SUPREME COURT OF QUEENSLAND

CITATION:	*Eastment v State of Queensland* [2018] QCA 253
PARTIES:	**PHILLIP JOHN EASTMENT** (appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8685 of 2017 DC No 3376 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 201 (Kefford DCJ)
DELIVERED ON:	5 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2018
JUDGES:	Morrison and Philippides and McMurdo JJA
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACTS – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – WEIGHT AND CREDIBILITY OF EVIDENCE – where the appellant brought an action in negligence – where the appellant was employed by the respondent as a correctional services officer – where the appellant suffers post-traumatic stress disorder as a result of an assault by a dangerous prisoner – where the pleaded case alleged that there was a breach of duty by reason of the failure of two officers to file a report in the prison information system concerning the perceived agitation of the prisoner at a court hearing two days before the assault occurred – where the learned trial judge found that the evidence of the prisoner's agitation at the court hearing was unreliable and found that there was no breach of duty occasioned by the failure to provide the appellant with information that the prisoner had been agitated at the court hearing – whether the learned trial judge's findings were against the weight of the evidence NEGLIGENCE – ESSENTIALS OF ACTION – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where the learned trial

judge found that an officer failed to pass on the information that the prisoner was agitated at the court hearing but failed to make a finding as to whether that was a breach of duty – where incident reporting was an important part of the prison management system – where it was also found by the learned trial judge that the prisoner's conduct at the court hearing did not require the distribution of information – whether the learned trial judge erred

NEGLIGENCE – ESSENTIALS OF ACTION – DAMAGE – CAUSATION – GENERALLY – where the prisoner walked towards the laundry of the prison unit and assaulted a fellow officer of the appellant in that laundry– where the appellant then attempted to intervene and was assaulted as well – where the appellant submitted the learned trial judge was wrong to address the issue of causation on the basis that if the appellant had made different choices leading up to the assault, the assault would still have occurred anyway – whether the finding that had he been given the information about the court hearing, the appellant would likely have intervened earlier, satisfies the test for causation

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, cited
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, cited
Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, cited

COUNSEL: G R Mullins, and B Rolton, for the appellant
B Charrington, and F V Nash, for the respondent

SOLICITORS: Maurice Blackburn for the appellant
Crown Law for the respondent

[1] **MORRISON JA:** Officer Eastment was a custodial corrections officer at the Maryborough Correctional Centre in March 2009. He was assaulted by one of the prisoners, whom I shall refer to as PX. On 8 March 2009 he and another officer were working in a secure area when PX began to assault the other officer. Officer Eastment intervened and PX began striking him as well, and yelling threats at him. Eventually PX was brought under control and apprehended.

[2] Officer Eastment instituted proceedings seeking damages for the personal injuries suffered in the incident with PX. The claim was brought in negligence and breach of implied terms in the contract of employment. His claim was dismissed on the basis that no breach of duty had been demonstrated and causation had not been established.

[3] Officer Eastment appeals that decision, contending that there were various errors in law and that the findings of the learned trial judge were against the weight of the evidence.

[4] The only issue is liability, quantum of the damages having been agreed.

The pleaded case

[5] Before examining the evidence at the trial the nature of the pleaded case can be identified. That appears from the Fourth Further Amended Statement of Claim,[1] and the Third Further Amended Defence.[2]

[6] Officer Eastment alleged that PX had a history which included: convictions for violent offences, an assessment that he was a risk to prison staff, actual violence towards prison officers, and a propensity for violence against prison officers. On 6 March 2009 PX was taken from the Maryborough Correctional Centre to the Magistrates Court at Maryborough in order to participate in a committal proceeding concerning an alleged assault committed by PX on another prison officer. At that committal Corrections Officer Linnenlucke gave evidence, having witnessed PX's assault. PX became agitated at the committal, yelled out to Officer Linnenlucke that she was a "lying cunt", demonstrated by his personal conduct a threatening demeanour with features of anger and aggression, and issued threats to Officer Linnenlucke. She felt concerned for her personal safety and the safety of other officers when PX went back to prison.

[7] The Statement of Claim pleaded that when she returned to the prison, Officer Linnenlucke reported to the Intelligence Officer, Mr Lyness, that PX had shown aggression, made threats and that she was concerned for her own safety and that of other officers. She also repeated similar concerns to her supervisor, Mr Dunlop. Mr Lyness passed the information he had been told to the Secure Accommodation Manager, Mr Ingram, and to a Secure Supervisor, Mr Keen. Mr Lyness also told the Assistant General Manager, Mr Spehr, that PX had been agitated during the committal.

[8] The Statement of Claim alleged that when PX returned to the prison shortly after the committal, he was agitated, and when interviewed by an Assessing Officer, Mr Smith, he was observed to be both agitated and "broody".

[9] In paragraph 10(a) of the Statement of Claim it was pleaded that Officer Linnenlucke "reported what she had witnessed of the prisoner's demeanour and conduct at the committal to one Michael Lyness, the Intelligence Officer at the prison". That allegation was admitted in paragraph 9 of the Defence, which went on to plead that Officer Linnenlucke told Mr Lyness that "the Prisoner was agitated at the Committal hearing".[3] The Defence alleged that was the full extent of any report by Officer Linnenlucke, and no report was made by her to Mr Dunlop.

[10] It was pleaded that on 8 March 2009 PX refused his morning medication. When Officer Eastment and another officer (Officer Gleich) commenced work on 8 March 2009 they were not given any information about PX.

[11] The pleaded case was that in the circumstances outlined above the respondent should have assessed PX as being prone to sudden and unpredictable outbursts of anger, violent attacks, and aggression or threatening behaviour, such that he

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1 Appeal Book (**AB**) 1103 (**Statement of Claim**).
2 AB 1138 (**Defence**).
3 AB 1110 and 1141.

required close supervision and monitoring. It was pleaded that the information communicated by Officer Linnenlucke should have led the respondent to have not released PX into the general prison population, but rather placed him in a detention unit. It also alleged that Officer Eastment, Officer Gleich, and other prison officers, should have been warned about PX's behaviour and Officer Linnenlucke's concerns, and the need for PX to be carefully supervised and monitored and not left alone with prison officers.

[12] The breach of duty and breach of implied term of the contract of employment were particularised as follows:[4]

(a) failing to provide a safe system of work;

(b) failing to provide Officer Eastment and Officer Gleich with relevant information concerning PX's agitated, threatening and aggressive demeanour and conduct at the committal;

(c) failing to inform Officer Eastment that PX had a known propensity for violent assault against prison officers;

(d) failing to inform Officer Eastment that PX had issued threats against Officer Linnenlucke at the committal;

(e) failing to ensure that PX was appropriately and adequately assessed on his return from the committal, and prior to his release into the general prison population;

(f) failing to place PX in a detention unit after his return from the committal, and thereafter keep him in the detention unit pending a formal assessment by a psychologist or senior prison officer;

(g) exposing Officer Eastment to an unreasonable risk of harm by allowing PX to mix in the general prison population without giving accurate and relevant information to Officer Eastment or Officer Gleich about PX and his state of agitation and the threats to Officer Linnenlucke;

(h) failing to ensure that sufficient prison officers were in the unit at the same time so that PX could be appropriately restrained;

(i) failing to warn Officer Gleich and Officer Eastment to be on their guard against possible unpredictable violence from PX, and not to let PX corner one of them in a confined space;

(j) failing to warn Officer Gleich of the matters listed above, thereby creating a situation where he went into the laundry alone with PX without realising the danger to which he was exposed;

(k) failing to ensure that the information provided by Officer Linnenlucke upon her return from the committal was properly distributed to all officers in the prison;

(l) failing to warn Officer Eastment or Officer Gleich in the briefing on the day of the assault, of the potential danger to their safety posed by PX, the need for careful monitoring of him and the need for special precautions about their own safety;

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4 Statement of Claim, paragraph 22, AB 1123.

(m) failure by Officer Linnenlucke, Mr Dunlop or Mr Lyness to complete and file on the Integrated Offender Management Strategy ("IOMS") system, and to otherwise disseminate within the prison, a written officer's report, case note, incident report or other report in respect of PX's conduct at the committal and Officer Linnenlucke's concerns.

