

SUPREME COURT OF QUEENSLAND

CITATION: *Corbin v State of Queensland* [2019] QSC 110

PARTIES: **KERRY CORBIN**
(plaintiff)
v
**STATE OF QUEENSLAND (QUEENSLAND
CORRECTIVE SERVICES)**
(defendant)

FILE NO: BS3127 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 3 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 16 – 20 April 2018 and 26 November 2018

JUDGE: Ryan J

ORDER: **1. Judgment for the defendant.**
2. The parties are to be heard on the question of costs.

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – Where the plaintiff was employed by the defendant as a corrective services officer – where the plaintiff was assaulted by a prisoner – whether the assault to the plaintiff was reasonably foreseeable – whether the defendant failed to take measures to protect the plaintiff from foreseeable harm – whether the defendant’s breach caused the harm to the plaintiff

COUNSEL: J Wiltshire for the plaintiff
B Charrington for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
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ISSUES AT TRIAL	4
THE PLAINTIFF, WOLSTON CORRECTIONAL CENTRE, PRISONER X AND THE ASSAULT	4
The plaintiff	4
The plaintiff’s training as a corrective services officer	5
Wolston Correctional Centre	5
The plaintiff’s employment at Wolston Correctional Centre and his on-the-job training	5
The plaintiff’s experience of the prisoners at WolCC	6
Prisoner X	6
The assault	6
Mr Mandic’s evidence about the assault	7
The plaintiff’s injuries	8
The plaintiff’s assessment of Prisoner X and his perception of the risk of an assault	9
PRISONER X’s CRIMINAL AND CUSTODIAL HISTORY	9
Material about Prisoner X’s behaviour prior to his placement at WolCC in April 2013	10
WolCC IOMS entries about Prisoner X (from April until October 2013)	11
Mr Corbin’s IOMS entries about Prisoner X	12
IOMS entries by other CSOs about Prisoner X	15
Observation about IOMS entries	18
LIABILITY	18
The <i>Workers Compensation and Rehabilitation Act</i> (Qld) 2003	18
THE DUTY OF CARE AND ITS CONTENT	20
FORESEEABILITY	23
Was Prisoner X a “remarkable” prisoner?	25
Evidence from those who worked with Mr Corbin or knew Prisoner X	25
Evidence of General Managers of WolCC	26
The evidence of the experts about Prisoner X	30
Prisoner X was not a remarkable prisoner	32
Should Prisoner X have been managed by way of an IMP?	32
Evidence of those with operational experience in Queensland of IMPs	33
Evidence of the experts about IMPs	38
Discussion of evidence about IMPs	43
BREACH OF DUTY	46
Would a reasonable employer have managed Prisoner X by way of an IMP?	46
Were the defendant’s policies inadequate?	48
Did the defendant breach the duty it owed to the plaintiff?	49
CAUSATION	49

The IMP precaution	50
Defendant's submissions	50
Plaintiff's submissions	53
Did failing to manage Prisoner X by way of an IMP cause the plaintiff's injury?.....	55
The two-officer precaution	56
Would the assault not have occurred but for the failure to take two-officer precautions? ...	57
QUANTUM	57
The plaintiff's health prior to the assault	57
After the assault	57
The surveillance footage	59
Inference to be drawn from the surveillance.....	74
General damages	76
Past economic loss	76
Past loss of superannuation.....	77
Future economic loss	77
Past special damages (including interest)	78
Future special damages.....	78

- [1] Kerry Corbin, a prison officer, approached a prisoner who had defied him and continued to smoke in breach of prison rules. The prisoner assaulted Mr Corbin, leaving him with physical and psychiatric injuries. Mr Corbin sues the State of Queensland for damages for personal injuries. He claims that the State, as Queensland Corrective Services, negligently managed the prisoner. His primary claim is that the prisoner ought to have been the subject of an “Intensive Management Plan” and that, had he been the subject of such a plan, it was probable that the prisoner would not have assaulted Mr Corbin.
- [2] The State of Queensland submits that the plaintiff has failed to establish a breach of duty on its part, or causation and that it is not therefore liable in negligence.
- [3] For the reasons which follow, I agree.
- [4] Accordingly, I order judgment for the defendant.

ISSUES AT TRIAL

- [5] I will refer to the prisoner who assaulted Mr Corbin as Prisoner X.
- [6] At the conclusion of the trial, the issues in dispute were:
 - (a) whether Prisoner X’s assault upon Mr Corbin was reasonably foreseeable;
 - (b) whether the defendant failed to take reasonable measures to protect Mr Corbin from the foreseeable risk of harm posed by the Prisoner X – that is, by managing Prisoner X under an Intensive Management Plan (IMP) or by ensuring that two prison officers were present for any dealings with him;
 - (c) whether the assault would not have occurred but for the defendant’s failure to manage Prisoner X by way of an IMP or by way of ensuring that two prison officers were present for any dealings with him;
 - (d) the veracity of Mr Corbin’s report to experts about the extent of his movement symptoms; and
 - (e) the quantum of Mr Corbin’s damages.

THE PLAINTIFF, WOLSTON CORRECTIONAL CENTRE, PRISONER X AND THE ASSAULT

The plaintiff

- [7] The plaintiff, Mr Corbin, turned 50 in March 2019. After working for many years as a chef and a truck driver, he entered the “academy” to train to be a prison officer in 2008. The training course ran for 10 weeks.
- [8] At the time of the trial, he was separated from his wife, and his mother was living with him. He has one adult son.

The plaintiff's training as a corrective services officer

- [9] Mr Corbin accepted that part of his prison officer training concerned officer safety. He did not agree that that was a *large* part of it. He agreed that he was taught to be vigilant at all times when dealing with prisoners and agreed, in effect, that a prisoner's temperament might vary from day to day.
- [10] He did not agree that he was trained in a "buddy system" to work as a pair with another corrective services officer (CSO). He did not agree that he had been taught to keep his co-worker in his line of sight. He said he was taught to know where his co-worker was – for example, having a smoke or going to the toilet.
- [11] After short periods in the relief pool and at the Supreme Court, Mr Corbin was employed at Wolston Correctional Centre as a CSO.

Wolston Correctional Centre

- [12] Wolston Correctional Centre (WolCC) is a protection prison – not a mainstream prison. It houses prisoners who are afforded protection status for a variety of reasons including that they are at risk of assault by other prisoners or that they have a particular vulnerability such as advanced age or mental illness.
- [13] Sharon Clark, the General Manager of WolCC from 2009 until February 2013, gave evidence about the variety of prisoners at WolCC in 2012. She said that 60 per cent of the prisoners at WolCC were "open mental health cases"; 50 per cent were child sex offenders and 20 per cent were "young offenders" who indicated "incompatibility" elsewhere and "would come to Wolston to do their time a little easier".¹ She said those young prisoners would stand over the older prisoners, keep food from them and did "a number of things" which "threatened the safety and security of the facility".
- [14] The prisoner who assaulted Mr Corbin was a young offender.

The plaintiff's employment at Wolston Correctional Centre and his on-the-job training

- [15] At WolCC, Mr Corbin worked on a roster, rotating through areas of the jail, including in the secure units. "His" secure unit was S5.
- [16] Mr Corbin was questioned about the training he received in the 12 months after completing the academy course. His answers were to the effect that while it was expected that senior officers would continue to teach or train new CSOs on the job – that did not happen. He expressly disagreed that he had been trained at WolCC to maintain a line of sight with his co-worker.

The plaintiff's experience of the prisoners at WolCC

¹ Transcript 2 – 85. I am aware that the sum of those percentages is more than 100 per cent.

- [17] Mr Corbin had some experience of mainstream prisoners at the Townsville Correctional Centre. He found the prisoners at WolCC “a lot more quiet and compliant”. He did not agree that prisoners were “volatile people ... as a general rule”. He said “not in a protection prison”.
- [18] In terms of their interaction with prison staff, Mr Corbin found that the prisoners at WolCC “were very engaging and [would] approach officers very, very freely, and basically, just have a general banter with them”. The mainstream prisoners whom he had encountered elsewhere “basically, wanted nothing to do with an officer at all”.
- [19] In terms of the way in which prison officers dealt with mainstream prisoners, he said “you’re a lot more aware of the dangers ... some of them would have IMPs; some of them would have intel notes ... warning not to approach without two or three officers or a supervisor present”.²
- [20] He said he showed prisoners “the same respect as what they gave me ... the way they spoke to me is the way I spoke back”. He felt he engaged with the prisoners at WolCC very well.

Prisoner X

- [21] Prisoner X was 29 years old when he was afforded protection prisoner status and transferred from Brisbane Correctional Centre to WolCC. He had previous convictions for mostly drug and property offences, which had been dealt with in the Magistrates Court. He arrived at WolCC on 12 April 2013. He was placed in unit S5. He assaulted Mr Corbin on 10 October 2013, within six months of his arrival.

The assault

- [22] The assault occurred in the common area of S5. Mr Corbin and CSO Stan Mandic were on duty. Just before the assault, they were both sitting at the officers’ workstation.
- [23] Mr Corbin was not too sure of the number of prisoners in the common area at the time. A few had gone to “industries” (work) but there were probably more than 20.
- [24] Prisoner X was with seven other prisoners at the table closest to the officers’ desk. They were playing cards. Prisoner X was smoking, which was not permitted inside. It was conduct for which Prisoner X could be “breached”.³ From his desk, Mr Corbin said to Prisoner X; “For fuck’s sake X, put it out”. Mr Corbin thought Prisoner X put the cigarette out. A little later, he saw Prisoner X leaning back in his chair and blowing cigarette smoke up to the ceiling. Mr Corbin took that as “a big F you”. Mr Corbin kept his eyes on Prisoner X as he manoeuvred his way around the workstation and into the common area itself. He did not look behind him to see if CSO Mandic was still at the workstation.

² Transcript 1 – 24, 1 35 – 42.

³ In the sense of a breach of discipline which, if proved, attracted punishment.

- [25] He walked to Prisoner X's table and said: "For fuck's sake, these cameras are apparently recording 24 hours a day now because they are on hard drive. You've just been caught. Pack this up and get outside".
- [26] Prisoner X looked Mr Corbin in the eye and said, "No you can't do that". Mr Corbin raised his voice, said he "could" and told Prisoner X again to "pack this up and get outside".
- [27] Prisoner X assaulted Mr Corbin by hitting him repeatedly on the left side of the head and face. He was knocked to the ground and may have briefly blacked out. There was a lot of blood. As Mr Corbin explained:⁴

He basically jumped up out of his head (sic) and then moved away. Was huffing and puffing. I was concerned because my back was to the other prisoners sitting at the table. I was looking at them, trying to get them to pack the stuff up, plus the other ones behind me. Notice he had taken his shirt off, huffing and puffing. He had apparently walked around and then basically charged at me and blindsided me and punched me. I remember three punches ... he had backed away after that, and I went to secure him so I didn't sustain any more injuries ... I had wrapped my arms around him to secure him so I wouldn't get hit any more ... I had profusely (sic) amount of blood pouring from my face, and I lost traction. He just basically pushed me backwards on my blood and smashed me into ... just outside the kitchen door ... the corner of the door. The concrete part ... Next fell to the floor. I think it was a plastic box that I got slammed onto ... Apparently we got up and wrestled again, and then I got slammed onto a table ... Hit the chairs as well on the way down ... And then I remember Stan running through the exercise door ...

- [28] Mr Corbin thought CSO Mandic had been at the desk at the workstation when he walked over to Prisoner X and the other prisoners. He did not hear CSO Mandic tell him he was leaving the unit. CSO Mandic had in fact left the unit to take the bins out.
- [29] Mr Corbin said that had he known he was the only prisoner officer in the unit he would not have confronted Prisoner X without backup or "having eyes on me". He would have called for extra assistance by "calling a code" and having Prisoner X removed from the unit.⁵

Mr Mandic's evidence about the assault

- [30] CSO Stanko Mandic explained that he usually worked in S3, but was working in S5 on 10 October 2013. He knew some but not all of the prisoners in S5. He did not know Prisoner X. He had worked with Mr Corbin before.
- [31] He recalled "banter ... remarks and stuff" between Mr Corbin and Prisoner X. He said it was "needling" but not aggressive. It was not friendly, jovial or joking. It was

⁴ Transcript 1 – 32 – 1 – 33.

⁵ Transcript 1 – 34.

“standoffish” talk from the prisoner including comments about looks and behaviour. He was “not really” concerned about any aspect of Prisoner X’s behaviour, apart from those comments.

- [32] Before Prisoner X assaulted Mr Corbin, CSO Mandic had just left the officers’ station to go outside to secure the bins by chaining them to a wall.⁶ When he came back inside, he noticed that Mr Corbin “wasn’t there” and he saw him wrestling and struggling on the table which was about two metres away. He had been away for “a couple of minutes” he guessed.
- [33] He instigated a “Code Yellow” on his radio, and went to assist Mr Corbin. He grabbed Prisoner X and struggled with him until he was restrained. Other officers who responded to the Code Yellow took Prisoner X away.
- [34] He said that, before he went outside, he said to Mr Corbin “just going to lock up the bins mate”. He believed Mr Corbin acknowledged him.
- [35] Under cross-examination he said that, although he heard the banter between Prisoner X and Mr Corbin, he “didn’t realise that it could have ... ever escalated to that sort of thing”. He estimated that he would have been outside for no longer than a minute to a minute and a half.⁷
- [36] He said that he did tell Mr Corbin that he was leaving. He said, in effect, that it was his practice to inform whomever he was working with if he was leaving the work area. He denied that he went outside to have a cigarette. He agreed that he would be more cautious about approaching prisoners if he was working alone. He personally would not address a group of prisoners by himself.⁸
- [37] He agreed that Prisoner X was in breach of the rules by smoking inside and his conduct required some action. But if the “situation was reversed” he would have waited for Mr Corbin to return to the unit.

The plaintiff’s injuries

- [38] Mr Corbin was taken to the Ipswich Hospital bleeding profusely from his mouth. His lip had been lacerated and his teeth were damaged and loose. His lip was sutured and he was referred to a dentist. There were no fractures of the facial or teeth bones. An MRI showed no facial abnormality but a maxillofacial surgeon diagnosed an injury to his infraorbital nerve which caused painful sensations. Abnormal movement symptoms and a stutter developed, which have varied over time, but which persist. Their cause is uncertain, but expert opinion is to the effect that they were precipitated by the assault. Also, Mr Corbin developed, and continues to suffer from, Post Traumatic Stress Disorder (PTSD).

⁶ So that the prisoners could not play with them or throw them around.

⁷ It was suggested to him that he had been gone for one minute and 45 seconds.

⁸ Transcript 4 – 92, ll 6 – 10.

- [39] The parties agreed that Mr Corbin's personal injuries included (i) PTSD; (ii) cranio-facial dystonia; (iii) bruising and lacerations; and (iv) scarring and disfigurement.⁹

The plaintiff's assessment of Prisoner X and his perception of the risk of an assault

- [40] Mr Corbin said Prisoner X "did not display protection behaviour". He was "confronting ... arrogant". "He would not follow any direction without, basically, having to push – push it."
- [41] Mr Corbin described the other prisoners in S5 at the time as very quiet and compliant; causing no issues or concerns. That was not consistent with Mr Corbin's later evidence about the five "big ringleaders" in the unit. He thought that Prisoner X and Prisoner Y were "pretty much the ringleaders, the heavies". He was told that Prisoner X and other prisoners stood over the more vulnerable prisoners and took their food or medication. He said that Prisoner X was bashing the paedophiles and older people who could not look after themselves (although there was no suggestion he saw this as an eye-witness).
- [42] Before Mr Corbin was assaulted by Prisoner X, he thought their relationship was "all right". He said, "We sort of have that sort of backwards and forth banter, really. I knew he was a little shit, but there wasn't a lot I could do about it". He would not have said there was bad blood or bad feelings between them.¹⁰
- [43] Mr Corbin was cross-examined about Prisoner X's status (as a "ringleader") and the consequences of Mr Corbin challenging him, and in that sense diminishing him, in front of his peers. Mr Corbin said that he had no reason to fear an assault from Prisoner X – even though he had reviewed his file "as far back as [he] was able to see". Nothing put him on notice of an assault upon an officer. Nothing he knew about Prisoner X nor anything in his history caused Mr Corbin to think that he ought to take special precautions in dealing with him.
- [44] He said he would have dealt with Prisoner X differently had he known that Prisoner X had a history of violence towards police officers or other prisoners, or known he had a history of threatening or verbally abusing officers. He would not have used "banter" and he would not have approached him "singularly".

