) She said that she felt uncomfortable in her interaction with Brain because he was insistent on getting her to help him even though there were others in the car park who she had pointed out to him would be more help because they spoke English better than she did. She said that she felt "a little bit" scared for her safety and felt uncomfortable due to his behaviour.

(c) She certainly had the means and opportunity to contact security because she was still in the car park at the time of the encounter. However, the following question and answer is telling:

> Now, is the reason that you didn't report this matter to the security officer was because your employer never told you previously to report any unusual events?---They told, but because I - I didn't know that it's like that serious or something happen. Because he just ask for help, I just feel like strange, but also I have to be hurry to drop my friend home.[35]

(d) So it seems that she did not think the events to be sufficiently unusual to be concerned, even though she believed that she had been instructed to report unusual events.

(e) It is certainly possible that with security awareness training, she may have had a greater degree of awareness of risk, but to my mind – and at best for the respondent – the evidence does not justify the conclusion that that possibility is any more likely than the possibility that she would still have behaved in the same (perfectly understandable) way as she in fact behaved.

[64] The result is that I accept the applicant's argument that it was not open for the learned primary judge to make the finding which he did concerning the likelihood of a report actually being made.

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[35] T3-61 at lines 10-17: AR290.

Conclusions 2 and 3:

[65] If a security guard had received a report from one or other of the female workers approached by Brain which said his behavior was suspicious and reported the facts said to justify that concern, the question is whether the guard would have left the security office and would have found Brain and required him to move on.

[66] That the guard would have left the office and tried to find the male person the subject of the report may be accepted without any difficulty.

[67] However, there is difficulty with the assumption that Brain would have been identified as the man the subject of the hypothesized report. Any report by Ms Huang and Ms Song would have been from the train station (or the train) as they were on their way home. It is difficult to see how such a report would have led to Brain being identified by the guard as the man the subject of the report. And the evidence of each of Ms An and Ms Fongrit was that at the end of their encounter with Brain he got in his car and drove off.[36] Having done their duty, the more likely next step is that they would have gone home and left the problem with the security guard. Again it is difficult to see how any report from either of them would have necessarily led to Brain being identified by the guard as the person who had caused them concern.

[68] The most which could be legitimately inferred is that, if a report had been made, the guard would have been left with a heightened state of awareness as to the possibility that a male person in the car park might pose a threat to female workers. The proposition that the guard would have left the office to see if such a person could be identified may be accepted without any difficulty. But it must be recalled that there were people wandering out into the car park all the time and there were always workers who liked to hang around in the car park after work to have a gossip, smoke or wait for their friends.

[69] One might speculate that eventually Brain might have been noticed and approached by the guard. But why would the guard be any less likely than Ms White and Mr Morris in fact had been – see [16] above – to accept the explanation which would no doubt have been proffered by Brain if he was approached, namely that he was waiting for another worker who was a friend of his?

[70] I do not think there is a sufficiently secure evidentiary basis to regard conclusions 2 and 3 as anything more than conjecture.

Conclusion 4

[71] The question is whether, if a security guard had required Brain to leave the car park, Brain would have complied, and, critically, would not have come back in time to encounter and injure the respondent.

[72] The proposition that, having been asked to leave, Brain would have left may be accepted without difficulty. But the notion that he would not have returned as soon as the guard's attention was elsewhere assumes that he would have responded in a rational way to the deterrence posed by a guard's potential scrutiny.

[73] It is appropriate to identify the evidence from which it is possible to draw conclusions as to how Brain might have responded in the hypothesized circumstances. As to this:

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[36] As to Ms An: see her evidence at T3-34 at lines 41-46: AR263. As to Ms Fongrit: see her statement (exhibit 13) at [20] and her evidence at T3-55 at lines 37-39.

(a) Brain was a former employee and must be taken to have known of the existence of the security guard; the physical circumstances of the car park, including its size, the location of the entrance and exit, the nature of the lighting and the existence of CCTV; the fact that many female workers left at the end of each shift and, broadly speaking, how that occurred.

(b) The learned primary judge was justified in inferring that on the night of 1 February 2013, Brain had decided to abduct one of the applicant's female workers.[37]

(c) Brain was determined to achieve his goal. He was not deterred by the existence of the security measures about which he must have known. Nor was he deterred by the fact that before he even embarked upon the course of approaching a potential victim, he had been recognized and spoken to by workers who knew him. A rational reaction to that fact would have been the realization that, in the event that he succeeded in his criminal endeavours, a subsequent investigation would have likely led the police to his door. The same observation can be made in relation to the fact that before he had approached the respondent he would have known that he had made three separate abortive approaches to other women in relatively quick succession, all of whom might be expected to remember him. But notwithstanding all of this, he persisted.

[74] I do not think there is a sufficiently secure evidentiary basis to conclude that Brain would have been deterred on the night in question simply by being asked to leave by the security guard. He was determined to do what he had apparently set out to do, and was not necessarily responding rationally to what should, rationally, have been treated as a sufficient deterrent on the night in question.

Conclusion on causation

[75] The test for factual causation required by s 305D required that the applicant's breach of duty was a necessary condition of the occurrence of the injury. It required a "but for" test of causation, namely that the respondent would not have suffered the particular harm but for the applicant's negligence. Where a breach of duty has been demonstrated but cannot be established as satisfying factual causation within the meaning of the statute, the proper conclusion is that causation has not been proved, unless, of course, the complaining party seeks to demonstrate that the case is an "exceptional" case to which s 305D(2) applies.

[76] The learned primary applied a "but for" test for causation. However, for the reasons which I have expressed, I agree with the applicant that the evidence did not give rise to a reasonable and definite inference in favour of any of the conclusions which were critical to that conclusion. The respondent did not at trial and did not before this Court seek to argue that the case was an "exceptional" case to which s 305D(2) applied.

[77] It follows that in my view the applicant has demonstrated that the primary judge erred in relation to his evaluation of the evidence on the critical element of causation.

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[37] The precise finding made was that "Brain was determined to abduct an Asian woman or women": see reasons at [5]: AR1216. There was some evidence that Brain was attracted to Asian women. Certainly the female workers he approached were all of Asian heritage or appearance. But for present purposes the question whether race or ethnicity was a motivating factor is irrelevant.

Conclusion

[78] The applicant has demonstrated that the primary judge erred in relation to the question whether the applicant's breach of duty caused the respondent's injury. The error was fatal to the respondent's claim against the applicant. It justifies this Court granting leave to appeal and allowing the appeal.

[79] I would make the following orders:

(a) the applicant is granted leave to appeal;

(b) the appeal is allowed;

(c) the judgment of the primary judge is set aside and in lieu thereof it is ordered that judgment is entered for the applicant on the respondent's claim; and

(d) the respondent must pay the applicant's costs of the proceeding below, and of the application for leave to appeal.