[13] The Statement of Claim pleaded that had the respondent taken steps to put PX into a detention unit rather than release him into the general prison area, and given appropriate warnings and reports, the incident would not have occurred.

[14] The Defence admitted that PX had the history alleged, and the propensity for violence against prison officers, but alleged there was no relevant information about PX that ought to have been given to Officer Eastment or Officer Gleich. Further, whilst PX had a propensity for violence, it was assessed to be of different degrees at different times during his imprisonment.

[15] The Defence put the events at the committal directly in issue, pleading that there was nothing at the committal that would have created a concern for the safety of any officer, nor that required any specific warnings or instructions to be given to prison officers. It also put in issue that PX was agitated at the committal. The Defence pleaded that various officers witnessed PX's state after the committal and before he was released back into prison, and no-one noted any behaviour calling for extra warnings, instructions or precautions.

[16] Further, the Defence pleaded that there was no incident involving, or conduct by, PX at the committal that required completion of any report, case note or incident report, or which would have given rise to any concern for safety.

Issues as to breach of duty on the appeal

[17] For the purposes of the appeal the contended breach of duty was limited to: (i) the failure by Officer Linnenlucke to complete a report or otherwise provide information to her supervisor, and by that mechanism to the accommodation managers; and (ii) the failure by Mr Lyness to pass on the information he got from Officer Linnenlucke.[5]

Evidence of conduct at the committal

[18] Officer Linnenlucke gave evidence that her previous dealings with PX had meant that on occasions of dealing with him she was concerned for her safety. On the day of the committal, 6 March 2009, she gave evidence in respect of PX. She described his demeanour while she gave evidence at the committal as being: "the whole time he kept staring at me"; he "appeared to be angry with … my evidence"; and he was moving from side to side.[6] She said that his behaviour concerned her in relation to her safety, and the safety of her colleagues, when PX returned to the prison.

[19] On her return to the prison she said she informed Mr Dunlop, her supervisor, about her concerns with PX "with his attitude and aggressiveness in the court room". She also saw Mr Lyness and informed him of her concerns about PX and "my concerns

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5 Appeal transcript 1-6 l 19.

6 AB 166 ll 19-27.

and my safety of myself and other officers that deal with him in the unit".[7] She could not recall what it was she told Mr Lyness.

[20] Officer Linnenlucke said that when she spoke to Mr Dunlop and Mr Lyness she did not complete a case note or report. She said that was because she didn't realise she had to do so.[8]

[21] In cross-examination Officer Linnenlucke referred to a statutory declaration which she made on 8 May 2012.[9] It became Exhibit 12. In that statutory declaration she detailed events at the committal in these terms:

> "5. I was called to the witness box and taken through my evidence by the prosecutor. After a few minutes, [PX], who was watching from the dock, yelled out that I was a 'lying cunt' and became very aggressive. He was making other threats against me that I cannot now remember the specifics of. I was very nervous as I am not experienced in giving evidence in court. He was very aggravated and yelling loudly. The [judge] stopped my evidence while [PX] was calmed down."[10]

[22] In cross-examination Officer Linnenlucke was referred to a telephone conference she had on 17 September 2015 with a senior lawyer from Crown Law. She agreed that during that conference she had said that she could not remember anything about the incident at the committal, nor the prisoner's name, nor the threats that were made that day.[11] She also said that she could not recall what it was she said to Mr Lyness.[12] She also agreed that as at 15 September 2015 she was not sure of the accuracy of any of the information that she had previously given in the statutory declaration. Further, to the extent that the statutory declaration was inaccurate, she had no independent memory upon which to rely and so she could not explain such an inaccuracy.[13]

[23] In the course of cross-examination Officer Linnenlucke was referred to the passage set out in paragraph [21] above, in which she described what PX was doing at the committal. The audio recording of the committal hearing was then played. Officer Linnenlucke then agreed with the following points:

(a) there was no yelling by anyone on the recording;

(b) her evidence was not stopped at any stage by the magistrate or anyone else to enable PX to be calmed down;

(c) there were no sounds of spitting;

(d) the magistrate did not intervene during her evidence apart from having a discussion with the defence lawyer;

(e) there was no audible threat issued by anyone;

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7 AB 165.
8 AB 167 ll 5-12.
9 Exhibit 12.
10 AB 583.
11 AB 169.
12 AB 170 ll 22-25.
13 AB 171 l 44.

(f) there was no "lying cunt" insult made by anyone;

(g) there was no suggestion in the recording that PX was acting or behaving aggressively in any way; and

(h) the recording showed that her recollection as set out in the statutory declaration was incorrect.[14]

[24] Officer Linnenlucke confirmed that at the date of the trial she could not recall the specifics of what happened at the committal hearing.[15]

[25] Later in the cross-examination this exchange occurred:[16]

> "Officer Linnenlucke … in your statutory declaration you refer at paragraph 5 to a significant outburst involving swearing, yelling and aggression; do you agree with that?---Yes
>
> And there's absolutely no scintilla of that on the recording that we heard, is there?---No.
>
> Are you able to offer any explanation as to why such a dramatic outburst doesn't appear at all on the recording?---Can't explain it.
>
> The reason, can I suggest to you, that no such outburst appears on the audio recording is that there was no outburst by [PX] in court on the 6th of March 2009?---I can't recall.
>
> And there was no aggressive behaviour by [PX] on the 6th of March 2009?---I disagree with that.
>
> There were no threats issued by him on the 6th of March 2009?---I can't recall.
>
> And the absence of any threats is the reason why even in your statutory declaration when you purported to remember some of the events of that day, you couldn't recall the specifics of any threats that were made?---No.
>
> Do you agree that that's the reason why?---Yes."

Events after the committal

[26] Mr Smith gave evidence that in March 2009 he was a welfare officer with Queensland Corrective Services, and working at the Maryborough Correctional Centre. In that capacity he conducted an interview with PX on his return from the committal. He said he could recall speaking to PX in the reception store. He took notes at the time of the responses and observations made. He described the exchange in this way:[17]

> "And can you recall [PX's] general responses to the questions you put to him that day?---As in his presentation and speech, there was nothing, sort of, remarkable, as in extreme … and by nature he presented as a quiet-spoken man.

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14 AB 176 l 40 to AB 177 l 21.
15 AB 180 ll 15-17.
16 AB 194 ll 13-36.
17 AB 240 ll 5-39.

> Did he make any comments to you about his feelings about the hearing that he'd attended?---The only comment that he made were … I asked him if he was happy with what had happened at court and … the only comment that he made was that he had … thought about that there was a court reporter there and … he was worried about what would be in the papers about what he'd said.
>
> And did he say why he was worried about that?---I took it as a perception of his status within the unit … with other prisoners
>
> And what did you say in response to that?---Not – not really glibly, but when you're talking with a prisoner in these sort of circumstances, I spoke on a level that would relate, and I just said to him … words to the effect of, 'You're the biggest fellow in the unit, so I don't think you've got anything to worry about.'
>
> I see?---And that's not necessarily body size but political position.
>
> I see. Now, Mr Smith, did [PX] express to you, or exhibit before you, any feelings of anger about the hearing?---No, nothing at all. He never said anything. He wasn't agitated physically, or anything like that.
>
> Did he express or exhibit any feelings of resentment about the court proceeding?---No, as I say, the only comment that he made was he'd been thinking about what the papers might say.
>
> And, further, did he express or exhibit any feelings or behaviour of an aggressive nature?---Nothing at all. He sat calmly … head, sort of, bowed, but nothing that concerned me."

[27] Mr Smith said that as a result of his assessment he did not have any concerns about PX's return to his normal unit within the correctional centre. He described his presentation as "staid" and "he would have been euthymic".[18] He said that he did not have any issues which would have caused him to withhold PX's release into the prison.

[28] Mr Smith said, in cross-examination, that he escorted PX back to his accommodation after the interview. Having done that he made the case note, Exhibit 18. He said that the investigation he carried out in the interview with PX was "about his presentation on the return from court, not about what could be or should be or would be".[19]

[29] Mr Smith's case note made on 6 March 2009 became Exhibit 18. It reads:[20]

> "Offender reported returning from Maryborough Magistrates Court. He stated that the case was adjourned. The offender reported nil concerns about this outcome. He additionally reported nil concerns regarding his return to Maryborough Correctional Centre. He denied any problems with prisoners at this Centre. The offender denied any current deliberate Self Harm and or suicide ideation, intent or plan.