PRISONER X's CRIMINAL AND CUSTODIAL HISTORY

- [45] The inference to be drawn from Prisoner X's criminal and custodial history by those at WolCC responsible for his management was relevant to the foreseeability of the assault. In particular, as the case was pleaded, the critical issue was whether those responsible for Prisoner X's management ought to have recognised that he posed such a risk of assault upon a prison officer that he required management by way of an IMP – either upon his placement at WolCC or at some time thereafter.

⁹ List of matters not in dispute.

¹⁰ Transcript 1 – 62, ll 29 – 37.

Material about Prisoner X's behaviour prior to his placement at WolCC in April 2013

- [46] Evidence tendered to the court by agreement provided information about Prisoner X, including information about his criminal history, his custodial behaviour and his prison disciplinary breaches from 2007 until 2013 (that is, the material behind tabs 7 and 8 of the Liability Trial Bundle).
- [47] I have proceeded on the assumption that all of the material behind tabs 7 and 8 was available to those making management decisions for Prisoner X upon his placement at WolCC. That might not have been the case,¹¹ but it is the assumption which is most favourable to Mr Corbin.
- [48] The tab 7 material revealed that Prisoner X had a New South Wales criminal history which, as at 20 January 2011, consisted of more than 20 convictions, the first dated 15 August 2005. Those convictions were for non-violent property related offences.¹² The material revealed that all of Prisoner X's Queensland matters were dealt with in the Magistrates Court.
- [49] The tab 7 material included a detailed report about Prisoner X's drug use.¹³ His drug use commenced with cannabis use when he was 13, and escalated to daily intravenous heroin use. His perception was that he developed a heroin addiction when he was aged about 24 having turned to opiates to deal with his amphetamine use. He was also prescribed an antidepressant for depression.
- [50] The overall effect of the material behind tab 7 and 8, which was available to the defendant *prior to 12 April 2013*, was that Prisoner X had abused drugs since his teenage years, including amphetamines and opiates. His offending was related in one way or another to his drug abuse. His most dangerous Queensland offence, involving driving directly at others, was committed while he was under the influence of drugs. At least one episode of assaulting/obstructing police occurred while he was under the influence of drugs. He was unable to stay drug free upon his release into the community. He was using drugs in custody in 2008, diverted his medication in January 2012 and was found in possession of a syringe in October 2012.
- [51] His custodial history included his assaulting, or being assaulted or threatened by, other inmates. At times, he demonstrated anti-authoritarian, challenging or defiant behaviour. Generally, he was better behaved while in the detention unit (and deprived of an audience of other prisoners) than he was out of detention. He had threatened prison officers, but had not acted on those threats.
- [52] He was most assaultive to other prisoners while he was accommodated at Arthur Gorrie Correctional Centre (AGCC) between May 2012 and February 2013. It was also at AGCC that he was most difficult and threatening towards staff. After his discharge from the AGCC detention unit on 19 December 2012, he was noted to be settled, polite

¹¹ For example, it was not clear on the evidence who had access to police QP9 documents.

¹² Page 246, Liability Trial Bundle.

¹³ Page 355, Liability Trial Bundle.

and compliant, more mature and posing no management issues. He was transferred to Brisbane Correctional Centre on 8 February 2013.¹⁴

- [53] On one occasion at Brisbane Correctional Centre, he taunted staff on the night shift. He was belligerent and non-compliant the next day. He and other prisoners stared at staff. He was found in possession of a string line on 26 February 2013. He was placed in the Brisbane Correction Centre detention unit as a consequence on 27 February 2013. He was settled when he returned to the unit and demonstrated acceptable behaviour until he was released on parole on 5 March 2013. Before his parole release he was described as having a tendency to be “a bit mouthy especially around other prisoners he want[ed] to impress”. He returned to drug use whilst in the community. His parole was suspended and he was returned to custody (on 19 March 2013) at Brisbane Correctional Centre.¹⁵ His behaviour whilst there was satisfactory. He was described as “a bit animated” but also as polite and compliant. He was transferred to WolCC as a protection prisoner on 12 April 2013.

WolCC IOMS entries about Prisoner X (from April until October 2013)

- [54] Notes by correctional services officers and other prison staff (like counsellors) about the prisoners at WolCC (and other prisons) are entered into an electronic record keeping or management system known as the IOMS.
- [55] The WolCC IOMS entries about Prisoner X are relatively infrequent. IOMS entries had to be made once a fortnight (for a prisoner not housed in a detention unit) and when something occurred which warranted adverse comment. The absence of an IOMS entry for a particular day suggested that the prisoner behaved well that day.¹⁶ Daily IOMS entries were required for prisoners in the detention unit. It follows that care must be taken in comparing the number of positive entries made while Prisoner X was in the detention unit to the fewer positive entries made when Prisoner X was not in the detention unit.
- [56] At the time (2013) the IOMS were supposed to be audited monthly, but that did not occur in the case of Prisoner X.
- [57] It was suggested by counsel for the plaintiff that the defendant’s review of the IOMS for Prisoner X and, in particular, the notes made by Mr Corbin about Prisoner X, ought to have prompted the defendant’s enquiry of Mr Corbin to explain further his notes. It is Mr Corbin’s case that *even if* the defendant did not appreciate, at the time of Prisoner X’s placement at WolCC, that he required management by way of an IMP, then the defendant should *at least* have appreciated it before the assault, having regard to his conduct at WolCC as reported in the IOMS.

Mr Corbin’s IOMS entries about Prisoner X

¹⁴ Exhibit 13 is Prisoner X’s movement history.

¹⁵ Whilst in custody, he spend a day in hospital for surgery on his knee.

¹⁶ Transcript 6 – 45, ll 3 – 10.

[58] Mr Corbin made IOMS entries about Prisoner X's "attitude" or the "issues" that he created or that he "pushed" the CSOs. Entries made by Mr Corbin and his explanation of them follow.

[59] On **29 April 2013**, not long after his placement at WolCC on 12 April 2013, Mr Corbin wrote:

Prisoner's name has been brought to my attention as having major issues within the unit. Apparently he has a major attitude problem. This was confirmed during the interview with this prisoner by CSO P Robinson, he has compatibility issues with a few prisoners in the unit, some of these issues date back to his time at another centre.

[60] Mr Corbin explained that the "major issues" had been brought to his attention by other prisoners in the unit. A major issue was a complaint to Mr Corbin from a prisoner about Prisoner X stealing his milk. Other prisoners told him that Prisoner X was standing over the older, paedophile prisoners.

[61] When asked about the compatibility issues to which he referred, Mr Corbin referred to his assumption that Prisoner X had been transferred from Brisbane Correctional Centre because he had "obviously had a bit of a tiff or someone's had problems with him from that unit in BCC" and his observation that the "issues" that had been "popping up" in S5 coincided with Prisoner X's placement there. In cross-examination, it was suggested to Mr Corbin that "any review" of Prisoner X's IOMS file did not "bear out" the information contained in this entry. Mr Corbin said he acquired this information first hand from CSO Robinson and he believed it.

[62] On **14 May 2013**, Mr Corbin wrote:

Prisoners cell was searched NTR.

Prisoner's behaviour within the unit is trying at best, he was breached for possessing a lighter which he didnt hand over and a later strip search failed to reveal.

Reading back through this prisoner's case file has revealed a history of this behaviour, plus Syringe Possession.

Prisoner was caught again with this lighter at 15:25, and it was finally surrendered to the Secure Manager, Secure Supervisor and CCO D. Guy.

This prisoner does not display the behaviour required here at this centre and has turned down placement in the Stepping out program. [This is discussed further below.]

This prisoner has established a bad baseline within the unit, please refer back to case note dated 29/04/13.

[63] By "trying at best" Mr Corbin meant that Prisoner X was "Trying – he's pushing the boundaries, basically just kept pushing us. Like, we have a set behaviour that we like in a unit, and if you keep pushing it, pushing it, to say you're not conforming, basically, to

what we want in the centre, in the unit”.¹⁷ In terms of “the behaviour required here at this centre”, Mr Corbin explained that Prisoner X was defiant in the face of “get[ting] caught with something” whereas other prisoners would say “Okay, boss. You got me. Fair enough. I’ll cop it”.¹⁸

[64] On 2 August 2013, Mr Corbin wrote:

Prisoners cell was searched Ntr, cell was clean and tidy and within QCS guidelines.

Prisoner’s behaviour can be hit and miss, and it is reflective of his case notes throughout his stay at this facility. But he is currently employed at Paint and powder much to my surprise.

This prisoner doesn’t appear to have a filter from his brain to his mouth, which would explain some of his actions.

He reported no issues or concerns at the time of the interview, he maintained good eye contact and good body posture and appears to be future oriented.

[65] He explained that, by “hit and miss”, he meant that sometimes, Prisoner X was “being good ... playing the game” and “other times ... he’s being defiant and not following rules”.¹⁹ As to there being “no filter”, he explained that when he (Mr Corbin) gave Prisoner X an instruction he would “just shout out whatever he was randomly thinking”.²⁰

[66] It was suggested to Mr Corbin that the case notes which preceded this entry did not reflect “hit and miss” behaviour. Mr Corbin disagreed. The following exchange occurred:²¹

In between ... a negative cell search with a good outcome and those good behavioural points, why put in there that he was hit and miss in his behaviour and he didn’t have a filter from his brain to his mouth, unless you didn’t like him? Why put it in there, Mr Corbin? --- It’s – I don’t know if you know what screw humour is like. It’s what we are. This is the humour – the banter back and forth we have with prisoners.

But you weren’t taught at the academy or at Wolston Correctional Centre when writing reports to make them witty and humorous. You were taught to make them factual and objective, weren’t you? --- We’ve got officers that just put a full stop and they’re – they’re case files basically reflects that. That’s their case note. You go look up on ---

So was this an attempt at humour, these comments about this prisoner on his file? --- No. It was basically saying that he was hit and miss in his

¹⁷ Transcript 1 – 45, ll 20 – 25.

¹⁸ Transcript 1 – 46, ll 7 – 14.

¹⁹ Transcript 1 – 59, ll 15 – 19.

²⁰ Transcript 1 – 59, ll 25 – 30.

²¹ Transcript 1 – 104, l 28 – 1 – 105, l 5.

behaviour but I'm glad to see he is still at his job and, unfortunately, he doesn't think before he talks or acts.

But you're not answering my question. Why put this in on this occasion when every interaction with him was positive? --- This is how officers talk. This is how we learn.

But it's his file and it's on his record and he'd done nothing wrong that day? --- I didn't say he did.

[67] On **7 September 2013**, Mr Corbin wrote:

Prisoners cell searched as per the rotational search matrix, NTR, His cell was clean and tidy and within QCS policies and standards, and Wolston Correctional centre local procedures.

Prisoner's attitude hasn't varied much from his arrival at this centre. That isn't a good thing. He has problems with authority and following simple instructions. This prisoner has an ingrained drug culture that won't be easy to erased, I don't think this Prisoner's attitude will change tho.

He has maintained employment at Paint and Powder much to my surprise.

[68] Mr Corbin explained that he was referring, in that entry, to Prisoner X's "trouble" following instructions and the fact that "it was always a performance to get him at lockaway". He said, "When trying to get him to do tasks, he would either be defiant and then he would finally relent and do it – so it was an effort to get him to do anything". The reference to his "ingrained drug culture" was a reference to his hanging with people who were known drug users. Mr Corbin believed there was a drug supplier in the unit.²²

[69] On that same day, Mr Corbin forwarded this case note to his supervisor, Brett Cross, by e-mail.

[70] Mr Corbin added the following to the e-mail:

He has come to my attention today as being a ring leader in persecuting Prisoner [Z] and others, he is personally blaming Z for those prisoners being moved from the unit, It has been a good start moving those prisoners but could of gone further with Prisoner X, and Prisoner [Y] considered to move also.

Regards Kerry

[71] He hoped that Mr Cross would move Prisoner X from the unit, in response to his e-mail.²³ That did not occur. He thought he followed up on his e-mail with Brett Cross on the following "inspection day" by saying "something" about it but "they [were] rushing, sort of, to get out of the unit, so they didn't really want to hear a lot". His evidence was to the effect that it was difficult to find time to speak to a supervisor.

²² Transcript 1 – 60, ll 13.

²³ Transcript 1 – 61, ll 42 – 45.

[72] Mr Cross did not receive this e-mail.

[73] Mr Corbin was cross-examined about the reason for his including in the IOMS notes his opinion about Prisoner X in the absence of a particular incident or behaviour. It was suggested to Mr Corbin that he did not like Prisoner X and that all of his reports about him included “unnecessarily” significant negative comments. Mr Corbin denied that he was attempting to build a case against Prisoner X. He said he wanted prisoners in the unit to behave the way they were “supposed to”.

[74] Mr Corbin was asked to confirm that, apart from the incident with the lighter, his case notes did not include any instance of Prisoner X behaving badly towards him. He did not answer in any responsive way. He said that he did not – as a result of the case notes – have Prisoner X “down as someone who needed to be watched carefully”. He said that he did not expect him to act as he did.²⁴

IOMS entries by other CSOs about Prisoner X

[75] It is important to place Mr Corbin’s IOMS entries about Prisoner X in the context of other entries made about him while he was at WolCC:²⁵

[76] The WolCC IOMS entries, by Mr Corbin and other CSOs, may be summarised as follows:

- **12 April 2013** (by Matthew Standfield) –
 - unremarkable presentation during interview following reception;
 - polite and co-operative;
 - willing engagement;
 - reported a mental illness for which he was medicated.
- **19 April 2013** (Matthew Standfield) –
 - said he was feeling good and had settled into S5;
 - taking medications for current mental illness;
 - denied “association” concerns;
 - was looking forward to obtaining employment.
- **19 April 2013** (Paul Georgas) –
 - nothing of concern found during cell search;
 - appeared to be adjusting well within unit;
 - interacting with other offenders and staff;

²⁴ Transcript 1 – 107, l 35 – 1 – 108, l 17.

²⁵ Tab 8, Liability Trial Bundle, Volume 2.

- in the process of gaining employment.
- **29 April 2013** – Mr Corbin’s entry about Prisoner X’s “major attitude problem”.
- **2 May 2013** (Ulrich Rack) –
 - cell neat and tidy;
 - no contraband;
 - good standard of personal hygiene.
- **7 May 2013** (Sarah Clatworthy (counsellor)) –
 - declined place on Stepping Up program. (Documentation about his refusal, found elsewhere in the evidence,²⁶ indicates that Prisoner X stated that he did not wish to participate because he had outstanding offences and he did not think that criminogenic programs would “count”. What that means is not clear. He may have meant that even if he were to do the Stepping Up program, it would not assist him in achieving parole because of his outstanding charges. However, the point is that his refusal was not because of belligerence on his part.)
- **14 May 2013** – Mr Corbin’s entry about Prisoner X’s behaviour being “trying at best” and his “bad baseline”. He also refers in this entry to Prisoner X’s possession of a cigarette lighter.
- **20 May 2013** (Duncan McKinnon) – workshop induction (for employment).
- (Not an IOMS entry) 28 May 2013 – Prisoner X pleaded guilty to a major breach of discipline, for possessing the cigarette lighter on 14 May 2013, and was reprimanded.
- **4 June 2013** (Sheila Mack) –
 - cell clean and tidy;
 - contraband removed (battery, jam, margarine, weetbix);
 - breached in May 2013 for possessing a cigarette lighter;
 - attended employment regularly.
- **23 June 2013** (Sheila Mack) –
 - cell clean and tidy;

²⁶ Page 569, Liability Trial Bundle.

- contraband removed (battery and ashtray);
- regularly attending employment;
- second refusal to attend getting started program. [I assume this is a reference to the Stepping Up program.]

- **24 July 2013** (Edwin McIntosh) –
 - stood at cell door with jocks on only;
 - all prisoners remained at their doors until Prisoner X was dressed;
 - Prisoner X “wasn’t happy and a bit lippy but didn’t cross the line”;
 - warning issued.

- **2 August 2013** – Mr Corbin’s entry about Prisoner X’s “hit and miss” behaviour and his having “no filter”.

- **17 August 2013** (Jason Wood) –
 - nothing to report about cell search;
 - worked;
 - followed all directions given.

- **23 August 2013** (David Williams) –
 - late for industry parade;
 - did not appear to take lateness seriously and was sent back to the unit;
 - challenged CSO by saying he would contact the trade instructor;
 - trade instructor rang the unit and Prisoner X was permitted to go to work;
 - Prisoner X “laughing as if it was all a joke”;
 - Prisoner X “needs to show more responsibility to his employment and respect for authority”.

- **30 August 2013** (Sheila Mack) –
 - contraband removed from cell (razor, roll of insulating tape, torn sheet);
 - “Prisoner displays a poor attitude at times when he is required to comply with centre rules and regulations”;
 - attends work regularly.

- **7 September 2013** – Mr Corbin’s entry about Prisoner X having problems with authority and an ingrained drug culture.

- **20 September 2013** (Alana Guy) – Negative result upon drug screening.
- **20 September 2013** (Kamlesh Singh) –
 - cell clean and tidy;
 - hygiene and well-being “good”.
- **6 October 2013** (Sharron Bianchi) –
 - in a double up cell which was neat and tidy “considering”;
 - attended work daily without prompting;
 - stated he had no issues or concerns;
 - considered some other prisoners in S5 to be mates.

Observation about IOMS entries

- [77] In my view, read as a whole, the IOMS entries about Prisoner X’s conduct at WolCC reveal that probably he stood over the more vulnerable prisoners and he was, at times, defiant and difficult in response to directions from prison officers.
- [78] They also reveal that the ringleaders in S5 had been broken up on 7 September 2013. None of the entries thereafter (prior to the assault) suggests a deterioration in Prisoner X’s behaviour. Up until the assault, he was better behaved at WolCC than he had been previously at AGCC and Brisbane Correctional Centre – although I acknowledge that the evidence reveals a significant deterioration in his conduct *after* his assault on Mr Corbin.²⁷

LIABILITY

The *Workers Compensation and Rehabilitation Act (Qld) 2003*

- [79] Part 8 of the WCRA concerns civil liability. Sections 305B and 305C set out the principles applicable to the standard of care. Sections 305D and 305E set out the principles applicable to causation.
- [80] Section 305B and 305C of the WCRA state:

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

²⁷ See Tamara Bambrick’s email, dated 24 February 2014: Pages 674 – 675, Liability Trial Bundle.

- (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.

[81] Sections 305D and 305E of the WCRA state:

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);
 - (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.

THE DUTY OF CARE AND ITS CONTENT

- [82] As his employer, the defendant owed Mr Corbin a duty of care. The duty was to take reasonable care to keep him safe at work and protect him from known or foreseeable risks. What is “reasonable” care depends upon the context.
- [83] The duty of care owed in a similar context was discussed in *New South Wales v Bujdoso*.²⁸ In that case,²⁹ the question for the High Court was whether the State had breached its duty of care to one prisoner who was assaulted by another, in circumstances where the prisoners were not closely supervised. The primary judge found that the State had not breached its duty of care. The primary judge found that it was reasonable for the State to conclude that the relevant prisoners could be trusted not to inflict an assault upon another; and their minimal supervision was reasonable. Bujdoso was successful in the Court of Appeal and the High Court.
- [84] Bujdoso had been convicted of sexual offences committed upon children. On appeal to the Court of Appeal, it was considered to be of particular relevance that Bujdoso had often reported incidents in which he had been threatened, vilified or humiliated by other prisoners. The Court of Appeal found that the State knew that Bujdoso was at risk. The State was held to have breached the duty of care it owed to him. It had actual knowledge that he was at risk but took no additional steps to protect him.
- [85] The State appealed to the High Court. Of the duty of care owed and its content, the High Court said (my emphasis):³⁰

It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the

²⁸ (2005) 222 ALR 663; [2005] HCA 76.

²⁹ Which was referred to by both parties.

³⁰ Ibid [44].

duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. **Violence is, to a lesser or a greater degree, often on the cards.** No one except the authority can protect a target from the violence of other inmates. Many of the people in prisoner are there precisely because they present a danger, often a physical danger, to the community. It is also notorious that without close supervision some of the prisoners would do grave physical injury to other prisoners. The respondent here did not simply rely upon the notorious fact that prisoners convicted of sexual offences against minors are at greater risk than other offenders: he proved that the appellant knew that he had been threatened and taunted by other prisoners, on that account, albeit to a somewhat lesser extent at Silverwater Prison than he might have been in the other institutions in which he had been imprisoned.

- [86] The High Court considered the special situation of prisoners and the obligations of those having their custody. The Court quoted from *Halsbury's Laws of England* (my emphasis):³¹

The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, including the prisoners. Actions will lie, for example, where a prisoner sustains injury as a result of the negligence of prison staff; or at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, **with greater care and supervision, to the extent that is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners ...**

The prison authorities also owe a duty of care to members of the public; and an action will lie where property is damaged by prisoners which results from negligence on the part of the authorities, **but a wide latitude will be allowed the authorities in determining proper ways of dealing with inmates before liability is imposed.**

- [87] The statement in bold about "wide latitude" was supported by reference to *Home Office v Dorset Yacht Club*.³² In that case, Borstal boys escaped the control and supervision of the Borstal officers supervising them and damaged a yacht and her contents. The Home Office was sued for negligently allowing them to escape. A preliminary issue was raised about whether the defendant, as custodian of the boys, owed a duty of care to the plaintiff which was capable of giving rise to liability in damages. The issue was decided in favour of the plaintiff at first instance and on appeal. It was also decided in favour of the plaintiff on appeal to the House of Lords. The reference to "wide discretion" is taken from the judgment of Lord Diplock:³³

³¹ Ibid [46].

³² [1970] AC 1004; [1970] 2 All E R 294, HL.

³³ Ibid AC at 1068.

A parliamentary intention to leave to the discretion of the Home Office the decision as to what system of control should be adopted to prevent the escape of Borstal trainees must involve, from the very nature of the subject matter of the decision, an intention that in the application of the system a wide discretion in the application of the system may be delegated by the Home Office to subordinate officers engaged in the administration of the Borstal system ...

[88] Lord Reid said something similar (my emphasis):³⁴

Governors of these institutions and other responsible authorities have a difficult and delicate task ... [The present] system is based on the belief that it assists the rehabilitation of trainees to give them as much freedom and responsibility as possible. So the responsible authorities must weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees and on the other hand the public interest of promoting rehabilitation. **Obviously there is much room here for differences of opinion and errors of judgment. In my view there can be no liability if the discretion is exercised with due care. There could only be liability if the person entrusted with the discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty.**

[89] The High Court stated that as the respondent was a known likely target of other prisoners, the State was under a duty to adopt measures to reduce the risk of harm to him. The High Court found that the State had adopted *no* measures to reduce the risk of harm to Bujdoso. It relied on its system of classification and “perfunctory personal oversight” by one warder, during the night, of all the prisoners in the relevant unit. It failed in its duty of care. Not only was there merely a foreseeable risk of injury to Bujdoso – he had been expressly threatened. Such a risk, once known, called for the adoption of measures to prevent it. Bujdoso pointed to measures which could reasonably have been undertaken but which were not (such as better and stronger locks). He was under no obligation to prove that those measures would have guaranteed his safety. Reasonable care was enough – but that was missing.

[90] The plaintiff referred also to *State of New South Wales v Napier*³⁵ in which it was said that there was a duty on those responsible for Her Majesty’s prisons to take reasonable care for the safety of those within (as per the quote from *Halsbury’s*).

[91] The defendant referred also to *Leeder v The State of Western Australia*,³⁶ in which the Court of Appeal made no criticism of the primary judge’s findings that (i) the State owed a duty to a prison officer to take reasonable care to avoid exposing him to an unnecessary risk of injury and (ii) that the risk of assault upon prison officers by prisoners was foreseeable.

³⁴ Ibid AC at 1031.

³⁵ [2002] NSWCA 402 at [73] – [75].

³⁶ [2008] WASCA 192.

- [92] The defendant relied particularly upon the more recent case of *Eastment v State of Queensland*,³⁷ submitting that, following *Eastment* and the other cases mentioned, the State was under a duty to impose a regime of “normal control and supervision” upon Prisoner X, “absent some cogent basis of contemporary knowledge requiring additional measures”.³⁸
- [93] The plaintiff expressed the duty in the following, similar way: “Beyond the notorious risk of any possible violence, where there is a specific known risk or propensity the prison authority has a duty to take such further steps as are reasonably available to it to obviate that risk”.³⁹
- [94] I consider that, if the State was, or should have been, aware of a risk of harm to its prison officers posed by Prisoner X, over and above the ever present risk of harm in the prison environment, then the State was under a duty to take reasonable measures to avoid the risk of harm posed by Prisoner X, in addition to the control and supervision measures already in place.
- [95] That duty is non-delegable but it is not strict. To be successful, the plaintiff must show that the defendant unreasonably failed to take measures or adopt means reasonably open to it to protect him from a foreseeable risk of injury *and* that, had those reasonable measures been taken, the plaintiff would probably not have suffered the injury.⁴⁰

FORESEEABILITY

- [96] A critical issue in this case is whether the assault upon Mr Corbin was reasonably foreseeable.
- [97] At common law, an inquiry about whether or not there has been a breach of duty, by *failing* to respond at all, or in a particular way, to a foreseeable risk of harm, must attempt, after the event, to identify what response a reasonable person, confronted with that risk, *would* have done to avoid it.⁴¹ Breach is not established by positing, with the benefit of hindsight, that something more might have been done.⁴²
- [98] *Eastment* approved the following comment from *Vairy v Wyong Shire Council* in expressing the scope of the duty of care (emphasis by Morrison JA):⁴³

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 the 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

³⁷ [2018] QCA 253.

³⁸ Defendant’s outline of submissions [19].

³⁹ Plaintiff’s outline of submissions [2.5].

⁴⁰ *Turner v State of South Australia* (1982) 56 ALJR 839 at 640 per Gibbs J.

⁴¹ *Vairy v Wyong Shire Council* (2005) 223 CLR 422.

⁴² *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer* [2006] NSWCA 45 at [3].

⁴³ *Eastment* at [126].

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 the duty of care which was a cause of the plaintiff's injuries.*** 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”.

- [99] In *Stokes v House with No Steps*,⁴⁴ Jackson J discussed the legal framework of liability where, as here, questions about breach of duty are not to be decided by reference to the common law alone: sections 305B to 305E of the WCRA apply.
- [100] At [62] his Honour observed that unless the relevant statutory provisions are borne in mind, it is likely that the wrong questions will be asked. His Honour said that the correct approach was illustrated by *Adeels Palace v Moubarak*:⁴⁵
- [27] The question of breach of duty must be considered by reference to the relevant provisions of the *Civil Liability Act* – in particular s 5B [the equivalent of s 305B of the Queensland Act].
- [28] It may be accepted, for the purposes of argument, that there was a risk, of which Adeels Palace knew or ought to have known (s5B(1)(a)), that there would be violent, quarrelsome or disorderly conduct in the restaurant. It may be accepted that this risk “was not insignificant” (s 5B(1)(b)) The question then becomes whether a reasonable person in the position of Adeels Palace would have taken the precautions that the plaintiffs alleged should have been taken (ss5B(1)(c), 5B(2)). Those precautions were the provision of licensed security personnel who would act as crown controllers or bouncers.
- [101] The plaintiff argued that the information available about Prisoner X’s drug use (in the community and in custody), his “propensity for violence including against authority figures” and his disrespect for authority, rules and directions “point[ed] to the prospect of the plaintiff acting in a violent manner towards prison staff being foreseeable”.⁴⁶
- [102] The plaintiff pleaded that, in the face of the reasonably foreseeable risk of harm posed by Prisoner X to CSOs, the State breached its duty to Mr Corbin by failing to manage Prisoner X by way of an intensive management plan – an “IMP”.⁴⁷

⁴⁴ [2016] QSC 79, to which the plaintiff referred me.

⁴⁵ (2009) 239 CLR 420, 437 [27] – [28].

⁴⁶ Plaintiff’s outline of submissions [3.6].

⁴⁷ The plaintiff also pleaded that the State, by its employee CSO Mandic, was negligent in leaving Mr Corbin alone in the common area of S5 when it was unsafe to do so. I will deal separately with this aspect of the claim. The plaintiff did not pursue his assertion, in his Statement of Claim, that Prisoner X was negligently granted protection prisoner status: Transcript 6 – 3, ll 37 – 40. The assertion that he should not have been placed in S5 was not pursued either.

- [103] The defendant conceded that an assault by a prisoner upon a CSO was foreseeable and not insignificant. However, the defendant argued that, before it could be said that relevant additional steps were required to protect a CSO from that risk, “special circumstances giving notice of an imminent risk of harm over and above the normative risk of prisoner violence” were required – and none existed.⁴⁸
- [104] The defendant argued that there was nothing remarkable about Prisoner X which called for him to be managed differently from the other prisoners in secure units at WolCC. The defendant relied upon evidence to the effect that Prisoner X was a typical or unremarkable prisoner: a significant proportion of the prison population at WolCC included young prisoners with drug problems and “attitude”, like Prisoner X.
- [105] The plaintiff argued that Prisoner X was not unremarkable – and even if he were, that did not mean that additional measures were not required to protect Mr Corbin from the foreseeable risk which he posed.

Was Prisoner X a “remarkable” prisoner?

- [106] Evidence about whether Prisoner X was a “remarkable” prisoner, in the sense that he posed a risk that other prisoners at WolCC did not pose, was given by witnesses who had worked at WolCC, including those who knew Prisoner X, and experts.

Evidence from those who worked with Mr Corbin or knew Prisoner X

- [107] The plaintiff called **Ian Eggins**, who had worked for Queensland Corrective Services (QSC) for 32 years, retired in 2016. He worked at several prisons – mainstream and protection. He was a correctional supervisor at WolCC from 2011/2012 until he retired. He was one of Mr Corbin’s supervisors and spoke favourably of him.
- [108] He gave evidence about the behaviour of protection prisoners at WolCC from 2011 until 2013 and the change over time in the composition of protection inmates. He said:⁴⁹

We tended to get a lot of prisoners requesting protection who would not normally have been classed as protection prisoner[s] in times gone past, so this meant that we got prisoners there who, for want of a better description, tried to be the – the big fish in a little pond. So some of them would behave themselves and just do their own time and get along with the sentence that they had to do and not cause any issues, but every now and then you got other prisoners who came in and who would like push the bounds of authority all of the time, stand over other prisoners for various – various items, flagrantly argue with the – the officer in charge of the – of the unit because they weren’t getting their own way. They probably weren’t the best behaved of the prisoners that we had ...

- [109] The prisoners who became the “big fish” were younger prisoners with “issues” in a mainstream environment. He expressed his opinion that of the 300 prisoners at WolCC,

⁴⁸ Defendant’s outline [25].

⁴⁹ Transcript 2 – 57, ll 35 – 45.

50 “should not” have been there. I find, on other evidence, that Mr Eggins probably significantly underestimated the number of prisoners at WolCC at the relevant time – but his estimate of the proportion of “big fish”, that is about one-sixth (or about 17 per cent) of the prison population, was consistent with other evidence and I accept it.