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18 AB 241 l 12.
19 AB 247 l 15.
20 AB 611.

> He did not present any at risk indicators at the time of interview. No further action was required."

[30] When cross-examined about PX's behaviour and response at the interview Mr Smith said it "wasn't sufficient enough … or strong enough … to trigger any sort of red flags or warnings to me", and if he had had any concerns he would have expressed them.[21]

[31] A statement by Mr Smith, dated 25 September 2012, became Exhibit 19.[22] In it he said that he had no issues with PX returning to his accommodation and that when he walked PX back to his building the concerns expressed by PX were with regard to how other unit prisoners were going to respond to the media surrounding his court case. He confirmed that after the incident with Officer Eastment he sent an email which contained his conversation with PX on his return and that "he was brooding about what the other boys in the unit would think of him".[23]

[32] Officer Hunter was called to give evidence about the demeanour of PX after the committal. Officer Hunter was the escorting officer who took PX from the courthouse back to the prison. He described PX's demeanour as "just standard quiet":[24]

> "Do you recall his demeanour or his behaviour that day?---No, just standard quiet. Didn't talk to you. Basically ignored you. You'd just have to give him directions to put his hands out to apply handcuffs and … basically you had to tell him what you wanted him to do.
>
> I see. Did you observe any agitation on his part?---No.
>
> Did you observe any aggression on his part?---No.
>
> Did he make any threats against you or any other officer?---No, not to me, or me offsider. No."

[33] Mr Hunter said that had there been anything by way of aggression or threatening behaviour on the part of PX, he would have informed his supervisor and submitted a report. However, there was no reason to do so in respect of PX on 6 March 2009.[25]

[34] Mr Hazelton was the police watch house manager at the Maryborough Police Station, and in charge of prisoners while they were at the court. He gave evidence about what he observed or recorded on 6 March 2009, specifically as to PX on his transfer to the court from the Maryborough Correctional Centre. He was referred to the Queensland Police Service reports concerning PX and his time in the cells at the court. It recorded "No complaints. No problems detected".[26] Whilst he had no independent recollection of PX's demeanour or attitude, he said had there been signs of aggression or threats that would have been noted in the report.

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21 AB 248.
22 AB 612.
23 AB 613 para 15.
24 AB 255 ll 4-15.
25 AB 255 ll 19-24.
26 AB 262 l 21.

[35] Mr Dunlop gave evidence of his dealings on 6 March 2009. At that time he was the Correctional Centre Services Supervisor. He said he could not recall any direct dealings or discussions with Officer Linnenlucke on 6 March 2009.[27] He said that if an officer had a concern with a prisoner the normal course of events was that the officer would approach him and he would advise them to see their line supervisor, specifically the accommodation supervisor and accommodation manager where the prisoner was housed.

[36] Mr Lyness gave evidence about his involvement.[28] As at March 2009 he was an intelligence officer at the Maryborough Correctional Centre. His role was to provide security intelligence to the General Manager in order to maintain good order and security of the prison. That involved obtaining information about external things such as drug supply or contraband, and internal things such as threats to staff, threats to prisoners, and things that would affect a prisoner's employment within the prison. That would include verbal or written threats to staff.

[37] He said that his role did not oblige him to pass on any information about behavioural issues, such as agitation.[29] He said he could recall receiving a phone call from Officer Linnenlucke on 6 March 2009 and, whilst he could not recall the precise terms, it was "words to the effect that [PX] had been to court and that he'd come back and he was agitated".[30] Mr Lyness said he could remember speaking to the Assistant General Manager at the time. He said he was not told by Officer Linnenlucke of any threats being made against the officers.[31] He said there was no need for him to write down anything in the form of a written report, but passing information on was sufficient.

[38] In cross-examination he said he agreed that when Officer Linnenlucke expressed some concerns about the behaviour of PX, he thought it essential to contact the accommodation manager and let him know, because it was critical information for people who were handling PX on a day-to-day basis to understand that he was agitated at the court hearing.[32] Later in the cross-examination he responded to propositions put to him about the content of the contact with Officer Linnenlucke:[33]

> "… she formed her concerns of [PX], and had concerns for her safety and the safety of other officers in the unit at the time. Do you agree that her concerns were expressed to you in those sort of terms?---No. Not like that, no.
>
> How were they expressed to you?---There was nothing to do with safety mentioned … it was that he was agitated, yeah, definitely.
>
> All right. But you have no recollection of a mention of safety?---No.
>
> And can I suggest to you that that conversation was in person, rather than on the phone?---No, it was definitely on the phone.

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27 AB 294 ll 22-26.

28 At the time of the events his surname was Clarey, and that name appears in the various records; by the time of the trial he had changed it to Lyness.

29 AB 304 ll 3-5.

30 AB 304 ll 20-22.

31 AB 304 l 37.

32 AB 306 ll 23-33.

33 AB 309 ll 5-22.

…

> Is it the case that you understood, after your conversation with Officer Linnenlucke, that you believed … [PX] was agitated with the court process?---Yeah. That's what I was told, yes."

Correctional Centre reports for 6 and 7 March 2009

[39] The secure supervisor handover notes for 6 and 7 March 2009 were tendered as part of Exhibit 1.[34] Those notes were created, as their name suggests, as a report between supervisors when a changeover from one shift to another occurred. Nothing in the handover notes was identified as indicating an issue with PX.

The audio tape and transcript

[40] The audio recording of the proceedings on 6 March 2009, as well as the transcript, were put into evidence.[35] I have listened to the audio recording and have compared it with the transcript. There is nothing in the audio recording which would substantiate any threat being made by PX, or even agitation during the hearing. There is nothing of the kind of conduct referred to by Officer Linnenlucke in her statutory declaration. All comments by PX were calm or whispers. There are some recorded comments that did not get transcribed, but nothing in the nature of a threat or anything disclosing agitation. Rather, they were whispered conversations between PX and his solicitor, discussing who to cross-examine and seeking advice,[36] a whispered conversation in which PX said "I'm not allowed to sneeze" and asking for advice,[37] and whispered instructions. In addition, one comment made by PX during the course of submissions by his solicitor was in fact directed to his solicitor, apparently instructing him not to persist with submissions that the prosecution's election to have the matter tried on indictment rather than summarily had disadvantaged PX. PX said "Don't worry about it. I'm not going to get it."[38] On the audio recording that is evidently directed to his solicitor.

Findings by the learned trial judge

[41] The learned trial judge identified a number of issues for determination. The first was whether there was sufficient evidence to find that PX behaved in a manner at the court hearing on 6 March 2009 that warranted action to alert officers at the correctional centre of that behaviour. The evidence on that issue was reviewed by the learned trial judge at paragraphs [26]-[32] of the reasons below. Her Honour then recorded that the appellant accepted that Officer Linnenlucke's recollection of the events is likely to be incorrect.[39] However, the appellant contended that it did not follow that nothing happened to cause Officer Linnenlucke to have serious concerns for her safety.

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34 The notes for 6 March are at AB 523; the notes for 7 March are at AB 525.
35 Audio recording at AB 1095; Transcript at AB 1071.
36 AB 1087 l 40.
37 AB 1089 ll 1-15.
38 AB 1091 l 17.
39 Reasons below at [33].

[42] The learned trial judge found that Officer Linnenlucke's evidence (of aggressive and threatening behaviour, or of a level of agitation that warranted special action) was unreliable.[40] Several reasons were given for that conclusion including:

(a) Officer Linnenlucke conceded that the audio recording showed her statutory declaration to be incorrect;

(b) having listened to the audio recording, the learned trial judge was not persuaded that the exchange referred to in the statutory declaration occurred at any time during the hearing;

(c) further, that whilst PX might have had a reason to be agitated, there was nothing more than a low level of agitation displayed at the hearing, demonstrated by the audible comments which conveyed mild frustration and calm conversation with PX's solicitor;

(d) although it was admitted that Officer Linnenlucke told Mr Lyness that PX was agitated at the committal hearing, the learned trial judge was not satisfied that she reported, or held, genuine concerns about her safety, or the safety of other officers, at the time of her return to the correctional centre; in that respect the learned trial judge evidently accepted the evidence of Mr Lyness that Officer Linnenlucke had not reported safety concerns; the learned trial judge was not satisfied that Officer Linnenlucke's failure to make a note was the consequence of any negligence, inadvertence or carelessness, as opposed to the absence of observable agitation or genuine concern;

(e) the statutory declaration and file note of the conversation with Officer Linnenlucke came years after the event;

(f) Officer Linnenlucke eschewed a cogent recollection of the content of her discussions with Mr Lyness and Mr Dunlop; and

(g) Officer Linnenlucke had accepted the inaccuracy of the statutory declaration.