- [110] While Mr Eggins recalled that some units at WolCC were quieter than others, he could recall nothing in particular about the behaviour of prisoners in S5 in 2013. He was asked to compare Prisoner X’s behaviour, as revealed in the IOMS, to the other prisoners on S5. He stated that he did not know the other prisoners in the unit and he could not compare him to them, but his behaviour was “normal” for the 50 prisoners he considered ought not to be at WolCC.
- [111] Under cross-examination, he agreed that “the advent of methylamphetamines, ice [and] those sorts of drugs” changed the demographic of prisoners “to some extent”. He agreed that the prison setting in 2016 was more violent than it was in the 1980s. In his opinion, in part, the change in behaviour was a consequence of prisoners’ drug related mental health issues and because “the wrong people” were afforded protection status.
- [112] The defendant called **Brett Cross**, who had worked in QCS for 34 years – including 18 at WolCC. He retired in 2018. He was a supervisor at WolCC at the relevant time. He knew Prisoner X. He said that he was “probably in the range of 6” to manage. He could get “very edgy” if he “thought he was being backed into a corner”. Mr Cross felt he could “talk him down”.
- [113] He was asked how Prisoner X compared to others in the unit. He said he was – on the “spectrum of prisoners” – just outside of average. He could “verbalise a bit” but he was working.
- [114] His attention was drawn to Mr Corbin’s case note, dated 2 August 2013, which mentioned Prisoner X’s hit and miss behaviour and his having no filter. He said that entry gave him no reason to speak to Mr Corbin. Nor did the entry of 24 July 2013 raise any concerns, because he had been given a warning and the matter had been dealt with. He did not think that Prisoner X’s attitude as revealed in those entries needed follow up.
- [115] He did not recall ever receiving the email which Mr Corbin sent to him. Had he received it, he would have spoken to Mr Corbin about it.

Evidence of General Managers of WolCC

- [116] The plaintiff called **Sharon Clark** who was the general manager of WolCC from 2009 until February 2013. She began working for Corrective Services in 1996. She left in 2016. She knew Mr Corbin and described him as fair-minded and competent. She was not at WolCC when Prisoner X was there.
- [117] Ms Clark said it was difficult to categorise “an ordinary prisoner”. She explained that there was variety among the prisoners at WolCC who had protection status. They

included child sex offenders; prisoners who had been Crown witnesses; high profile or notorious offenders; prisoners released from maximum security units, who required intensive management; psychogeriatric prisoners and those who had compatibility issues with other prisoners. Also, WolCC also ran the high intensity sexual offenders treatment program, and prisoners were placed there to complete that program.

[118] She was taken to information about the behaviour of Prisoner X which included IOMS entries to the effect that –

- on 4 October 2012, after a prisoner was told to down the volume of the television, he –
 - berated a prison officer, including by calling him a “fucking dog” and writing ‘DOG’ with buttered toast on the glass of the officers’ station; and
 - threatened to “smash” an officer;
- on 17 October 2012 – he possessed a syringe;
- on 6 December 2012, he –
 - called another prisoner a “fucking dog” and punched him;
 - refused to come into the airlock with prison officers;
 - argued about wanting his coffee (which was being held by a prison officer) and knocked it out of the officer’s hand; and
- 26 February 2013 –
 - set up a string line from his cell to another cell to send another prisoner a letter; and
 - made “wise comments to” and stared at prison officers in the company of another three prisoners.

[119] Ms Clark considered that behaviour to be different from the behaviour of a “typical” WolCC prisoner and more like the behaviour of a young, mainstream prisoner. She agreed that prisoner-on-prisoner assault was not uncommon, but it was not the “norm” for every prisoner and “certainly not in a protection jail”. She agreed that it was not entirely preventable. She agreed that a significant number of prisoners at WolCC in 2013 were prisoners of the young, mainstream prisoner type (between 100 and 120).

[120] The defendant called **Tamara Bambrick**, who has been employed by QSC for 21 or so years, since 1997. She was appointed as the General Manager of WolCC in May 2013.

[121] Ms Bambrick was on leave on the day Prisoner X assaulted Mr Corbin. Whilst she may have had previous conversations about Prisoner X, he was not “on her radar” as a prisoner she was concerned about.

- [122] She had reviewed the behaviour of Prisoner X between his arrival at WolCC and the assault. Prisoner X sat in the “middle of the bell curve” when it came to prisoner behaviour. He was a “normal” prisoner – although that did not mean that he was “well behaved”. He was, in Ms Bambrick’s assessment, anti-social, pro-criminal and involved in drug use, if not the drug trade. He was sarcastic and belligerent, although that fluctuated. On balance, he was compliant.
- [123] She gave evidence, consistent with other evidence, to the effect that a prisoner might behave better upon their placement than upon remand. A placed (that is, sentenced) prisoner knew their future and could work towards parole. After placement, a prisoner’s actual behaviour would determine his treatment at WolCC.
- [124] She explained that the demographic of WolCC had changed since it opened in 2000. In 2000, it had a reputation for, and in fact had, no incidents. By 2008, her third “tour of duty” at WolCC, the demographic had changed significantly and it had changed again upon her return in 2013:⁵⁰
- ... The – the stereotype of ... the mature aged paedophile who is a very clean, tidy prisoner who doesn’t pose you any problem which was real in the year 2000 has not been in evidence for over a decade now. It’s about the youth, it’s about the – the introduction of ice into our community and the – the mental health impacts that that has. It’s about the anti-authoritarian etcetera, that we have in our – in our youth coming through.
- And you mentioned the change in demographic associated with that; has it also meant a change in overall behavioural patterns? --- Absolutely.
- To what extent? --- To the extent that this now becomes fairly normal behaviour, that anti-authoritarian I – I think I can challenge authority. You know, 21 years ago when I started, prisoners didn’t challenge authority and when they did, they were markedly different instantly. This is just the norm.
- [125] She was taken to the case notes about Prisoner X at WolCC which included Mr Corbin’s negative notes about Prisoner X. She said that some of Mr Corbin’s notes reflected “almost an assumption that protection was synonymous with good behaviour” which it was not. She did “not at all” agree that protection prisoners were generally quieter and had fewer problems than mainstream prisoners.
- [126] The defendant called **Kerrith McDermott** who had been employed by QCS for 28 years before her retirement in June 2018. She was the general manager of WolCC from February to May 2013 – and was the general manager upon Prisoner X’s arrival. Her first appointment as general manager was in 1998. She had been the general manager of five Queensland prisons, including WolCC.
- [127] She explained the process of reviewing prisoners upon their arrival at WolCC to determine their placement and management. Advice about new prisoners was given by the Intelligence Manager to the general manager and those present at morning meetings

⁵⁰ Transcript 5 – 56137 – 5 – 57, 118.

– that is the management team, sentence management staff, correctional managers, medical staff and others. The information provided depended upon the new prisoner’s profile.

- [128] Ms McDermott had no independent recollection of Prisoner X’s arrival at WolCC. For the purposes of the trial, she had reviewed his IOMS from October 2012 until October 2013 and the information about his behaviour at AGCC. On the basis of that material, she described Prisoner X’s behaviour as “fairly typical for his age group” and “fairly typical for the nature of his offences” which were predominantly theft and drug related offences. He was “no stand out”.⁵¹ He was an unremarkable prisoner.
- [129] Ms McDermott observed that AGCC was different from WolCC because WolCC was a placement centre and the prisoners there (at WolCC) were “settling into home”. The prisoners at AGCC (a remand prison) were “facing court and charges and everything else that goes with that”. The prisoners there tended to be “less settled, more inclined to injure themselves, more inclined to lash out, [and to have] less reserves ... to manage their own behaviour.”⁵²
- [130] In cross-examination, Ms McDermott was taken through Prisoner X’s history of detention in 2012. It was suggested to her that his knocking the coffee cup out of a prison officer’s hand was “significantly aggressive”. She agreed that it was inappropriate activity and an aggressive move, but “in terms of ... the scale” she was not sure that it was significant.⁵³ She said that while Prisoner X’s conduct included implied threats to prison staff – in terms of what was “normal” within a correctional centre, it was not serious.
- [131] It was suggested to her that the usual history of a WolCC prisoner would not include “four stints in the detention unit over five months”. She said it would and that that history was not uncommon. Considered in isolation, Prisoner X’s behaviour looked “very poor” but it was unremarkable when compared to the criminal and institutional behaviour of other prisoners. She did not agree that it was “significantly worse than the average prisoner coming into Wolston”.⁵⁴
- [132] Ms McDermott said that all prisoners “posed a significant risk to the good order of the prison and the safety of prisoners and staff” if their behaviour was not managed “appropriately”. It was suggested to her that Prisoner X posed a “significant risk”.⁵⁵ She said:⁵⁶

I think there was a good chance here – and there was evidence – that he would continue with his drug-seeking and drug-taking behaviour. I think he would continue to be belligerent and a show off, but I didn’t see – I don’t see any evidence that there would have been, at that particular point, a serious risk to the safety of the centre.

⁵¹ Transcript 6 – 7, ll 19 – 30.

⁵² Transcript 6 – 8, ll 28 – 37.

⁵³ Transcript 6 – 17, ll 15 – 20.

⁵⁴ Transcript 6 – 18.

⁵⁵ Transcript 6 – 21.

⁵⁶ Transcript 6 – 21, ll 31 – 38.

- [133] I asked questions of Ms McDermott with a view to understanding how she, as general manager, would have managed a prisoner like Prisoner X who was likely to continue with his drug seeking and belligerent ways at WolCC. She said:⁵⁷

The best way to manage a prisoner is with the involvement of correction staff. And I think when you look at the case notes at Wolston Correctional Centre, I think staff were doing a good job of managing him.

... Which is why there were so relatively few negative incidents ... and why he was able to maintain employment. Employment's a very prized activity in any correctional centre. So there must have been something identified that suggested this prisoner was, you know, worthy of continued employment.

- [134] She considered his behaviour at AGCC to be on the relatively lighter end of the scale. She continued:

And it would not be unreasonable for a prisoner to come in and say "Okay. This is Wolston. This is a fresh start. You've got your sentence. You're doing this long a period. You can have this many visits. You can get employment. You can move to residential. There's actually a glimmer of hope.

- [135] Ms McDermott said that there was a definite difference in behaviour between prisoners on remand and those in a placement prison. But the history of a prisoner's behaviour in a remand prison informed those at the placement prison about the prisoner. Here it informed the defendant that Prisoner X was not "squeaky clean ... he's a druggie ... he's very mouthy and he loves to show off".

- [136] Ms McDermott was asked to compare the "good" IOMS entries made about Prisoner X while he was in the detention unit at AGCC to the poor behaviour referred to in the IOMS entries when he was out of the detention unit. Ms McDermott explained that daily IOMS entries were required for prisoners in the detention unit. Once out of the detention unit, IOMS entries were required fortnightly and if the prisoner behaved in a way which warranted adverse comment. One could assume, therefore, good behaviour in the absence of an IOMS note on a particular day.

The evidence of the experts about Prisoner X

- [137] The parties each called prison management consultants to give expert evidence about the reasonable management of Prisoner X.

- [138] Neither consultant had current operational experience in prisons.

- [139] The evidence of the several witnesses with relevant, current, operational experience of WolCC evidence included evidence about the change in the composition of WolCC over time, the mix of protection prisoners and the way in which Prisoner X compared to the rest of the WolCC prisoner population, as outlined above. However, the experts

⁵⁷ Transcript 6 – 25.

were not asked for their opinions on the assumption that that evidence was true. The factual basis for their opinions was limited to the documents produced by the defendant about Prisoner X's criminal and correctional history, divorced from any information about the protection environment at WoICC in 2013. That was not satisfactory.

[140] Also, the defendant's expert had not considered the whole of the documentary material in detail before he gave his evidence.⁵⁸

[141] In my view, the inadequate factual bases upon which each of the experts expressed their opinions substantially reduced the weight of their opinions.

[142] **William Allgood**, a Correctional/Security Management Consultant, was the plaintiff's expert.⁵⁹

[143] Mr Allgood joined the Victorian Prison Service in 1979 and completed his training in general duties in 1980. He served on committees and reference groups (which I assume had a policy focus) from about 1987. In 1997, he was the Acting Director of Prisons, Victoria. He served in senior roles, including as deputy governor, governor and general manager of prisons, until June 2005. He has been a consultant since June 2006, and from 2008, has provided expert opinion reports.

[144] In Mr Allgood's experience, Prisoner X's behaviour was not "an accurate reflection of a normal prisoner accommodated in a protection unit or protection prison". His breach profile was more akin to an incident profile of "a higher security recalcitrant inmate". I note that Prisoner X was designated a "high security" prisoner. The evidence at trial was that he did not warrant a higher security classification. There was no evidence at trial about the security status of a "normal" protection prisoner housed in a secure unit at WoICC.

[145] Mr Allgood was "confident" that few, if any, of the prisoners in S5 would have the range of indiscretions/behaviours as those recorded against Prisoner X. He considered Prisoner X remarkable in that sense.⁶⁰

[146] The defendant's expert, **Neil McAllister**,⁶¹ is a consultant, specialising in advice to corrective services agencies. He has worked in correctional and detention environments since 1990, in research and policy roles. He has conducted investigations into serious incidents in secure facilities involving violent offenders. He has consulted to corrective services since 2008. He has not managed a prison, nor has he worked as a correctional officer (apart from a few weeks when he provided relief because of industrial action).

[147] Mr McAllister had no personal knowledge of WoICC. He had extensive knowledge of AGCC, which he described as a tough prison in terms of its client base of remand

⁵⁸ Transcript 4 – 83 – 4 – 84. The material had been provided in two batches. The plaintiff's expert provided a supplementary report having considered the second batch of material. The defendant's expert did not.

⁵⁹ He prepared three reports, dated 27 March 2017, 10 September 2017, and 13 April 2018.

⁶⁰ Report, 27 March 2017 [126], [127].

⁶¹ Mr McAllister prepared two reports – the first dated 19 July 2017 and the second dated 11 September 2017. The first report was based on incorrect documents and was replaced by the second.

prisoners who were known to be more problematic and troublesome than sentenced prisoners.

- [148] Mr McAllister did not think that Prisoner X's history was "remarkable" compared to the cohort of prisoners of his same age and background. In his opinion, there were no "strong indicators" that Prisoner X was reasonably likely to assault a prison officer on the day of his assault upon Mr Corbin.
- [149] Under cross-examination, Mr McAllister was shown to have based his opinion on an incomplete or inaccurate understanding of Prisoner X's previous behaviour. He did not know that he had previously threatened prison staff on more than one occasion. He did not appreciate that his criminal conduct including his driving a car at police and other acts of violence. His opinion, that Prisoner X's Queensland prison history was "relatively minor", was based on incomplete information which did not include certain reports of prison incidents involving Prisoner X.⁶²
- [150] He agreed that his assessment of Prisoner X's dangerousness had been based on incomplete information but remained of the view that Prisoner X was not remarkable.

Prisoner X was not a remarkable prisoner

- [151] There was consistency between the witnesses who had worked at WolCC at the relevant time about the significant proportion of protection prisoners who did not fit the stereotypical protection prisoner mould of the quiet, older paedophile. The prisoners who did not fit the mould were younger prisoners who used drugs and challenged authority. They were in protection because they had "issues" in mainstream prison units (not because of the nature of their offences). They had attitude and they were defiant. Their inclusion in the protection population was a consequence of the uptake of the use of methylamphetamine in the community. And prisons, including protection prisons, were more violent places than they once had been.
- [152] Mr Allgood's view, that Prisoner X was remarkable, was at odds with the views of those with current WolCC experience. Those with current WolCC experience, including the plaintiff's witness Ms Clarke, acknowledged that times had changed and that the protection prison environment included about 20 per cent of offenders like Prisoner X – that is, younger prisoners, who had committed "mainstream offences", who were not as easy to manage as the stereotypical, older, paedophile, protection prisoner.
- [153] I find that Prisoner X fell into this proportion of prisoners. In that sense, he was unremarkable. Indeed, on the evidence, other prisoners like him were removed from S5. However, I agree with the plaintiff that the relevant question is not so much whether Prisoner X was remarkable, but whether the foreseeable risk which he posed of an assault upon a CSO required his management under an IMP.

Should Prisoner X have been managed by way of an IMP?

⁶² Transcript 4 – 32ff.

- [154] The *Custodial Operations Standard Operating Procedure – Intensive Management Plans* which applied in this case explained the purpose of IMPs – namely they were “multipurpose” and implemented for prisoners who were identified as requiring “a higher level of supervision and/or case management and/or intervention strategies than provided through standard prison management processes”. On one view – “remarkable” prisoners.
- [155] The procedure included as an example of a prisoner who might require an IMP as one who was “identified to have a pattern of breaches of discipline, behavioural case reports and/or intelligence reports identifying problematic behaviour (e.g. observed to bully, intimidate or victimise other prisoners and/or actively engaged in substance abuse and drug related behaviours”.
- [156] The experts and those with operational experience of IMPs gave evidence about IMPs generally and whether Prisoner X warranted management by way of an IMP.

Evidence of those with operational experience in Queensland of IMPs

- [157] **Bernard Kruhse** was the General Manager of Brisbane Correctional Centre who granted protection status to Prisoner X in 2013. He said that Prisoner X’s institutional conduct was not relevant to the decision about his protection status. He said that prisoners calling prison officers “dogs” was “almost a daily occurrence”, as was threatening officers to “have a go ... I’ll smash you”. It was relevant to a prisoner’s management to know that they engaged in drug activity and used a stringline to pass messages. It was also relevant that a prisoner was willing to be part of a group and act in a disruptive manner: but that was “98, 99 percent” of Mr Kruhse’s prisoners.
- [158] As to whether a prisoner spending 31 days out of a five-month period (as Prisoner X had done in 2012) was unusual, Mr Kruhse said that it depended. He said the goal was to manage a prisoner in a way which would see him succeed, which might include managing him via an IMP:⁶³

... Prisoners can, depending on their individual circumstances, go through acute phases of – of sort of raging against the system, where they feel that they’ve been mistreated, unfairly dealt with, etcetera. And we can generally, over time, get them through that. Short periods in the ... detention unit ... to defuse that situation, take them out of the environment where they might be ... many prisoners suffer mental health issues and they can be led by other prisoners. There’s a great deal of peer pressure. So to get to know what’s driving the prisoner, to be able to look at what causes the prisoner to fail, and then to be able to design a management process around that prisoner to see them succeed – all of those things you’ve mentioned are considered because we’d know then his drug activity, his propensity to join gangs and be involved ... as a follower. The – we know that that causes him to fail, so we’ll try and make sure that we design something around him to see him succeed.

⁶³ Transcript 5 – 21.

And when you say “design something around him”, that might be an individual – an intensive management plan, mightn’t it? --- It very well could be.

- [159] Mr Kruhse was asked whether matters like the prisoner’s behaviour in the DU compared with their behaviour in the unit and their belief that they gained status by resisting authority were relevant to the way in which an IMP might be tailored. Mr Kruhse said that the IMP was designed to see the prisoner succeed based on an understanding of what made them fail. But there were “lots of things in between” where officers could use natural consequences. Some prisoners responded well to interaction and “natural consequences” (e.g. if they misbehaved on the oval, they might be taken off the oval).
- [160] In his experience, behavioural change was not achieved by separate confinement – but rather via long term engagement with the prisoner. There were “many steps forward and many steps back during that process ... where they have periods of success and then relapse”.⁶⁴ He agreed that for a prisoner with a history of specific incidents, resulting in time in a detention unit, one would look at tailoring an IMP with a view to preventing the incidents which led to placement in the detention unit.⁶⁵ When Prisoner X was in his care, he did not require an IMP.
- [161] **Mr Eggins** was questioned about IMPs, which he said resulted in a prisoners being moved from a particular unit or being restricted in some way, including by limiting their phone calls or “buy-ups”, contact visits or out of cell time. He was asked about the sort of prisoner behaviour which would result in a prisoner being placed on an IMP. He said the main reasons for placing a prisoner on an IMP were “[a]uthority issues, violence ... against staff, violence to other inmates, stealing items – property belonging to other inmates, damage to prison property, making threats to staff, threats to inmates”. Supervisors could recommend to their managers that a particular prisoner be placed on an IMP and that recommendation would be considered by a panel. A staff member could speak to a supervisor about a prisoner being placed on an IMP. He would expect a staff member who was concerned about their physical safety to speak to him, as supervisor, about their concerns.
- [162] **Ms Clark** was asked how she managed the “balance” between difficult prisoners and other prisoners at WolCC. She said prisoner management was based on their institutional behaviour. If their institutional behaviour was “sound” they would be managed through the centre. She continued:⁶⁶

They would be at first accommodated in Secure and they would make their way over to the residential side of the facility and then onward to low custody or to discharge. If their institutional behaviour was poor then we would manage their institutional behaviour. And I referenced earlier the – the time where I withdrew protection from a group of prisoners and that was specifically in relation to stand over and assaultive behaviour.

⁶⁴ Transcript 5 – 22, ll 14 – 15.

⁶⁵ Transcript 5 – 22, ll 30 – 40.

⁶⁶ Transcript 2 – 85 – 2 – 86.

Right. So if you did withdraw protection status from a prisoner ... and you were then putting them back into mainstream were there risks that then had to be balanced in doing that? --- Yes, absolutely.

...

... Other than in removing protection status, what options are available to – to manage the behaviour of prisoners who weren't demonstrating the appropriate standard of behaviour? --- Safety orders ... Safety orders are for in – put in place for two reasons. One is the prisoner's risk of harm to themselves, and the other is risk to the security and good order of the facility. So placed on a safety order, a prisoner can be managed in a location like a detention unit or a health centre. And beyond that, or – or in addition to that, prisoners can be managed on what we've called IMPs ...

[163] Ms Clark spoke generally about IMPs and their terms:⁶⁷

The IMP would prescribe everything from cell placement, association, time out of cell, movement around the facility, the use of restraints or additional escorting staff, whether or not the prisoner could attend programs or activities, the nature of – of visitation, whether the prisoner was permitted to have contact or no-contact visits, those things.

... So if a prisoner, for example, had been threatening or assaultive, then the issue of movement around the facility, number of staff in the location, the number of staff on an escort, the use of restraints, those things would come into play. They wouldn't necessarily be in place, for example, for a prisoner who was on an IMP because they'd returned a number of positive UTs.⁶⁸ And so there was, you know, drug use.

...

... the IMP would be – would have a prescription in terms of the prisoner being seen by people like the – the Correctional counsellor, the Correction supervisor, the senior psychologist, and the IMP would be reviewed on a fortnightly or a monthly basis, etcetera ...

[164] Ms Clark spoke in general terms about her experience of the effectiveness of IMPs. She found them to be “very effective” and she had managed “some of the most notorious prisoners in the State” via the IMP process.

[165] She said some new WolCC prisoners were placed on an IMP as soon as they arrived. Her experience at WolCC was that about 60 per cent of the number of IMPs imposed were imposed upon prisoners upon their placement at the centre. About 40 per cent of the IMPs were imposed upon prisoners after “a significant incident”. She was not asked to give examples of significant incidents.

[166] She was asked about the circumstances in which a prisoner might be placed on an IMP as soon as they arrived at WolCC. She said that an IMP might be imposed upon

⁶⁷ Transcript 2 – 86, 1 42 – 2 – 87, 1 16.

⁶⁸ Urine tests.

placement for a prisoner who was flagged for any reason – including a history of poor institutional behaviour or a history of assaultive behaviour.

- [167] Typically, the request for an IMP came from a correctional supervisor, a senior psychologist, or a manager of accommodation. She agreed that the conditions of an IMP would respond to the reason for the imposition of the IMP. For example, an IMP imposed in response to a prisoner’s drug issues would have different conditions from one imposed in response to assaultive behaviour. She agreed that it was “fair” to suggest that different managers might reach different conclusions about whether or not to impose an IMP on a prisoner based on their own use and experience of IMPs.
- [168] Ms Clarke was asked about prisoners placed at WolCC for the purpose of undertaking a program, such as a high intensity sexual offenders’ treatment program. She explained that the need for a prisoner to do a program was one of the placement priorities for WolCC. She gave evidence that a prisoner placed at WolCC to complete a program who refused to participate in it could expect a review of their placement and their refusal might be grounds for their removal from WolCC. I note that Prisoner X was not placed at WolCC for the purpose of undertaking a program and there was no evidence which suggested that his refusal to participate in the program offered to him (Stepping Up) was grounds for his removal from WolCC.
- [169] **Ms Bambrick** said that in October 2013, the population of WolCC was around 650 prisoners. Between 10 and 15 prisoners were on IMPs at any given point in time – although it varied. When Ms Bambrick gave evidence the population of WolCC was 749. The number of IMPs had not changed. She explained why the number of IMPs was “so low”:⁶⁹
- ... an intensive management plan can be for two reasons. People mostly assume that it will be for the purpose of behavioural management. It is, but it can also be for what we call functional support prisoners, so those who have higher needs because of cognitive impairment, psychological, mental health etcetera. And an IMP ... is for the purpose of managing those that are on the higher end of – of the threshold, so those – those top percentage prisoners that require something very specifically different to the average management.
- [170] She explained that, apart from IMPs, breaches of discipline and safety orders, staff were told that “every interaction is an opportunity for intervention”.
- [171] The management of a prisoner placed at WolCC was determined by the General Manager upon their placement, and it involved a consideration of the incoming prisoner’s needs, the needs of existing prisoners and the needs of staff. “Intel” informed those at the morning briefings of “remarkable” things about new prisoners. As General Manager, Mr Bambrick “mostly” reviewed a document entitled “Administrative Form – Sentence Management – Decision Making Record”⁷⁰ which was prepared for the purposes of a prisoner’s security classification and placement at WolCC. There was no

⁶⁹ Transcript 5 – 29, ll 35 – 45.

⁷⁰ Tab 19, page 643ff, trial bundle.

documentation of the process by which the management of a prisoner at WolCC was determined.

- [172] She agreed that Prisoner X's history showed that he posed a significant risk to the good order of the prison and the safety of prisoners and staff if he was not properly managed. But she did not agree that his proper management required an IMP:⁷¹

... I think that that's evidenced by the fact that he then spent another six to however many months until the ... awful incident that occurred to CCO Corbin without having continuations of such behaviour. He has patterns of case notes which show that he fluctuates and I think there may be one incident that exists within there but a prisoner who continued a perpetuation of that rather than stabilising, which is quite different to what he was in the preceding time in Arthur Gorrie – would've been a prisoner, yes, who would have been managed very differently but that's not what he demonstrated at Wolston.

- [173] Ms Bambrick was taken to the notes of Prisoner X's behaviour immediately before his placement at WolCC. She agreed that the entry on 29 October 2012 revealed Prisoner X's issues with attitude and defiance and his demonstrating status amongst his peers by resisting authority. She agreed that the note of 13 February 2013 revealed behaviour which was abusive to staff. She said it was not acceptable behaviour but it was not remarkable. She agreed that his mouthy behaviour reflected his trying to impress other prisoners. She added that he was antisocial. She considered that the notes showed that Prisoner X would "perform" for an audience of other prisoners. That audience was not present while he was in the detention unit, explaining his better behaviour there.

- [174] She agreed that Prisoner X demonstrated defiance and anti-authoritarian behaviour. She was then asked about the likely effectiveness of an IMP for such a prisoner:⁷²

... And all of that would suggest that if you put a prisoner like that on an IMP with restrictions on privileges and incentives for regaining those privileges, if he behaved himself that was likely to be effective with him? --- For the specific purpose of your question the answer is yes. For me answering whether or not I would put that prisoner on an IMP – no – ... if he's not demonstrating appropriate behaviour ... an officer or somebody else needs to intervene and challenge him, but he's not dissimilar to the dense population.

All right. In terms of considering the conditions for an IMP, again ... if you are going to put this prisoner on an IMP, having restrictions on that prisoner's movements or their ability to associate with other prisoners and, therefore, be in a position to demonstrate that anti-authoritarian behaviour in front of them would be an appropriate condition to put on him? --- Yes, indeed. But I wasn't the responsible general manager when this occurred. This ---

⁷¹ Transcript 5 – 44, ll 6 – 18.

⁷² Transcript 5 – 49, l 28 – 5 – 50, l 16.

... I understand you didn't make this decision but I suggest that this prisoner coming to Wolston with that history of having been in the detention unit, with that history of poor behaviour in the unit while with – but the serious instances in the detention unit meant that this prisoner ought to have been put on an IMP when he came into Wolston for the good order and management of Wolston? --- My answer to that would be, no or else⁷³ we would've done that. The decision maker and the whole team that listened to his history would've said, "Oh my goodness. We need an IMP for this man, or something ... a safety order in a detention unit".

But ... you're assuming that that was made. There's no record of that decision making process? --- No. But the evidence that he wasn't placed on there, and there are competent decision makers, indicates that they made an assessment where he's just another prisoner coming into custody.

- [175] Ms Bambrick agreed that IMPs were generally very effective in managing a prisoner's behaviour if they were implemented and used properly.
- [176] She did not consider Prisoner X's behaviour at WolCC to have been as grave as the behaviour he demonstrated at AGCC. At WolCC, he continued to behave immaturely and irresponsibly but he was "far better behaved" than he had been at AGCC. While it was possible that he would have acted out in a similar way at WolCC – he did not in the six to seven months before the assault.
- [177] She agreed that the case notes about Prisoner X ought to have been audited more than the once that they were – but that audits were not now conducted, reflecting perhaps their lack of importance. Had she audited the case notes, she would have gone to the staff and asked what more they were doing to address Prisoner X's behaviour. An audit would not have "flagged him" for an IMP. The behaviour referred to in the notes was not more remarkable than the behaviour of the majority.
- [178] She concluded her evidence by stating that IMPs were not always effective. There were prisoners who just would not change.
- [179] **Ms McDermott** explained that IMPs were one of a number of tools which could be used to manage prisoners. The other tools were safety orders, to achieve segregation, and breach processes. IMPs were designed to guide prisoner behaviour. IMPs were imposed not only because a prisoner had been poorly behaved or belligerent. An IMP might be imposed upon a prisoner who was intellectually challenged, or who had a medical condition, or had just been released from a detention unit or maximum security.
- [180] Having reviewed Prisoner X's file and his behaviour, she could see no grounds for the imposition of an IMP before his assault upon Mr Corbin. She explained that the only IMP category he *potentially* fitted in to (having regard to relevant procedures) was the one referred to in paragraph [155] above. But he did not "fit" into that category. Whilst

⁷³ The transcript is incorrect. It states: "My answer to that would be, *nowhere* else we would've done that". I have listened to the trial recording. Ms Bambrick said, "My answer to that would be no, or else we would've done that" which is consistent with the balance of the paragraph.

he had assaulted other prisoners, his history of doing so was not extensive. He could be rude and obnoxious but with staff he never “stepped over the line”. Although the case notes suggested poor behaviour at times, there were a number which suggested good behaviour.⁷⁴

Evidence of the experts about IMPs

[181] **Mr Allgood** was of the view that Prisoner X’s history warranted his management by way of IMP upon his placement at WolCC. For obvious reasons, the plaintiff relied heavily on Mr Allgood’s opinion. I have set it out at some length.

[182] In his 2017 supplementary report, Mr Allgood discussed potential IMP restrictions. He did *not* consider Prisoner X to warrant access restrictions; a time schedule; a limit upon his interactions with other prisoners (at least in the first instance, subject to his response to the IMP and behaviour); nor was additional prisoner escort warranted, although it could be considered if circumstances changed.⁷⁵

[183] Mr Allgood was of the view that Prisoner X’s behaviour could be moderated by way of psychological counselling. Mr Allgood said:⁷⁶

... the critical issue for managing [Prisoner X] would be to improve his strong resistance to directions and authority. And that behaviour, in my experience is improved by assisting [Prisoner X] to develop an understanding (perhaps with help from psychological support staff involvement) that discipline and staff using their authority is part of the duties of custodial staff and rules are made for the safety and wellbeing of both staff and inmates. The application of an IMP would have a very sound chance of effectively addressing the [Prisoner X] issues.

[184] In his 2018 report,⁷⁷ Mr Allgood explained that his earlier opinions had been strengthened by the additional material that he had received. It was his “sustained view” that Prisoner X should have been managed via an IMP upon his placement at WolCC “with which his negative behaviours and predominant negative attitude could have been much better addressed, monitored, and controlled to an **acceptable protection/programs based unit standard**” (my emphasis).

[185] I note Mr Allgood’s reference to the protection unit “standard” and observe that the factual basis upon which Mr Allgood provided his opinion did not include facts about the composition of WolCC and the standard of behaviour of its prisoner population at the relevant time.

[186] Of IMPs generally, he said they were available to support the management of “the more difficult or more challenged inmates”. He said:

⁷⁴ Transcript 6 – 8, ll 1 – 12.

⁷⁵ Report, 14 September 2017 [34] – [37].