[43] The learned trial judge also highlighted other matters which, according to her Honour's findings, highlighted the unreliable nature of Officer Linnenlucke's evidence. They included her claim that she was not aware of the need to prepare a case note or officer report, which was contrary to her history of doing so. Further, there were discrepancies in her recall of the events at the committal. Finally, Officer Linnenlucke was plainly a reluctant witness.

[44] The learned trial judge concluded that she was not satisfied that there was any agitation displayed by PX on 6 March 2009.[41] In so finding, her Honour rejected Officer Linnenlucke's evidence as unreliable, relied upon the audio recording, accepted the evidence of Mr Hunter as to PX's quiet demeanour on his transfer back to the correctional centre, accepted the evidence of Mr Hazelton that there were no signs of aggression or agitation by PX whilst at the watch house, and accepted the evidence of Mr Smith whose contemporaneous note of his assessment of PX upon his return to the correctional centre did not suggest any aggression or agitation.

[45] The learned trial judge concluded by finding that she was not satisfied that there was any aggressive, threatening or agitated behaviour by PX at the court hearing on

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40 Reasons below at [34].

41 Reasons below at [39].

6 March 2009, sufficient to give notice that an assault upon an officer by PX was imminent.[42]

[46] The learned trial judge, in the course of examining the question of breach of duty, rejected the contention that there was a heightened risk that warranted special attention.[43] Her Honour was not satisfied that there was any breach of duty occasioned by the failure to provide Officer Eastment and Officer Gleich with information that PX had demonstrated an agitated, threatening or aggressive demeanour at the committal hearing. The reason for that was simple: the learned trial judge was not satisfied that there was behaviour by PX that required special mention.[44]

[47] Further, the fact that Officer Linnenlucke had disavowed that there were threats against her, conceding that her accounts of threats was wrong, satisfied her Honour that there was no breach of duty occasioned by failing to inform Officer Eastment that PX had issued threats against her.[45]

[48] Further, there was no breach of duty by failure to ensure that PX was appropriately assessed on his return from the committal hearing, because he was appropriately assessed by Mr Smith under the prescribed system. Her Honour noted that no challenge was made to the veracity of Mr Smith's assessment.[46] The learned trial judge noted that Mr Smith's conclusions were "unequivocally supported by the observations of Mr Hazelton … and Mr Hunter".

[49] The learned trial judge was not satisfied that there were any threats, nor a level of agitation that required reporting.[47] Her Honour went on to note that even if there had been a level of agitation at the committal hearing, her Honour was not satisfied that by 8 March 2009 there was a need for heightened supervision or restraint. That followed for several reasons which included:

(a) on the day after the committal hearing PX was acting normally;

(b) Officer Eastment and Officer Gleich each said that PX appeared to be normal on the morning of the assault, at least until shortly before it happened; and

(c) the CCTV footage of the day room for the unit in which PX was detained did not reveal any obvious aggression or agitation on the part of PX as he approached the laundry immediately prior to the assault on Officer Gleich.

[50] The learned trial judge turned to the question of whether there was a breach of duty by failure to generate an incident report, case note or written advice to the supervisor. Her Honour again noted that she was not satisfied that there was conduct by PX at the committal proceeding that required the distribution of information about him. Her Honour again referred to her rejection of Officer Linnenlucke's evidence as unreliable, finding that she did not hold any safety concerns when she returned to the Maryborough Correctional Centre. Further, her Honour was not satisfied that there was any report by Officer Linnenlucke about concerns for her safety. On that aspect she accepted the evidence of Mr Lyness. However, her Honour doubted the reliability of his recollection that he passed the

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42 Reasons below at [40].
43 Reasons below at [57].
44 Reasons below at [57](a).
45 Reasons below at [57](b).
46 Reasons below at [57](c).
47 Reasons below at [57](e).

information about PX's agitation on to others. Her Honour considered his recollection on that aspect to have been influenced by what he believed would have been done, rather than a clear and independent recollection of what was actually done. Thus, on that aspect, the learned trial judge rejected the evidence of Mr Lyness.

Discussion – findings against the evidence

[51] Mr Mullins of Counsel, appearing for the appellant, contended that the learned trial judge's findings were against the weight of the evidence. In order to deal with that ground it is necessary to say something more about the information reported by Officer Linnenlucke.

What Officer Linnenlucke told Mr Lyness

[52] The precise content of the admission of paragraph 10(a) of the Statement of Claim by paragraph 9 of the Defence must be understood. In terms it is an admission that Officer Linnenlucke reported what she had witnessed of PX's behaviour and conduct at the committal. That says nothing of what the content of that report was. However, paragraph 9 goes on to plead that all she said was that PX was agitated at the committal. Paragraph 9 of the Reply[48] put that in issue.

[53] The evidence of Officer Linnenlucke on this issue was rejected.[49] Moreover, the learned trial judge held that there was no aggressive, threatening or agitated behaviour by PX at the committal, rejecting Officer Linnenlucke's evidence as to this as well.[50]

[54] The learned trial judge found that paragraph 9 of the Defence was an admission that Mr Lyness was told by Officer Linnenlucke that PX was "agitated" at the committal.[51] However, her Honour rejected that anything else was said, and specifically that Officer Linnenlucke held or reported any safety concerns.[52] In this respect her Honour accepted the evidence of Mr Lyness.[53]

[55] Further, whilst her Honour recorded that the conduct by PX at the committal was nothing more than "low level of agitation, if that", and an "absence of observable agitation",[54] they were expressed as reasons for rejecting the evidence of Officer Linnenlucke as unreliable. The more pertinent finding was that the learned trial judge was not satisfied that PX actually displayed any agitation at the committal on 6 March 2009 or afterwards.[55]

[56] That finding is the evident foundation for her Honour's finding that there was no breach of duty by Officer Linnenlucke for failing to make a report in the IOMS system, because that would have been a vague entry without factual foundation.[56]

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48 AB 1156.
49 Reasons below [34](c).
50 Reasons below [34](b)(ii), [39], [57](a) and [68].
51 Reasons below [69].
52 Reasons below [34], [40] and [68].
53 Reasons below [34](c).
54 Reasons below [34](b)(ii) and (c).
55 Reasons below [39] and [40].
56 Reasons below [71]. As to this the learned trial judge accepted the evidence of Mr Stenzel, the principal advisor operational training for Queensland Corrective Services: AB 230 l 40 to AB 231 l 30, and AB 232 l 38 to AB 233 l 2.

[57] Therefore, the content of the admission amounts only to this: whilst Officer Linnenlucke merely said to Mr Lyness that PX was agitated at the committal hearing, in fact PX had not been agitated, nor had he displayed observable agitation. Notwithstanding what she said, Officer Linnenlucke neither held nor reported any genuine concerns for her or any other officer's safety.

Was Officer Linnenlucke's report passed on?

[58] The learned trial judge rejected Mr Lyness's evidence that he passed on Officer Linnenlucke's statement about PX being agitated at the committal hearing. In so doing her Honour preferred the evidence of Mr Rosolen and Mr Spehr, each of whom were the relevant reporting supervisors, and each of whom had no recollection of receiving such a report.[57]

[59] Her Honour preferred the evidence of Mr Dunlop to that of Officer Linnenlucke as to whether she said anything to him.[58]

Was it open to reject Officer Linnenlucke's evidence?