⁷⁶ Report, 14 September 2017 [38].

⁷⁷ Exhibit 8.

The outcomes referred to essentially impact on the inmate to the effect that he or she will clearly understand that there are incentives for a positive approach and positive outcomes as well (sic) disincentives for failure to make required and needed adjustments and that their involvement will be supported and encouraged.

That is not to say that every single inmate will fully embrace and willingly participate in the concept. However, in my operational experience, those who had the IMP concept imposed on them for valid and understandable reasons or who willingly participate quickly realise that it is a two way tool that can and does make life inside more bearable for inmates.

...

... a well constructed and managed IMP does have the potential and capacity to prevent and reduce negative behaviour but if not in all instances immediately prevent, it deals with the potential for a repeat of the behaviour through adjustment to conditions.

With [Prisoner X's] reluctance to participate or complete program requirements, there appears to have been no action other than to allow the non-completion to occur when the beneficial outcomes of completing the program/s were his need and the prisons need. An IMP in place in these circumstances could clearly have assisted to address the requirement for completion.

In my experience with IMP's (sic) it is the required communication elements that lead to the best outcomes, inmates are able to formally raise their issues and concerns with their case worker and case manager or other involved party face to face and the regular meeting process which IMP's (sic) required, leads to ensuring matters raised are understood, followed through and outcome explained.

With a well-planned IMP in place I would be confident that an inmate like [Prisoner X] would quickly realise that there are benefits to him to comply with the conditions, as do the vast majority of inmates who are placed in IMP's (sic).

[Prisoner X] I am sure would be like 99% of all inmates, they seek out what is best for them and work actively toward achieving the privilege or regaining what they have lost and are motivated to actively retain what they have gained or regained.

In [Prisoner X's] case it seems that there was no IMP or management tool applied nor were incentives applied nor considered for acceptable conduct and behaviour, likewise, no formally identified outcomes for less than satisfactory behaviour, (other than detention) nor any programmed meeting scheduled to closely monitor his behaviour and demeanour and discuss concerns. A major flaw in my opinion by the management responsible for [Prisoner X's] placement, behaviour and the safety and well-being of inmates and staff in the unit.

Beyond the regular meeting and communication process in IMP's (sic) there are other equally important elements. In most but not all cases a variety of

condition, subject to need, will make up the content of an IMP, apart from regular communication with unit staff, specialist and management staff, some will involve restrictions on out of cell hours, conditions on contact visits, conditions on recreational activities, restrictions on who the inmate may directly associate with, where they may be employed, etc.

So there can be much to incentivise and inmate/s to achieve and maintain an acceptable level of behaviour through the application and management of well considered and effectively managed IMP.

...

Wolston Prison, as a protection and programs based facility, I understand would have a more compliant and cooperative inmate cohort which leads me to wonder why its management would not ensure those inmates, who don't readily fit the model, are not more individually managed via an IMP process. I simply find it difficult to understand when an inmate of [Prisoner X's] background appears to be treated in the same manner as those who are of the more compliant type.

SUMMARY

There seemed to have been little in the way of a preventative focus in management of a difficult inmate like [Prisoner X] at Wolston Prison, and the ideal management tool in my experience was the availability of the IMP process that certainly had the potential to make a positive difference including the prevention of the attacked (sic) on Mr Corbin.

The style of management [Prisoner X] was subject to, his reluctance to participate and complete required program (sic) and his ongoing substandard behaviour contributed to the attack on Mr Corbin. It appears that Mr Corbin became [Prisoner X's] target because Mr Corbin was one of a few staff members who were across [Prisoner X's] style and conduct, and one who had the foresight and professional intent to flag his concerns through reports on the systems available and viewable to managers.

It continues to be my strong belief that had a well constructed and well managed IMP been utilized to manage [Prisoner X] at Wolston Prison it is most unlikely that [Prisoner X] would have committed an unprovoked attack on Mr Corbin.

[187] On the strength of his experience, Mr Allgood said that someone with Prisoner X's "immediate past history" would have been subject to an IMP or management tool of a similar kind. Mr Allgood accepted that in his opinion, Prisoner X was not unremarkable, was informed by his experience of the prison system in Victoria before 2005.

[188] Mr Allgood could not think of one person, with whom he had been directly involved, who had not made positive adjustments under the IMP regime. While it was possible that Prisoner X might have reacted to Mr Corbin's reprimand of him, in front of his peers, for smoking, his experience suggested that Prisoner X's reaction would not have been as violent had he been under an IMP. He said it was "remotely possible" that Prisoner X would have reacted violently anyway. He could not think of one IMP which

had not had a positive effect – not necessarily to the extent desired, but some positive effect.

[189] Mr Allgood was firm in his view that an IMP would have prevented “a random act of violence fuelled by anger in the heat of the particular moment”.

[190] **Mr McAllister’s** original opinion was that he did not agree that Prisoner X should have been the subject of an IMP while at WolCC from 12 April 2013 until the day of the assault. He did not present a credible danger to staff. He had not demonstrated “a pattern of problematic behaviour of a degree of severity that would have justified the imposition of an IMP, e.g. a significant history of assaults on other prisoners, assaults on staff, drug use”. He continued, “In reality, many of [Prisoner X’s] ‘incidents’ ... were minor infractions which, in my experience, are commonplace in prisons”.

[191] In re-examination, he was reminded of the need to correct his view of Prisoner X’s history of assaults (it was not minor). He was asked whether that affected his opinion about whether Prisoner X presented as a credible danger to staff. He said that it did not:⁷⁸

... his past history would’ve been of interest to Wolston Correctional Centre but arriving at a new correctional centre, I would’ve thought they would want to form their own opinion about his – where he is – where he’s at, so to speak. Some of the things have happened previously may have had to do with the dynamics of that particular correctional centre – the staff, other prisoners – I don’t know. So I would’ve thought arriving at a new correctional centre, he would, for the sake of a better description, be given the benefit of the doubt for – for a period of time to see how he settles in. That would be my impression about that. So that’s why I said in 8.4 that him not having physically assaulted staff – yes he had been involved in incidents with other prisoners, whether he was the guilty party or not, doesn’t really matter – but I don’t – I think it’s a stretch to suggest that that would’ve suggested that he posed a credible threat of assault on staff.

[192] Mr McAllister considered it “unlikely” that the imposition of an IMP would have prevented the assault upon Mr Corbin. He explained:

It is not the policy of an IMP to forensically manage the activities of a prisoner. Indeed, QCS policy states:

‘an IMP cannot be used to significantly restrict a prisoner’s out of cell time, nor be used as a means of separate confinement ... or their ability to interact with other prisoners.’⁷⁹

In essence, even if [Prisoner X] had been subject to an IMP, this would not necessarily have prevented him from being out of his cell during normal unlock hours, e.g. on the day of the assault on Corbin. In that regard, the issue of ‘*the assault happening suddenly and without warning*’ is not relevant to the existence of otherwise of an IMP for [Prisoner X].

⁷⁸ Transcript 4 – 81, ll 23 – 34.

⁷⁹ QCS *Custodial Operations Practice Directive – Risk Management*, pp 43 – 44.

[193] Mr McAllister agreed that, if you were to reduce Prisoner X's contact with other prisoners, then that would reduce the opportunity for him to try to impress them. However, Mr McAllister was not sure how that could be done in practice.

[194] It was suggested to Mr McAllister that there was a "good chance" that had Prisoner X been on an IMP, his out-of-cell time would have been restricted:

... given the various notes indicating that he had poor attitude, particularly when trying to impress other prisoners, there's a strong prospect that would've been one of the conditions? --- Again, I don't know. I – I'd simply observe that confining prisoners to their cells in – in a unit – a general accommodation unit for long periods of time is not common practice. If it was felt that that was necessary, then a prisoner would normally be removed to another type of detention. Units don't operate very well around a prisoner in one cell being kept in their cell for, like, 22 hours a day.

But it may well work on the basis that those restrictions are put in place for a period of time. And if there is an improvement in behaviour, then the prisoner may get further out-of-cell time or there may be restrictions in similar ways? --- Look, I don't know. As I said, there's – there's other references in these procedures which make – seem to make quite clear that – that IMPs should not be used to significantly restrict a prisoner's time out of cells ...

[195] Counsel for the plaintiff referred to other aspects of IMPs including requiring regular meetings between a prisoner and supervisors, counsellors, psychologists or similar about the prisoner's "progress and expectations". Counsel suggested that regular consultations of that kind was "one of the primary elements of getting a prisoner to improve their behaviour". Mr McAllister said it could be. He continued:⁸⁰

... at the end of the day, an IMP is just a piece of paper ... It'd be like telling somebody that they have to go to Alcoholics Anonymous. Obviously, if they're not committed to it, they're not really going to buy into it. But if a – if it's put to a prisoner that he should be on an IMP and they agree to that – and I think there's provision that they can actually sign to say they agree and – and buy into it – then there's an expectation that they will follow the rules that are set out in the IMP – and there can be a whole range of different things that they have to do, like not test positive for drugs, not do this, not do that. But at the end of the day, it doesn't – it – it's not a guarantee that they're not going to do something untoward.

[196] Mr McAllister agreed that either a prisoner would not improve on an IMP, and the restrictions would continue, or they would improve on an IMP and "you get the outcome you desire".

[197] After counsel for the defendant concluded his re-examination, I questioned Mr McAllister about the pattern which seemed to emerge of Prisoner X's compliance whilst

⁸⁰ Transcript 4 – 61, ll 34 – 46.

in the detention unit and his aggressive, assertive, troublesome behaviour when he was not in the detention unit. He said that when he wrote his report, that pattern was not apparent to him. He had only reviewed case notes for the year from 1 October 2012. He was not aware of incidents of aggression, dating from 2007, when he wrote his report of 11 September 2017.

Discussion of evidence about IMPs

- [198] The effect of the evidence from those with relevant experience in a custodial environment was that *a* level of violence is foreseeable. That comes as no surprise. Apart from the individual criminal propensities of those who make up the prison population, it is well known (and was revealed in evidence) that many prisoners suffer from mental illness and many have drug issues. They live in close proximity. Prisoners (including Prisoner X) share cells. The prison environment is basic (as it is intended to be). Prisoners have – of course – no freedom and little autonomy. They are often idle. Tempers will fray and inmate upon inmate assaults are not uncommon. However, assaults by prisoners upon prison officers are less common.
- [199] The plaintiff submitted that Prisoner X fell into the category of prisoner nominated in the operating procedures as suitable for an IMP – in that his historical pattern of breaches etcetera indicated that he needed such a management strategy.
- [200] The plaintiff relied upon the evidence of Ms Clark that Prisoner X’s history was the exception rather than the norm for prisoners at WolCC.⁸¹ But she also said that about 20 per cent of prisoners at WolCC had the characteristics of “mainstream offenders” who had more “institutional issues” than those of the child sex offender.⁸² Her general impression was that somewhere between 100 and 120 prisoners at WolCC fell into the category of mainstream offenders. No relevant witness was asked how, if at all, the management of prisoners (mainstream or protection) had changed in response to the large number of prisoners with drug issues and the increase in violence in prisons over time.
- [201] The evidence was that, at the relevant time, 10 to 15 WolCC prisoners were managed by way of an IMP. However, there was no evidence led from those with relevant Wolston experience about the threshold for managing, by way of an IMP, prisoners who had a history of assaulting other prisoners. Ms Clark had withdrawn protection status from a group of prisoners who engaged in assaultive behaviour – but there was no evidence about the way in which Prisoner X’s behaviour was similar to theirs or the reason why she made that decision, rather than impose IMPs upon them.
- [202] The plaintiff relied on the evidence of Ms Bambrick that Prisoner X’s institutional behaviour, before he was placed at WolCC was “very poor”⁸³ in support of his submission that Prisoner X ought to have been managed by way of an IMP. Ms Bambrick accepted that description of Prisoner X’s behaviour, having been taken

⁸¹ Plaintiff’s outline of submissions [3.27 (b)].

⁸² Transcript 3 – 73.

⁸³ Plaintiff’s outline of submissions [3.27 (c)].

through his four periods in the detention unit in five months. However, this was her evidence in context:⁸⁴

So you'd have to say that his institutional behaviour coming into Wolston was very poor? --- Yes, I would say that.

Okay. Significantly worse than the average prisoner coming into Wolston? --- Not necessarily.

Not necessarily? --- No.

Well, was it or wasn't it? --- It exists on a continuum, I guess, and it depends on what other factors you would be looking at. If he had a history of significant behaviour, even in prior episodes, and we're flagging "My goodness, [Prisoner X] is coming back and look what he's just done in a dense period of time", if he's an ex-MSU placed prisoner, if he's coming in with offences of extreme violence etcetera, those factors aren't present. There – there is a glut of a six month period culminating in him going out and not lasting very long and being returned to custody.

All right. Well I suggest that that was a significant history of poor institutional behaviour which warranted consideration of placing him on an intensive management plan? --- I don't agree

- [203] She accepted that Prisoner X's history of assault was relevant to decisions about his management. She went on to explain that it was not uncommon for protection prisoners of his type to have a history of prisoner on prisoner assaults. She said that was probably "the reason he's on protection catching up with him". I understood her answer to mean that she assumed that the assaults Prisoner X was involved in had something to do with his "incompatibility" issues in mainstream prisons. On the evidence, that did not appear to be so, at least by 2013, but her point was that a history of assaultive behaviour was not uncommon for protection prisoners at WolCC.
- [204] The plaintiff relied upon Mr Kruhse's evidence about tailoring an IMP to prevent a "history of specific incidents" which led to time in the detention unit. The context in which Mr Kruhse made that remark is set out above. He did not consider that Prisoner X required an IMP whilst he was at Brisbane Correctional Centre.
- [205] The plaintiff relied upon Mr Allgood's opinion that Prisoner X ought to have been the subject of an IMP upon his placement at WolCC.
- [206] Under cross-examination, it was established that Mr Allgood last worked in a management role in an Australian prison in 2005. He agreed that when he last worked in that environment, the drug "ice" had not emerged as a major problem. He was aware of the "significant behavioural complexities" associated with that drug. He had managed prisoners using "speed" but not "ice". He understood speed to be "not as robust in its effect" as ice.

⁸⁴ Transcript 5 – 42, 140 – 5 – 43.

- [207] As I have already said, Mr Allgood's opinion suffered because of the factual basis upon which it was made. I am not suggesting that Mr Allgood required current operational experience before his opinion could carry weight. But, to have persuasive weight in the context of this trial, his opinion had to be based on evidence about the composition of WolCC in 2013 or at least upon the change in prison demographics and prisoner behaviour since the ice scourge. Mr Allgood's understanding of the WolCC cohort as "more compliant and cooperative" was inconsistent with the evidence about the cohort from those with relevant experience. His understanding of the protection unit "standard" was not informed by information about the protection environment in 2013.
- [208] Also, Mr Allgood was mistaken about their being a *requirement* for Prisoner X to complete the program offered to him. There was no oral evidence led about this program or its purpose or its exclusivity to WolCC or otherwise. There was certainly no evidence that Prisoner X was required to complete it. Indeed, the evidence was to the effect that his refusal was of no consequence to his management or placement. It might have been to his detriment not to participate from a parole perspective, but Prisoner X's understanding was that it would be of no assistance to him because he had outstanding charges: see the IOMS entry dated 19 April 2013.⁸⁵
- [209] I consider that Mr Allgood over-valued the significance of Prisoner X's refusal to participate in the program offered to him. He treated the program as something relevant to the risk posed by Prisoner X. There is no evidence that it was. He treated Prisoner X's refusal to participate in the program as a defiant act that was not addressed by management but that was not the case.
- [210] Mr Allgood was critical about the absence of management tools or incentives when it came to managing Prisoner X's behaviour. However, I find that management tools were deployed. Prisoner X was "breached" for having a lighter in his possession. His turning up at the cell door in his underwear only was addressed by the CSOs requiring all prisoners to remain at their doors until Prisoner X dressed himself properly (plainly relying on a likely negative peer response to prevent a repetition of the behaviour). He was sent back to his unit when he was late for industry parade (although I note that he was later permitted to attend work). And the ringleaders in the unit were broken-up.
- [211] Mr Allgood suggested that Mr Corbin was targeted by Prisoner X because he was one of a few staff members who were across Prisoner X's behaviour and prepared to document it. But there was no evidence that Prisoner X was aware of the IOMS entries made by Mr Corbin.