[60] Mr Mullins contended that it was Officer Linnenlucke's impression of PX's behaviour that was the key to the veracity of her report and not what actually happened. The learned trial judge only assessed her evidence against what had actually transpired at the committal and gave no weight to her impression. In that way the learned trial judge concluded that what was observed was, at best, low level agitation not worthy of report. Therefore her rejection of Officer Linnenlucke's evidence, and the finding that the failure by her to report was not a breach, was in error. What her Honour should have found was that Officer Linnenlucke's contemporaneous report, that PX was agitated at the committal hearing, was "true fact", and it should have been reported.[59]

[61] It was further contended that three reasons could be postulated as to why Officer Linnenlucke did not report the agitation in the prison IOMS system. The first was that all she saw was "low level agitation, if that", and it was not worth reporting. The second was that she expected Mr Lyness to do it. The third was that it was simply her inadvertence or negligence in not doing so.

[62] Mr Mullins' point as articulated during oral submissions was that the only relevant part of Officer Linnenlucke's evidence was the fact of her having reported to Mr Lyness that PX was agitated:[60]

> "It's the fact she reported that he was agitated that is a critical factor that her Honour should have taken into account in weighing the extent of the agitation. …
>
> Because why would she go back and report it if there wasn't something that was significant? …
>
> It wasn't considered in that evidence. That's the point. The point is that the statement to Mr Lyness and the fact that she made this statement was never weighed in the content of the evidence at

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57 Reasons below [69].
58 Reasons below [70].
59 Appeal transcript 1-12 to 1-13.
60 Appeal transcript 1-24 to 1-25.

> paragraphs 34 to 40, and that's why I made the submission to her Honour … why would she make this statement if there wasn't something significant behind it? And her Honour needed to grapple with that issue and say, 'Well, I accept that the record says – the transcript and the recording don't say anything, but on the other hand she did come back and report it immediately after when she had no idea what was going to happen in the future.' Why would she have come back and reported it after if she had no idea what was going to happen in the future?"

[63] Further, it was submitted that the learned trial judge did not address the fact that the events on 8 March 2009 (the assault on Officer Eastment and Officer Gleich) was corroborative of the fact that Officer Linnenlucke held genuine concerns on 6 March.

[64] The pleaded case alleged that there was a breach of duty by reason of the failure of Officer Linnenlucke and Mr Lyness to complete an IOMS entry or other written report.[61] The entry that should have been made was alleged to be "in respect of the conduct of [PX] and Officer Linnenlucke's concerns about his conduct".

[65] Mr Lyness's evidence was that Officer Linnenlucke told him that PX "had been to court and that he'd come back and he was agitated".[62] As a result he said he rang his immediate supervisor and the accommodation manager.[63]

[66] In cross-examination the question put to Mr Lyness was in this passage:[64]

> "Yep. And that's why when you got the telephone call from Officer Linnenlucke … you thought it was essential **when she expressed to you some concerns about his behaviour at court** to contact [indistinct] accommodation manager to let them know?---Absolutely.
>
> Because that was critical information - - -?---Absolutely.
>
> - - - for the people who are handling him on a day to day basis - - -?---Sure.
>
> - - - to understand that he was agitated at the court hearing?---Yes."

[67] As is evident from the highlighted words, the question was put on a basis not sustained on the learned trial judge's findings. In any event Mr Lyness rejected that there was any mention of being concerned about safety, as appears shortly thereafter:[65]

> "… [Officer] Linnenlucke says that she had a conversation with you, and you agree with that. And she says this: she formed her concerns of [PX], and had concerns for her safety and the safety of other officers in the unit at the time. Do you agree that her concerns were expressed to you in those sort of terms?---No. Not like that, no.

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61 Paragraph 21(m), AB 1126.
62 AB 304 l 21.
63 AB 304 ll 26-35.
64 AB 306 ll 23-32; emphasis added.
65 AB 309 ll 4-32.

> How were they expressed to you?---There was nothing to do with safety mentioned in - it was that he was agitated, yeah, definitely.
>
> All right. But you have no recollection of a mention of safety?---No.
>
> …
>
> Is it the case that you understood, after your conversation with [Officer] Linnenlucke, that you believed … [PX] was agitated with the court process?---Yeah. That's what I was told, yes.
>
> And it's the case that your understanding of the IOMS system was that it was the officer on duty who would case note the matter in IOMS?---That would be my belief, yeah.
>
> Now, you understand that you contacted the accommodation manager at the time?---Yes.
>
> And advised them of your concerns, or passed - - -?---I passed on exactly what was said to me, yes."

[68] In my view, the contentions on this ground should be rejected. There are a number of reasons for that conclusion.

[69] First, the reality is that the only part of Officer Linnenlucke's evidence to survive was that the subject of the admission in the Defence, namely that she told Mr Lyness that PX was agitated. Otherwise there was a comprehensive rejection of her evidence as being unreliable. No doubt the strongest reason to reject her evidence was the fact that she had sworn a statutory declaration that was far remote from the truth, eloquently demonstrated by the audio recording. But there was more: her inability to remember events; her vague evidence; her inconsistent evidence outlined in paragraphs [36]-[37] of the reasons below; and the inconsistency between what she said and the evidence of others such as Mr Hunter, Mr Hazelton and Mr Smith.

[70] On the basis of those findings the evidence that she held concerns about safety was rejected. That she said any such thing was expressly denied by Mr Lyness, whose evidence on that point was accepted.

[71] Such a comprehensive rejection of her evidence tells against attributing any significance to the mention that PX was agitated, beyond that bare fact. Officer Linnenlucke's evidence does nothing to give that statement any meaningful content.

[72] Secondly, the findings are to the contrary of that statement having any significance. Based on the audio recording, the most contemporaneous and accurate evidence in the entire case, the learned trial judge found that there was no agitation by PX at the committal. Whatever he did, it was "a low level agitation … if that". Given Officer Linnenlucke's familiarity with the reporting system, and her history of doing so, the absence of any note by her revealed "the absence of observable agitation".

[73] On those findings, while Officer Linnenlucke said it, it was not true, and in any event she did not hold any genuine concerns about the safety of any officer. How then, one asks, can the mere fact of saying something that was not true, or at least inaccurate, be given greater significance just because it was said? The IOMS system was not designed for vague reports that did not have factual foundation, let alone untrue reports.

[74] Thirdly, there is no basis for concluding that the learned trial judge missed the submission that the statement had significance just because it was made. At paragraph [33](e) of the reasons below her Honour refers to the submission made about the statement that PX was agitated: "The plaintiff submits that the only explicable reason for that complaint is that Officer Linnenlucke had concerns about PX's behaviour and she believed that someone should be informed so that action might be taken". In my view, that is a plain reference to the submission said to be not taken into account.

[75] Fourthly, given the finding that Officer Linnenlucke did not hold genuine concerns about the safety of herself or any officer, it is difficult to see how the mere fact of her telling Mr Lyness about PX being agitated warrants its elevation in importance. If that were so, then the other contemporaneous reports of PX's condition would have to be weighed in also. Thus Mr Hazelton said PX was not agitated during his time in the watch house, Mr Hunter said PX was not agitated during the transfer back, and Mr Smith (who interviewed PX face to face on his return and walked him back to his unit) said he was calm and only concerned about what other prisoners would think about his court appearance.

[76] Fifthly, the events two days later could hardly be seen as corroborative of the fact that Officer Linnenlucke held genuine concerns on 6 March 2009. The finding was that she did not hold such concerns, at least in part because she did not file a report on the IOMS system. The findings were that there was no evident agitation at the committal hearing, and certainly none afterwards that day. If the events of the assault were to be weighed in on this basis, then the fact that the shift supervisor reports for 6 and 7 March said nothing to indicate that PX was still agitated would also have to be taken into account. One wonders where that task would end.

Admissibility of subsequent statements

[77] A secondary point raised under this part of the appeal was that the learned trial judge did not address three unsworn statements by prison officers as to what PX said immediately after the assault on 8 March 2009.[66] The contention was that their evidence showed there was a connection between the assault on 8 March and the committal on 6 March. The committal on 6 March 2009 was in respect of a charge of spitting on another officer. It was said this evidence would provide support for the evidence of Officer Linnenlucke that PX was agitated at the committal hearing.[67]

[78] The statements were admitted on a provisional basis, so that their ultimate admissibility would be the subject of submissions and a further ruling.

[79] The relevant part of the statements are that PX said: "fucking dogs I did not spit on no one";[68] "I didn't spit on no fucking officer you fucking dog cunts I didn't spit on nobody, all you fucking cunts cant (sic) get fucked";[69] and "I didn't spit on anyone you dog cunts get fucked".[70]

[80] In my view there are difficulties with the contention that the statements were admissible, or relevant.

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66 The statements are Exhibit 21, AB 621.
67 Appeal transcript 1-28 to 1-29.
68 AB 621.
69 AB 623.
70 AB 625.

[81] The statements were not sworn, but merely given as part of an investigation into the assault on 8 March 2009. If they were to be tendered the officers would need to be called, and they were not. There is no *Jones v Dunkel* point here, as though the officers were employed by the respondent, there is no reason to think that they would resist being called by Officer Eastment. The fact that their statements were introduced after the plaintiff's case closed is equally no bar, as an application could have been made to reopen.

[82] In any event, the connection sought to be made is tenuous, and its worth doubtful. The references to spitting were said to be the link to agitation at the committal. But the audio recording of the committal revealed that there was no such agitation. Given the best evidence as to what happened was the real time audio, it is not at all surprising to find that the learned trial judge did not see benefit in dealing with these (inadmissible) statements.

[83] Further, this contention flies in the face of the evidence from Mr Hazelton, Mr Hunter and Mr Smith, and not to mention the handover supervisor reports, that PX was calm on 6 March after the committal, and on 7 March.

[84] Then there is the added difficulty, that questions as to a duty of care are not assessed through a prism of hindsight, which this exercise would require.[71]

[85] In any event, the plaintiff had the benefit of the admission that Officer Linnenlucke told Mr Lyness that PX was agitated at the committal. These statements add nothing to the quality or content of that statement. Neither could Officer Linnenlucke. The audio recording does that.

[86] Another subsidiary point related to the evidence of Mr Smith. In cross-examination he accepted that he sent an email after the assault, saying that PX had been "dark and moody" when he came back from court. The complaint is that the learned trial judge did not deal with that evidence.

[87] The contention should be rejected. The evidence was heavily qualified, as it consisted, in its entirety, of this question and answer:[72]

> "It's the case, isn't it, that after the event you sent an email to - was it intel, or operational services, stating that you thought as at the time of your assessment on 6 March 2009 that [PX] was dark and moody?---Yes, I - I recall sending some email, I think."

[88] That is hardly an acceptance of anything but the fact that he sent an email.

[89] Elsewhere Mr Smith explained in his statement what PX was brooding about, namely "he was brooding about what the other boys in the unit would think of him".[73] In his evidence Mr Smith said something similar: see paragraph [26] above.

[90] The evidence about the email had little weight compared to the detailed evidence about his assessment of PX on the day, and his contemporaneous file note (see paragraph [29] above).

Conclusion on evidentiary grounds

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71 *Rosenberg v Percival* (2001) 205 CLR 434 at 441-442; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [124], [126] and [128].

72 AB 248 ll 1-4.

73 AB 613 para 15.

[91] For the reasons expressed above the several grounds relating to the findings being against the evidence lack merit.

Grounds concerning breach of duty

[92] Mr Mullins contended that the learned trial judge erred in that her Honour found that Mr Lyness failed to pass on the information given to him by Ms Linnelucke, but did not make a finding as to whether that was a breach of duty. He submitted that if there was no finding because the report only showed low-level agitation that was flawed because: (i) the reporting system did not rely upon the veracity of the information reported; and (ii) whether it was a breach had to be assessed at the time the information was received, not later; when it was received Mr Lyness considered it important to pass on which signifies it was a breach not to do so.

[93] The learned trial judge's findings on this aspect are as follows:

(a) incident reporting was an important part of the prison management system; it was critical that the supervisor and subordinates of PX's prison unit had access to relevant information about PX;[74]

(b) if a person was concerned for their safety or the safety of another officer, a report was required; on receipt of such a report, an incident report would then be entered in the IOMS system;[75]

(c) the procedure in March 2009 required careful consideration of a prisoner's history and, *inter alia*, the circumstances of any agitation;[76]

(d) if Officer Linnenlucke considered that PX was aggravated and was concerned about her safety, or the safety of other officers, the incident should have been reported through an incident report, the IOMS system, a case note or a handover note;[77]

(e) Officer Linnenlucke reported to Mr Lyness that PX was agitated at the committal hearing;[78]

(f) the conduct at the committal hearing did not require the distribution of information about PX; the evidence of Officer Linnenlucke disclosed no reasonable or rational basis for her holding concerns about her safety or the safety of other officers; she did not hold safety concerns when she returned from the court on 6 March 2009;[79]

(g) there was no report by Officer Linnenlucke of her having any concerns for her safety;[80]

(h) Mr Lyness did not pass on what he was told by Officer Linnenlucke;[81] and

(i) there was nothing that warranted reporting by Officer Linnenlucke.[82]

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74 Reasons below [60].
75 Reasons below [61].
76 Reasons below [64].
77 Reasons below [65].
78 Reasons below [69].
79 Reasons below [68].
80 Reasons below [69].
81 Reasons below [69].
82 Reasons below [71]-[73].

[94] One factor that supports a conclusion that Mr Lyness' failure to pass on the information was a breach of duty was his own evidence. During his evidence in chief he said that in his role as Intelligence Officer he was not required or obliged to pass on information about behavioural issues such as agitation.[83] However, in cross-examination he qualified that in the passages referred to in paragraphs [65] and [66] above. The effect of his evidence was that whilst he was not obliged to do so, he recognised that he should do so in the case of Officer Linnenlucke's information.

[95] That evidence, and what might be reasonably expected of Mr Lyness in a reporting sense, should be considered in light of what Mr Lyness knew about PX as a prisoner. He knew: (i) PX had been in maximum security at Wacol; (ii) he had an extensive criminal history; (iii) he was a big man; (iv) he had attempted to strangle an officer in 2007; and (v) he was a violent man.[84] Given that knowledge, when he was told that PX had been agitated at the committal hearing that should have prompted Mr Lyness to pass on the information. He recognised that he should, and said he did. The learned trial judge found that he did not.

[96] In my view, subject to what follows, that would have resulted in a finding of breach of duty on the part of Mr Lyness.

[97] However, there is another consideration.

[98] True it is that the learned trial judge did not make an express finding about whether the failure to report by Mr Lyness was a breach of duty. On one view, however, it is implicit in the findings set in paragraph [93] above that such a failure was not a breach of duty. Those findings are that the particular thing that Officer Linnenlucke told Mr Lyness, namely that PX was agitated at the committal hearing, was not a reportable incident. Or, to put it differently, the failure to report that thing was not a breach on the part of Officer Linnenlucke. If that is so, it is hard to see how it could reasonably be otherwise for Mr Lyness, who operated under the same reporting system.

[99] When the learned trial judge's reasons are examined closely it is apparent, in my view, that her Honour intended to include the allegation against Mr Lyness in the findings in paragraphs [66]-[73] of the reasons.

[100] At paragraph [66] her Honour records the submission that a breach of duty was alleged in respect of the failure by Mr Lyness (amongst others) to "generate an incident report, case note, or to otherwise advise the supervisor of [the prison unit] that [PX] had been agitated during the course of the committal hearing … such that the information could be passed on to the plaintiff and Officer Gleich through the IOMS system or the handover process". The footnote to that paragraph refers to the trial submissions, which are in much the same terms. Then her Honour records the basis of the submission that Mr Lyness failed to pass on the information from Officer Linnenlucke when he should have, in paragraph [67]. That failure by Mr Lyness is dealt with in paragraph [69].

[101] What then follows are the findings set out in paragraphs [93](f) - [93](i) above. Of critical importance to the resolution of this issue are the findings that: (i) the circumstances did not require distribution of information about the conduct of PX at

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83 AB 304 ll 3-5.

84 AB 306.

the committal;[85] (ii) Officer Linnenlucke's information was vague and had no factual foundation;[86] and (iii) there was nothing that warranted reporting.[87]

[102] In my view, this ground of appeal fails. However, as will become apparent, even if a finding of breach of duty were made, based on the failure by Mr Lyness to pass on the information from Officer Linnenlucke, it does not follow that the appeal would succeed.

Causation

[103] It is necessary to set out some further detail about the assault.