BREACH OF DUTY

- [212] The defendant conceded that an assault by a prisoner on a CSO is foreseeable and that the risk of injury in such an assault was not insignificant. Upon those concessions – sections 305B(1)(a) and (b) of the WCRA are satisfied and the question whether the defendant has breached its duty depends upon whether, in the circumstances, the defendant unreasonably failed to take precautions against the risk of assault upon a CSO posed by Prisoner X.

⁸⁵ Liability Trial Bundle 617.

- [213] “The circumstances” included (among other things) Prisoner X’s criminal and custodial history; the mix of prisoners accommodated at WolCC; the tools available to manage behaviour; his conduct at WolCC prior to the assault; his holding down employment at WolCC and the separation of the ringleaders of S5.
- [214] The plaintiff’s Statement of Claim asserted that the defendant had been negligent in affording Prisoner X protection status and placing him at WolCC; negligent in failing to manage him by way of an IMP; negligent in the way in which it informed CSOs about a prisoner’s history and security classification; and negligent in failing to cause two CSOs to be present when instructing or breaching a prisoner; and negligent (by way of the actions of CSO Mandic) in leaving Mr Corbin in the common area alone.
- [215] The plaintiff did not pursue the complaint contained in paragraphs 12(a), (b), (d), (e) and (f)(i) of his Statement of Claim which asserted Prisoner X’s negligent placement as a protection prisoner at WolCC and in S5.

Would a reasonable employer have managed Prisoner X by way of an IMP?

- [216] The plaintiff pursued the complaint in paragraph 12(c) of his Statement of Claim which asserted, in effect, that a reasonable employer would have managed Prisoner X by way of an IMP.
- [217] As to that assertion, I find that –
- prior to the assault, a reasonable assessment of Prisoner X was that he was an anti-social, pro-criminal, drug-user, who was, at times, sarcastic and belligerent in his engagement with CSOs. He was, at times, a “mouthy” show off. He was a little more difficult to manage than the average prisoner, but he was holding onto his employment;
 - at AGCC and Brisbane Correctional Centre, he had made threats to, or attempted to intimidate, CSOs. His most recent attempt at intimidation (that is, recent to his placement at WolCC) occurred on 26 February 2013, when he and other prisoners stared at CSOs;
 - he had not, prior to his transfer to WolCC, actually assaulted a CSO;
 - he had a history of assaulting other prisoners, and of being assaulted himself. His most recent (to his placement at WolCC) assault upon another prisoner was committed on 6 December 2012; and
 - immediately before his transfer to WolCC he was “animated” at times, but polite and compliant.
- [218] I find that Prisoner X posed a higher risk of violence *generally* than the stereotypical protection prisoner in the sense that he posed the risk of violence posed by mainstream prisoners but he was one of many prisoners at WolCC who posed such a higher risk.
- [219] On the plaintiff’s case, the risk that required particular management was the risk that Prisoner X would assault prison staff. I am not persuaded that that risk arose to such an extent as to require the defendant to manage him by way of an IMP.

- [220] I accept that, before the assault, Prisoner X's behaviour at WolCC had been "trying"; he had a "poor attitude" and he was, at times, "unfiltered". He had not threatened or attempted to intimidate CSOs at WolCC as he had done at AGCC and Brisbane Correctional Centre, but I accept that he was a not-readily compliant prisoner who continued to challenge authority.
- [221] While his behaviour at WolCC was trying – and I accept that it was trying on days other than those in respect of which an IOMS entry was made – and that he stood over the more vulnerable prisoners in S5, I am not persuaded that his behaviour, in the context of his history, and in the context of the protection population in 2013, warranted the imposition of an IMP to manage his risk.
- [222] In my view it was reasonable for the defendant to treat Prisoner X's history of threats and taunts and attempts to intimidate staff as big-noting expressions of immaturity which would not be acted upon. It was reasonable for the defendant to expect that Prisoner X would settle upon his placement at WolCC or at least reasonable to see how he behaved at WolCC before making a decision about whether he required special management.
- [223] I am not persuaded on the evidence that a reasonable employer would have managed Prisoner X by way of an IMP, either upon his admission to WolCC or at any time before the assault upon Mr Corbin.

Were the defendant's policies inadequate?

- [224] Paragraphs 12(f) and 12(g) of the Statement of Claim assert that the assault upon Mr Corbin was caused by the negligence and/or breach of contract by the defendant in –
- f) Failing to develop, implement, maintain or enforce any or any adequate policies regarding the accommodation of inmates such as [Prisoner X] including policies which:
 - (i) would cause a thorough investigation into the suitability of a prisoner for his/her accommodation in a protection unit when CCOs have identified issues in terms of behaviour and discipline;
 - (ii) would cause the CCOs to be aware of the prisoner's history and security classification so as to properly assess the manner in which they will interact with that prisoner;
 - (iii) would cause at least 2 officers to be present when instructing or breaching a prisoner in circumstances where the prisoner has a history of assault, obstructing police, repeated indiscipline, threatening and hostile behaviour towards authority and a desire to maintain his status in front of his peers by resisting authority and where it was otherwise unsafe for the plaintiff to approach the prisoner alone.
 - g) By its employee, CCO Stan Mandic, in leaving the plaintiff in the common area alone during the incident when it was unsafe to do so and for which the employer is vicariously liable.

- [225] With respect to the allegation in 12(f)(ii), there was very little attention paid at trial to how much information a CSO ought to be given about a particular prisoner.
- [226] In his written submissions, the plaintiff referred to the fact that the WolCC IOMS notes about Prisoner X were not audited monthly as they were meant to be. The plaintiff argued that, despite Prisoner X's history "showing his behaviour required monitoring in the interests of the safety and good order of the unit, there was no effective formalised or systematic procedure for that to occur". He referred to the evidence that Mr Cross did not receive Mr Corbin's email which said that Prisoner X should be removed from S5.
- [227] The defendant submitted that CSOs were able to access Prisoner X's case file – at least up to a point – as Mr Corbin had done. Also, by the time of the assault, Prisoner X had been at WolCC for about six months and the CSOs were well aware of his behavioural issues. That is borne out by an examination of the IOMS – Mr Corbin was not the only CSO who was aware that Prisoner X was a trying prisoner with attitude.
- [228] I do not consider that this aspect of the claim has been made out.
- [229] With respect to the allegation 12(f)(iii), which was repeated in 12(g), the plaintiff submits that I should proceed on the basis that either (i) CSO Mandic told Mr Corbin that he was leaving the unit but did not ensure that Mr Corbin knew that he was leaving; or (ii) CSO Mandic did not tell Mr Corbin that he was leaving the unit; or (iii) CSO Mandic went out to have a "quick smoke and did not bother to tell" Mr Corbin.
- [230] The defendant relied upon CSO Mandic's evidence that he did tell Mr Corbin that he leaving the unit and that Mr Corbin acknowledged him.⁸⁶
- [231] The defendant submitted that Mr Corbin was not a credible witness and that I should prefer the evidence of CSO Mandic on this point. The defendant referred to the surveillance evidence (which is discussed below) and other aspects of Mr Corbin's testimony which it submitted reflected adversely on his credit.
- [232] In addition to issues of credit, the defendant submitted that it would be expected that CSO Mandic would tell Mr Corbin where he was going. It also relied upon Mr Corbin's own evidence that his whole focus was on Prisoner X. The defendant submitted that it was likely that because of that focus, Mr Corbin gave no thought to the presence or otherwise of CSO Mandic.
- [233] It is very clear from the psychiatric evidence that the plaintiff has been extremely stressed and distressed by this litigious process. It has consumed his life for years. I note
Dr Foxcroft's particular concerns for his mental health. I find that, under the stress of this litigation and because of his understandable desire to succeed, Mr Corbin has tailored some of his evidence to his perceived advantage. For example, I consider that he understated his safety training and overstated the impact of his movement disorder.

⁸⁶ Transcript 4 – 87, ll 38 – 45.

With respect to his safety training, I accept Ms Bambrick’s evidence that one of the things which was “trained and reinforced” was to move in pairs, or to always operate “in line of sight” (including when a CSO intended to approach a misbehaving prisoner)—which Mr Corbin denied.

[234] I find that, probably, CSO Mandic told Mr Corbin that he was going to put the bins out and that Mr Corbin probably heard him. But Mr Corbin’s relationship with Prisoner X was such that he was triggered by Prisoner X’s conduct to such an extent as to forget in the moment that he was alone in the unit.

[235] It follows that I do not find that the defendant failed to take two officer/line of sight precautions.

Did the defendant breach the duty it owed to the plaintiff?

[236] No. I am not persuaded that a reasonable employer would have managed Prisoner X by way of an IMP. I am not persuaded that the defendant failed to take two officer/line of sight precautions. I am not persuaded that the defendant’s policies were inadequate.

CAUSATION

[237] Even if I am wrong about the defendant’s alleged breaches of duty, I am not persuaded that any breach of duty caused the injury to Mr Corbin.

The IMP precaution

Defendant’s submissions

[238] The defendant referred me to several cases to assist in my understanding of the requirements of section 305D in the context of the present case in particular – where the injury was caused because a third party committed a criminal act.

[239] Those authorities explain that –

- (a) the statutory provisions require an approach to causation which is different from the common law approach: *Inghams v Tat*;⁸⁷
- (b) the statute divides the causal determination into the elements of factual causation and scope of liability;
- (c) policy considerations inform the scope of liability judgment – that is whether legal responsibility should attach to the defendant’s conduct: *Strong v Woolworths*;⁸⁸
- (d) factual causation requires proof that the defendant’s negligence was a necessary condition of the occurrence of particular harm; a necessary condition is a

⁸⁷ [2018] QCA 182.

⁸⁸ (2012) 246 CLR 182.

condition that must be present for the occurrence of particular harm: *Strong v Woolworths*;

- (e) there may be more than one set of conditions necessary for the occurrence of particular harm, and a defendant's negligent act or omission, which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm, will meet the test of factual causation in section 305D(1)(a); in such a case the defendant's conduct may be described as contributing to the harm: *Strong v Woolworths*;
- (f) recognising that changing any of the circumstances in which the injury occurred *might* have made a difference does not prove factual causation: *Adeels Palace*;⁸⁹
- (g) factual causation is not proved by pointing to possibilities that might have eventuated if circumstances had been different: *Adeels Palace*;
- (h) the question of factual causation is not answered by pointing out that the relevant duty of care (in the *Adeels Palace* case) was to take reasonable steps to prevent violent assault, and that the damage sustained by the plaintiffs was "the very kind of thing" which the relevant duty obliged Adeels Palace to take reasonable steps to prevent. That observation may bear upon questions about scope of liability. Describing the injury as "the very kind of thing" which was the subject of the duty must not be permitted to obscure the need to prove factual causation: *Adeels Palace*;
- (i) In *Adeels Palace*, the "but for" test of factual causation was not established. It was not shown to be more probable than not that, but for the absence of security personnel, the shootings would not have taken place. That is, the absence of security personnel on the night the plaintiffs were shot was not a necessary condition of their being shot. Because the absence of security personnel was not a necessary condition of the occurrence of the harm [the equivalent of s 305D(1)(a)] was not satisfied. The question then was whether the [the equivalent of s 305D(2)] applied: *Adeels Palace*;
- (j) Section 305D(2) applies to an exceptional case: a case in which negligence cannot be established as a necessary condition of the harm – the "but for" test cannot be established. In such a case, a court must consider whether or not, and why, responsibility for the harm should be imposed upon the negligent party: *Adeels Palace*
- (k) Whether or when section 305D(2) is engaged depends upon whether, and to what extent "established principles" countenance departure from the "but for" test of causation: *Adeels Palace*
- (l) It would be contrary to established principles to hold Adeels Palace responsible in negligence if not providing security was *not* a necessary condition of the occurrence of the harm but providing security *might* have deterred or prevented its occurrence: *Adeels Palace*.

[240] In *Adeels Palace*, the High Court said:⁹⁰

⁸⁹ (2009) 239 CLR 420.

⁹⁰ *Ibid* at [57].

... the event which caused the plaintiffs' injuries was deliberate criminal wrongdoing and the wrongdoing occurred despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That being so, it should not be accepted that negligence which was not a *necessary* condition of the injury that resulted from a third person's criminal wrongdoing was a cause of that injury. Accordingly, the submission that the plaintiffs' injuries in these cases were caused by the failure of Adeels Palace to take steps that *might* have made their occurrence less likely, should be rejected.

- [241] The defendant emphasised the need for the plaintiff to prove that a relevant breach *would, not might*, have prevented the harm under section 305D, relying on *The Corporation of the Synod of the Diocese of Brisbane v Greenway*,⁹¹ *Inghams v Tat*, and other Court of Appeal decisions and decisions of the District Court of Queensland.⁹²
- [242] In *Greenway*, a care worker suffered PTSD having been assaulted by the violent young person in her care for the evening, and provided with inadequate support thereafter. After the assault, she remained alone with him in their accommodation until the morning. She was successful at first instance in her claim for damages in negligence against the defendant employer. The defendant appealed. The question on appeal was whether the defendant's negligence had caused all or some of the plaintiff's loss and damage.
- [243] McMurdo JA, with whom Morrison JA agreed, set out the psychiatric evidence. Each psychiatrist said that the absence of support for the plaintiff immediately after the incident was a contributing factor to her PTSD. It was "remotely possible" that PTSD might not have developed had there been a high level of support after the incident. It was "possible" that it would have been ameliorated by a high level of support.
- [244] In allowing the appeal, McMurdo JA explained that the trial judge erred by not applying the "but for" test of causation in finding that the defendant's breach of duty was a necessary condition of the plaintiff's injury. The psychiatric evidence was that the PTSD was not inevitable from the incident itself: "But the respondent bore the onus of proving that, more probably than not, the injury would not have occurred from the incident alone. The injury may not have been inevitable because there was a 'remote possibility' that, absent the breach of duty, it would not have occurred, but that was not breach of causation on a balance of probabilities".⁹³
- [245] McMurdo JA went on to apply the "but for" question under section 305D(1)(a). His Honour asked how the discharge of the defendant's duties would have made a difference to the respondent's experience. The exercise of reasonable care by the defendant required it taking whatever steps were necessary to protect the plaintiff from ongoing exposure to the potential of further harm (by the young person). At its highest,

⁹¹ [2017] QCA 103 at [38] – [41].

⁹² I have read them all but will not refer to them all. The authorities were: *Adlington v Dominos Pizza Enterprises Limited* [2016] QDC 31; *Baillie v Jackson & Anor* [2015] QDC 31; *Govier v Unitingcare Community* [2017] QCA 12; *Love v Lindsay Brothers Management Pty Ltd* [2013] QDC 174; and *Lusk v Sapwell* [2011] QCA 59.

⁹³ *Greenway* [2017] QCA 103 at [43].

the psychiatric evidence provided no more than a *possibility* that, but for the breach of duty, the PTSD would not have occurred. The appeal was allowed. Causation had not been proven.

- [246] In *Inghams Enterprises v Tat*,⁹⁴ the plaintiff was a shift worker at a factory. She was attacked late at night in the factory's car park. She suffered significant PTSD thereafter. She was successful at first instance in her claim for damages in negligence against the defendant, her employer. The defendant was successful on appeal.
- [247] The primary judge found that the defendant had breached its duty to the plaintiff by failing to educate its staff to report suspicious behaviour in the car park and that the plaintiff's injury had been caused by that breach. The primary judge was found to be in error in reaching that conclusion. The Court of Appeal found that the primary judge had based his conclusion on conjecture, rather than reasonable inferences. The primary judge should not have assumed that the assailant would have acted in a rational way – having been (hypothetically) asked to leave by a security guard who had (hypothetically) received reports about his suspicious behaviour.
- [248] Bond J considered the evidence from which it was possible to draw conclusions about how the assailant might have reacted. Bond J concluded that there was not a “sufficiently secure evidentiary basis” for concluding that the assailant would have been deterred simply by being asked to leave. His Honour said, “He was determined to do what he had apparently set out to do [that is, abduct a woman factory worker], and was not necessarily responding rationally to what should, rationally, have been treated as a sufficient deterrent on the night in question”.⁹⁵
- [249] The primary judge had applied the “but for” test, but the evidence did not give rise to a reasonable and definite inference in the plaintiff's favour.⁹⁶
- [250] In *Inghams v Tat* the trial judge should not have assumed that the assailant would have acted rationally in response to a request to leave the premises. In the present case, that translates to a caution that I should not assume that counselling under the IMP would have worked on Prisoner X; or that it would have worked immediately; or that Prisoner X would have continually improved in his attitude (rather than having good days and bad) while subject to the IMP.
- [251] The defendant submitted that, as in *Inghams v Tat*, there was not “a sufficiently secure evidentiary basis” for me to conclude that the assault upon Mr Corbin would not have occurred had Prisoner X been the subject of an IMP at the relevant time.
- [252] The defendant submitted that, “[i]f certain punishment will follow, it behoves very significant doubt that postulated measures would have prevented the occurrence of violence ... The suggestion that this heat of the moment errant conduct *would* rather

⁹⁴ [2018] QCA 182.