[104] Officer Eastment said that at each morning's handover briefing the main thing dealt with was officer safety.[88] He would check on a prisoner on the IOMS system if he had been told there was a problem with that prisoner.[89] He said that "nine times out of 10" PX would be mentioned in the morning briefings.[90]

[105] Officer Eastment observed PX on the morning walk through and said his "demeanour was that he was fine, ready to come out of his cell".[91] He was "just doing his normal thing" and was not agitated.[92] Officer Gleich saw much the same thing.[93]

[106] That part of the normal daily routine, prior to the assault commencing, involved Officer Eastment being upstairs and Officer Gleich downstairs, as each was in the process of hand locking the cells with the prisoners out of them. Officer Gleich was involved with an argumentative prisoner who did not wish to come out of his cell, and Officer Eastment went down to assist.[94] Having locked that cell the two officers headed for the exit. Just before getting there a prisoner (not PX) asked Officer Gleich if he (the prisoner) could get some sugar.[95]

[107] Officer Gleich went to unlock the cupboard, and Officer Eastment kept an eye on him from about 10 metres away.[96] The prisoner who had asked for sugar did not enter the laundry, but went to the door and then left for the kitchen.[97]

[108] At a point when Officer Gleich was almost in the laundry Officer Eastment noticed PX walking towards the laundry. By the time PX got there Officer Gleich was in the laundry. Officer Eastment said PX "looked like he was on a mission".[98] There had been nothing aggressive about him until he was walking towards the laundry.[99]

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85 Reasons below [68].
86 Reasons below [71].
87 Reasons below [73].
88 AB 36 l 23.
89 AB 36 ll 43-47.
90 AB 44 ll 13-16.
91 AB 39 l 12.
92 AB 70 ll 27-44, AB 71 ll 1-3.
93 AB 94 ll 9-27.
94 AB 40.
95 AB 40 l 35 to AB 41 l 15.
96 AB 41 l 20.
97 AB 72 ll 23-27.
98 AB 41.
99 AB 72 l 5.

Officer Eastment did not stop PX "because I didn't think he was going to be a problem",[100] and "I did not think to stop him for any reason".[101]

[109] He saw PX start to assault Officer Gleich up against a wall, and went to the laundry. He gave a verbal direction to PX to cease, then when he did not, intervened and hit PX a couple of times because he would not listen to the verbal direction.[102] That dazed PX a little and allowed Officer Eastment to position himself between PX and Officer Gleich, and then get Officer Gleich out of the laundry.

[110] When Officer Eastment positioned himself between PX and Officer Gleich PX "hit me several times … he was swinging and repeating that he was going to fucking kill us screw dog cunts", "I told you someone was going to pay", and "I'm going to kill your fucking families".[103]

[111] Officer Gleich similarly described the morning procedure and that as the officers were waiting to exit, a prisoner called out to ask for sugar. He then explained:[104]

> "And what did you do?---It was a fairly normal sort of request. I went over to the laundry, where they had … a storeroom that was set up in there, to locate their sugar and pepper and all that sort of stuff. I went into there, unlocked the cupboard. … I had to stay in there because … the key was attached to … a lanyard, so I couldn't leave … the actual room. The messman … well, kitchen worker - he walked in … to get the sugar.
>
> All right. And what happened after that?---At that point, look, it … was a normal … a mess worker. I'd had him there the day before. He … come in, … I didn't really know what was going on. He just had … a little cardboard box in his hand. He sort of walked up to the cupboard, threw it to the side, and then he just started punching into me."

[112] The messman who came in was PX. One significant part of that passage is that Officer Gleich said that one reason why it was normal was that he had "had him there the day before". He said that PX had been his normal self the previous day and there was nothing out of the ordinary about his behaviour.[105] In other words, PX had been in the laundry with Officer Gleich the previous day, and there was no evidence to suggest that PX's behaviour the previous day was anything other than normal.

[113] Officer Gleich said that PX was the messman and it was his task to collect things such as sugar. There was nothing abnormal about that task or about PX's conduct in performing that task on 8 March 2009.[106]

[114] From the assault, Officer Eastment sustained physical injuries and post-traumatic stress disorder.

Submissions

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100 AB 73 ll 5-8.
101 AB 73 l 17.
102 AB 42 ll 14-30.
103 AB 42 l 37 to AB 43 l 2.
104 AB 90 ll 10-21.
105 AB 98 ll 11-24.
106 AB 95 l 45 to AB 97 l 39.

[115] Mr Mullins submitted that the learned trial judge was wrong to address the issue of causation on the basis that:

(a) had Officer Eastment intervened before PX reached the laundry the assault would not have been prevented, but rather, it would probably have started when that intervention occurred;[107] and

(b) any decision by Officer Gleich not to go into the laundry alone was unlikely to have deterred PX, and the assault was likely to have started in the general area.[108]

[116] He submitted that to do so was to wrongly reason that a different assault would have occurred leading to the same consequences. There was no evidence to support that thesis. The finding that had he been told the information about the committal Officer Eastment would likely have intervened earlier, satisfies the test for causation.[109]

[117] In oral address Mr Mullins put the issue this way:[110]

> "The major injury to the appellant here was post-traumatic stress order. Had there been a different attack, he may or may not have suffered that injury. He may have suffered fewer punches, if any, if he were not in a confined space. Officer Gleich may have been able to avoid the assault if he was not in a confined space, which would have avoided the need for the appellant to intervene. There are a myriad of different factors that might have changed and that is precisely what might have – one of the things being that they had concern – had they known that there was some prospects of this trouble from this witness, they might have expected it to occur."

Discussion

[118] The Statement of Claim pleaded that had the information been passed on the incident where PX assaulted Officer Eastment would not have occurred.[111]

[119] The evidence of Officer Eastment and Officer Gleich, as to what they would have done differently had they known that PX had been agitated at the committal, was brief. No issue was taken with the summary of it in the reasons below:[112]

> "The plaintiff and Officer Gleich both gave evidence of extra precautions they would have taken if the matters of threats, aggression and agitation (combined with the prisoner's history) had been made known to them. The plaintiff said that he might have intervened before [PX] got to the laundry so that Officer Gleich would not be alone in the laundry. Officer Gleich said he would have been a lot more wary of [PX] and would not have been caught in the laundry by himself."

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107 Reasons below [82].
108 Reasons below [83].
109 Referring to *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 379 [45] and 397 [104].
110 Appeal transcript 1-38.
111 Paragraphs 20 and 22; AB 1121 and 1126.
112 Reasons below [79]; internal footnotes omitted.

[120] The evidence from them informs that summary. Officer Eastment's evidence about the manner of his proposed earlier intervention was:[113]

> "So I would have walked across and verbally give him that he's not to enter the laundry, and then I would have physically stood … in the laundry door and stopped him from going in, and then informed [Officer Gleich] that [PX] was making his way in."

[121] That answer was given in response to a question premised on if he had known that PX had "been agitated, acted aggressively towards a CSO, and that that CSO had concerns for her safety and the safety of other officers".[114] However, he proposed the same response even if all he knew was that PX "had just been agitated at the hearing".[115] Further he said he would have looked up the prisoner's case notes.[116]

[122] Officer Gleich's evidence about his being more wary was qualified in cross-examination when he said that: (i) if a prisoner's agitation was mild and had not been repeated over the next couple of days he would not expect that to be reported;[117] and (ii) that such a state of affairs would not lead him to modify his behaviour.[118]

[123] The evidence from other witnesses (such as Mr Keen) as to what they would have done can be put to one side. It was based on knowing that PX had made threats, been aggressive or abusive, or that the reporting officer held concerns for the safety of officers. None of those things were supported by the findings.[119]

[124] The learned trial judge's findings are at paragraphs [79]-[85] of the reasons. Having identified the precautions that Officer Eastment and Officer Gleich said they would have taken, the learned trial judge said:[120]

> "[80] Neither precaution establishes that the harm, more probably than not, would have been prevented or the injury minised (sic).
>
> [81] The evidence of the plaintiff was that some prisoners would take on 20 officers. [PX] was a very large man, of immense strength, with a violent history. The CCTV footage showed him aggressively engaging with a group of officers.
>
> [82] I am not satisfied that an intervention by the plaintiff before [PX] reached the laundry would have prevented the assault. Had there been such an intervention, the probable course of events would be that the plaintiff would have been assaulted at the time he sought to intervene.
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> [83] The plaintiff submits that the evidence indicated that [PX] was waiting for an opportunity to confront an officer in a confined

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113 AB 48 ll 36-39.
114 AB 44 l 28-31.
115 AB 48 ll 44-47.
116 AB 49 l 26.
117 AB 100 ll 31-36.
118 AB 101 ll 5-9.
119 Reasons below [85].
120 Internal footnotes omitted.

> space. I do not accept that this has been demonstrated. Any decision by Officer Gleich not to go into the laundry alone was unlikely, in my view, to have deterred this large, powerful and violent man from his intent. The assault is likely instead to have started in the general area.
>
> [84] I am also not satisfied that the presence of two officers would have deterred [PX]. When the assault started, the officers were only about ten metres apart and only a few seconds from each other."

[125] In oral address Mr Mullins accepted that even if the precautions foreshadowed by Officer Eastment and Officer Gleich had been taken an assault by PX would still have happened.[121] His point was that it would have been a different assault with a different outcome.

[126] The duty of care was to avoid the risk of harm, namely that a prison officer might be assaulted by PX. The risk, and therefore the scope of the duty of care, would be expressed too narrowly if it were framed as the risk of the particular assault that happened on 8 March 2009. As was said in *Vairy v Wyong Shire Council*:[122]

> "Again, because the inquiry is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. **In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries.** The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing"."

[127] In *March v E & MH Stramare Pty Ltd*[123] the High Court held that the question of causation is to be assessed as a matter of common sense and experience. The relevant question to be asked is whether a particular act or omission can fairly and properly be considered a cause of the event.[124]

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121 Appeal transcript 1-41 ll 6-35.
122 (2005) 223 CLR 422 at [124]; emphasis added.
123 (1991) 171 CLR 506.
124 *Fitzgerald v Penn* (1954) 91 CLR 268 at 276.

[128] Where the negligence consists of an omission to do something, the plaintiff must establish that the performance of the duty would have averted the harm.[125] The onus rests on the plaintiff to show that the taking of the relevant step "more probably than not … would have prevented or minimised the injury which was in fact received".[126] As was said by this Court in *Prasad v Ingham's Enterprises Pty Ltd*:[127]

> "[93] However, to succeed, the applicant had to establish, on the balance of probabilities, that the measures the respondent failed to adopt would have prevented or minimised her injuries. The necessary satisfaction of this element of causation was described in *Kuhl*:
>
> 'To satisfy the element of causation ... it would be necessary to identify the action which, on the available evidence, the trial judge could conclude ought to have been taken; that action, if failure to take it is to be accounted negligent, must be such that the foreseeable risk of injury would require it to be taken, having regard to the nature of that risk and the extent of injury should the risk mature into actuality; and it would be necessary that the trial judge could conclude as a matter of evidence and inference that, more probably than not, the taking of that action ... would have prevented or minimised the injuries the plaintiff sustained.'
>
> [94] That requirement was also considered by McMeekin J in *Woolworths Ltd v Perrins*:
>
> 'In order to establish the necessary causal link between any arguable negligence on the part of the employer and the injury suffered by the employee, it is necessary to show that the measures that it is said the employer failed to adopt would protect the employee from injury, not 'could' or 'might': *Queensland Corrective Services Commission v Gallagher*; *Turner v South Australia*. In that latter case Gibbs CJ said:
>
> > "When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury would probably have been averted, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd*."""

[129] In this case that required it to be established that had the information given to Mr Lyness been passed on, then steps would have been taken that would, more probably than not, have prevented or minimised the injury in fact suffered.

[130] This is where, in my view, the challenge to the findings on causation faces a considerable hurdle. The question of what would have been done cannot be

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125 *Lusk & Anor v Sapwell* [2012] 1 Qd R 507 at 523 [76].
126 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 379 [45] and 397 [104].
127 [2016] QCA 147 at [93]-[94]. Internal citations omitted.

addressed in a vacuum. A proper consideration of the issue must proceed on the basis that Officer Eastment and Officer Gleich, and their employer, knew not only Officer Linnenlucke's report of PX being agitated, but also the other reports and evidence of PX's state after the committal. Thus, they would have also known that:

(a) the handover report for 6 March mentioned nothing about PX;

(b) he was calm at the court watch house after the committal;

(c) he was calm during the transfer back to prison;

(d) he was interviewed by Mr Smith on return, some hours after the committal ended, and was assessed as posing no extra risk;

(e) he was calm when Mr Smith walked him back to Secure 9;

(f) the handover reports for 7 March and 8 March mentioned nothing about PX; and

(g) PX had been inside the laundry with Officer Gleich the previous day, without incident.

[131] That state of knowledge suggests that no other step was called for on the part of the employer between 6 March and 8 March 2009. PX might have been agitated at the committal according to Officer Linnenlucke, but he was not later when he was returned to the prison, nor when he was assessed by Mr Smith, nor the next day (7 March). In those circumstances it cannot be concluded that a duty to take reasonable care would require anything more than had been in place with respect to dealings with PX. No finding to that effect was made and none was suggested on the appeal.

[132] Therefore the only different steps were the two postulated, earlier intervention by Officer Eastment, and Officer Gleich avoiding being alone in the laundry. But they fall to be assessed as the only changes to the circumstances as they happened. In other words, one takes the events as they actually occurred on 8 March, and then assess what the difference would likely have been if the alternative step was introduced. Contrary to the submissions advanced, that does not make it a different assault from the one pleaded.

[133] The learned trial judge's findings were, in my respectful view, correct. In all likelihood Officer Eastment's earlier intervention would not have prevented the assault happening. As noted in paragraph [120] above, Officer Eastment proposed that he would have intervened by a verbal direction, then stood in the doorway to the laundry to prevent entry. Therefore any assault by PX would probably still have occurred in the enclosed space of the laundry, rather than some point outside it. And, his intervention, both in the form of an oral direction to PX to cease and physically interposing his body between PX and Officer Gleich, did not cause anything to cease on 8 March.

[134] There is no reason to think that PX's attack was specifically directed at Officer Gleich, and PX's statement in the midst of the assault, "I told you someone would pay for this", would seem to bear that out.

[135] Further, the step identified by Officer Gleich, avoiding being caught alone in the laundry, was unlikely to prevent what happened. The evidence was that PX held the

prison position of "messman" and that was the prisoner who was responsible for collecting things such as the sugar that Officer Gleich was going in to get.[128] Once Officer Gleich opened the cupboard he had to stay there because the key was attached to a lanyard around his neck.[129] It must be recalled that PX, as messman, had been in the laundry with Officer Gleich the previous day, with no suggestion of any unusual behaviour. The CCTV footage showed PX walking calmly and quietly towards the laundry, giving no warning of what was to come. PX was not deterred by being confronted by two officers in the assault on 8 March, and later by many more. There is every reason to conclude that the assault would still have occurred, even if it was outside the laundry.

[136] This ground of appeal lacks merit.

Conclusion

[137] The grounds of appeal lack merit. The appeal should be dismissed with costs.

[138] **PHILIPPIDES JA:** I have had the considerable advantage of reading the reasons for judgment given by Morrison JA. I agree that the appeal should be dismissed with costs for the reasons stated by his Honour.

[139] **McMURDO JA:** I gratefully adopt the comprehensive summary of the evidence by Morrison JA. I agree that the appeal must be dismissed.

[140] In my view, a breach of duty was proved, in that Mr Lyness should have passed on the information which he had received from Officer Linnenlucke, which he failed to do on the trial judge's findings. The question then is whether that breach of duty caused the appellant to be injured. Substantially for the reasons given by Morrison JA, the appellant failed to prove that element of causation.

[141] In essence, the appellant's case was that had he and Officer Gleich known of the information which had been given to Mr Lyness, they would have been more alert to the prospect that the prisoner would suddenly become violent. That case required proof that, more probably than not, that heightened state of alert would have in some way prevented this violent and irrational man from behaving as he did. I am unpersuaded that the trial judge erred in her conclusion that if there was a breach of duty, it did not cause the appellant to be assaulted and injured.

[142] I agree with the orders proposed by Morrison JA.

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128 Officer Eastment at AB 72-73; Officer Gleich at AB 90, 95-96.

129 AB 96 ll 10-15.