⁹⁵ Ibid at [74].

⁹⁶ Ibid at [75].

than might have been prevented by the imposition of an IMP in unstated terms is contrary to the evidence and common sense”.⁹⁷

- [253] The defendant also submitted that there was nothing to suggest that the presence of a second officer would have changed the reaction of Prisoner X to Mr Corbin’s approach. At best, had CSO Mandic been near Mr Corbin when he approached Prisoner X, the assault upon Mr Corbin might have involved fewer blows.
- [254] I note that the incident report reveals that Prisoner X was particularly determined in his assault upon Mr Corbin. The incident report (by CSO Mandic) states that Prisoner X had Mr Corbin in a headlock and was hitting him. CSO Mandic got hold of Prisoner X’s right hand. He ordered Prisoner X to let go of Mr Corbin and to stop trying to hit him, but Prisoner X did not.⁹⁸ Other CSOs arrived on the scene and ultimately Prisoner X was escorted to the Detention Unit by four officers while making verbal threats. CSO Mandic suffered an injury to his right shin in the incident.

Plaintiff’s submissions

- [255] The plaintiff submitted that factual causation was established because it was probable that the assault would not have occurred if Prisoner X had been subject to an IMP at the relevant time.
- [256] He relied upon *Tabet v Gett*⁹⁹ for its explanation that proof of causation at common law required a plaintiff to prove that, according to the course of common experience, the *more probable* inference is that a defendant’s negligence caused the harm. He referred additionally to *Bujdoso* to make the point that a plaintiff was not required to prove that, were it not for the defendant’s negligence, his safety would have been guaranteed.
- [257] He submitted that I ought to accept the evidence of Mr Allgood that “had a formal IMP been in place to support the custodial and specialist staff in the day-to-day management of [Prisoner X], there is a very strong likelihood the incident of assault on CSO Corbin on 10 October 2013 may well have been avoided”.
- [258] As I have already mentioned, Mr Allgood’s experience was dated. His understanding of the 2013 protection prison environment was inconsistent with the reality of it. Although he asserted that his prison experience enabled him to comment on the management of Prisoner X (in 2013), I was not persuaded by that assertion.
- [259] The plaintiff also submitted, in effect, that the IMP that ought to have been imposed upon Prisoner X would have involved restrictions on his out of cell time and his movement. He relied upon Mr Eggins’ evidence that if a prisoner was the subject of an IMP due to authority issues with staff, his ability to interact with staff members was restricted or controlled. However, the plaintiff’s expert, Mr Allgood, did not consider that Prisoner X required restrictions of that sort. I am not persuaded that Prisoner X’s

⁹⁷ Defendant’s written submissions [91] and [97].

⁹⁸ Page 633, Liability Trial Bundle.

⁹⁹ (2010) 240 CLR 537 at [111].

attitude, as demonstrated before the assault, was the sort of attitude that warranted restrictions on his ability to interact with staff members.

- [260] The plaintiff relied upon the evidence of Ms Clark that she found IMPs very effective and that she had managed the most notorious prisoners in the State by way of IMPs. That second aspect of her evidence does not assist the plaintiff. It fits in with the evidence about how few prisoners were managed by way of IMPs. Ms Bambrick gave evidence that there were only 10 – 15 prisoners managed by way of an IMP at the relevant time. Having regard to the evidence, it is reasonable to assume that some of those prisoners required IMPs for reasons which had nothing to do with their behaviour, but rather with other vulnerabilities (including advanced age, intellectual functioning or mental health). It is reasonable to assume that one or two of those prisoners were “notorious” prisoners, or prisoners transitioning from maximum security. That leaves few IMP places left for prisoners with behavioural issues. I am not persuaded that Prisoner X’s behaviour, prior to the assault, warranted his placement on an IMP. That is, of course, relevant to the question of breach of duty.
- [261] Returning to the question of proof of causation, the plaintiff submitted that had Prisoner X been placed on an IMP, and had Mr Corbin been aware of it, then he would have been more wary about approaching him.
- [262] The plaintiff submitted that his case was like the case of *Bujdoso* and *Leeder* (in which prison officers had successfully sued the State in negligence) more than it was like the case of *Eastment* (in which the prison officer was not successful).
- [263] In *Bujdoso*, the likely effectiveness of the measures which ought to have been taken to protect the plaintiff from the foreseeable (indeed threatened) injury was obvious. The plaintiff prisoner was an easily identifiable child sex offender who was housed in a unit among prisoners who had threatened him. That unit was a dangerous environment because of its layout and the absence of a prison officer for long periods of time.
- [264] The measures which could reasonably have been undertaken (in the light of the threats made) included closer and more frequent checking of the prisoners in the unit; better and stronger locks and doors; checking for weapons; and relocation of the plaintiff within the unit to a room close to the prison officer’s room. Indeed – even if it were not obvious – there was evidence led that placing Bujdoso in a room closest to the prison officer would have reduced the risk of assault upon him and evidence that better surveillance had been effective in stopping other unacceptable activities of prisoners within that unit.
- [265] In *Leeder*, a prisoner had been taken to a cell in the detention unit because he had been aggressive towards, and sought a physical conflict with, a prison officer. Sometime later, he broke the window in the cell – suggesting that his aggressive mood had not settled. A prison officer who was working in the detention unit the next day was not told about the prisoner’s behaviour. He was assaulted by the prisoner when he opened his cell. It was held that the reasonable care of the plaintiff required the defendant to inform him about the prisoner’s behaviour before he opened his cell so that he could assess the situation. On the question of causation, there was evidence led of a certain

procedure which would reveal whether or not a prisoner was likely to cause trouble before their cell door was opened. The Court of Appeal held that in the absence of evidence from the defendant that that measure (and other measures the plaintiff might reasonably have taken) would not have prevented the assault, then the only finding open was that the defendant's breach of duty caused the plaintiff's injuries.¹⁰⁰

Did failing to manage Prisoner X by way of an IMP cause the plaintiff's injury?

- [266] I find myself, on the evidence, unable to satisfactorily evaluate the likely effect of an IMP on Prisoner X.
- [267] I am not prepared to act solely on the assertion made by Mr Allgood that, in his opinion, had Prisoner X been managed by way of an IMP, the assault would not have occurred because Mr Allgood's evidence about this was in such general terms.
- [268] Nor am I prepared to act on his opinion even though it was consistent with other evidence about the effectiveness of IMPs because that other evidence was similarly expressed in a very general way. And it was tempered by (common sense) evidence that some prisoners just will not change and evidence to the effect that the IMP itself (the "piece of paper") cannot achieve anything unless the prisoner subject to it is committed to change.
- [269] The evidence was to the effect that IMPs were tailored to a prisoner's circumstances. The IMP proposed for Prisoner X by the plaintiff's expert was one that emphasised psychological engagement or counselling to improve Prisoner X's attitude.
- [270] Mr Allgood is not a psychologist. I am not persuaded that Mr Allgood had sufficient experience of the response of a prisoner like Prisoner X to psychological engagement to give his evidence about the likely success of the IMP he proposed much weight.
- [271] Further, I have no sense of the frequency or duration of the counselling which was anticipated. I have no sense of when Prisoner X would be likely to have shown the attitude change which it was intended to bring about.
- [272] I accept Mr Kruhse's evidence that the management of prisoners was a process that involved periods of improvement and periods of relapse. Mr Allgood's own evidence anticipated that Prisoner X might not cooperate in the IMP – in which case Mr Allgood suggested that he would or could have been moved from S5 (a proposition which I will accept as correct for the moment).
- [273] Even if I accept Mr Allgood's evidence that a prisoner's behaviour would improve under an IMP that required "regular monitoring of the prisoner, meetings with a multidisciplinary group of staff and regular reviewing of expectations and desired outcomes" he said nothing about *when* it was probable that those desired outcomes would be achieved. It is reasonable to assume that in the case of Prisoner X, the desired change in attitude was unlikely to be rapid. I have no sense of how long Prisoner X

¹⁰⁰ [2008] WASCA 192 at [145].

would have been given to engage with his IMP before a decision might be made to remove him from S5.

[274] Mr Corbin was, I find, fed up with Prisoner X. Prisoner Z defiantly and brazenly was determined to break the rules by smoking inside. His assault upon Mr Corbin was frenzied. His knowledge that he would be punished for it did not deter him. Nor was he deterred from his assault upon CSO Mandic's return to the unit. I do not find in the evidence a secure basis for the conclusion that the defendant's failure to manage Prisoner X by way of an IMP was a necessary precondition of the occurrence of the injury. In other words, I am not satisfied that the failure caused the injury.

[275] Nor am I persuaded that, in the heated circumstances in which the assault occurred, Mr Corbin would have acted any differently knowing that Prisoner X was involved in counselling designed to improve his attitude or knowing that he was subject to an IMP whatever its terms.

The two-officer precaution

[276] The plaintiff also submitted that the actions of CSO Mandic caused the assault: Had he ensured that Mr Corbin knew he was not in the unit, Mr Corbin would not have approached Prisoner X.

[277] As I have explained, I am not satisfied that the defendant failed to take two-officer precautions. However, for the purposes of this causation analysis, I will assume that CSO Mandic did not ensure Mr Corbin knew that he was leaving the unit.

[278] On the evidence, Mr Corbin did not say anything to CSO Mandic before approaching Prisoner X. Nor did he check to see whether CSO Mandic was at his desk. He was totally focused on Prisoner X.

[279] Whether he heard CSO Mandic say he was leaving the unit or not, I find that Mr Corbin did not think about where CSO Mandic was when he approached Prisoner X.

[280] He was annoyed that Prisoner X had not been removed from the unit with the other ringleaders. There had been humourless banter between them that morning. Mr Corbin was fed up with Prisoner X. He was – understandably – annoyed and frustrated that Prisoner X had defied him and his focus was on doing something about it.

Would the assault not have occurred but for the failure to take two-officer precautions?

[281] I accept the defendant's submissions. I am not persuaded that the presence of a second officer would have changed the reaction of Prisoner X to Mr Corbin's approach. Also, at best, had CSO Mandic been near Mr Corbin when he approached Prisoner X, the assault upon Mr Corbin might have involved fewer blows.

- [282] I am not therefore persuaded that but for CSO Mandic's assumed actions, the assault would not have occurred.

QUANTUM

- [283] Even though I am not satisfied that the defendant is liable to the plaintiff is negligence, it is appropriate for me to assess the quantum of damages.

The plaintiff's health prior to the assault

- [284] Mr Corbin said that his health was fantastic immediately prior to the assault.¹⁰¹ He broke down after his marriage, but he "manned-up" and sought treatment, including with Dr Julianne Gardner. He had treatment sessions with her and thought everything was "going great". Before the assault, he was planning on cancelling the next session with her because he felt it was unnecessary. The issues she dealt with were not ones which interfered with his ability to work.
- [285] He had also seen a psychiatrist, Dr Field, after his marriage failed, for "extra help". He was diagnosed with bi-polar disorder, which symptoms included (in him) hypersexuality and reckless spending. The disorder, and its symptoms, had been lifelong, but had never interfered with his work.¹⁰² He was treated with lithium, which he felt kept him level-headed and allowed him to function properly.

After the assault

- [286] After the assault, and his treatment at the Ipswich Hospital, the plaintiff went home. Physically, his head was sore and lumpy. His lip was sore. The painkillers had worn off.
- [287] He managed to go back to work but symptoms emerged and developed, including a head twitch or tic and migraines. He was also more nervous than usual. The head tic worsened and "travelled" down to his hand. The tic affected his "eyes ... face ... mouth ... teeth ... neck ... shoulders and [the] top of [his] back".
- [288] On his first day back at work, he worked on S5. On his second day back, he worked on S7. He wrestled with a prisoner whom he had found in possession of a cut-down syringe and "that was probably when the tic started". On his third day back, it was quite bad.
- [289] He was unable to work continuously. He took holidays in lieu of WorkCover leave because his workers' compensation benefits were inadequate. He tried to return to work on three occasions, including via a placement at a probation and parole office, but he could not do so successfully. His twitches "got really bad", his handwriting was illegible and he had trouble concentrating.

¹⁰¹ Transcript 1 – 63, ll 5 – 10.

¹⁰² Transcript 1 – 64, ll 1 – 13.

[290] To control his movement symptoms, he received Botox injections in his “neck, face, eyes, throat and shoulders” every three months.

[291] At trial, he said that he suffered from the following symptoms as a consequence of the assault by prisoner X –¹⁰³

- “... my dystonia ... a head tremor. My jaw is clenching, grinding my teeth. Holding my hand to stop it shaking. Extremely paranoid about people behind me and people getting close ... getting anxious of getting followed now”;
- “reduced feeling in my face, like pins and needles ... severe migraines ... scar tissue ... which sort of grates [and catches] on my teeth”;
- “little” neck tremors;
- “tremendous” amounts of pain;
- pain present every day, as a consequence of the “little nods” of the head – only relieved by laying down with a pillow under his head;
- five headaches a week;
- four/five migraines a month – with “absolutely blinding pain ... like, my eyes are getting pushed in with red hot pokers ... I can actually feel my scalp, which is terrible. And I just feel sick”;
- anxiety and panic attacks – panic attacks “multiple times a day”;
- flashbacks/nightmares.

[292] The symptoms varied considerably day to day –¹⁰⁴

If I’m in a very stressful environment they get very bad. When I’m sort of at home around my dogs and that they are not as bad at all. But even driving on – riding on public transport it’s starting to affect me the whole ride in.

[293] A little later in evidence he said –¹⁰⁵

Starting out is always not too bad. Hopping on the train, that’s when everything builds up, unless the train is full of people (sic) and you’ve got that real hot closed in air feeling. That will pick me off pretty quick. And I’m feeling pretty anxious and exhausted by the end of the journey.

[294] Mr Corbin said that he rarely left his house because he was so nervous and anxious. And he shook. Before the assault, Mr Corbin was very social. He had joined a motorcycle club and had an acting dating life.

¹⁰³ Transcript 1 – 67, l 35 – 1 – 71, l 5.

¹⁰⁴ Transcript 1 – 68, ll 30 – 35.

¹⁰⁵ Transcript 1 – 69, l 45 – 1 – 70, l 3.

- [295] As to his future employment prospects, Mr Corbin said that he could not sit or stand, or travel in traffic without “setting this [his movements] off”. He could not be trusted with a knife – which meant he could not work as a chef. It would not be safe for him to drive a truck. He only drove “off-peak” and knowing where he was going. He could not work as a taxi or Uber driver. He could not work in an office, sitting for long periods, because of problems with his neck, as well as “cognitive issues”. He could not stand for long periods because of his back issues.
- [296] Before the assault, he had planned to study for a masters’ degree in justice with a view to counselling work. He felt that he excelled at helping people. He could no longer study: “I can barely read a paragraph without losing my mind”.
- [297] At trial, his mother was living with him. He was unable to do housework: “it pretty much sits there to the point where we all just have to do it, and then any work that I see to do, I seem to be laid up for three days afterwards because of severe pain”. He could only mow his lawn “in sections”.

The surveillance footage

- [298] Mr Corbin was referred to surveillance footage, from 6 March 2018, which showed him leaving a building after an appointment with his expert psychiatrist, Dr Malcolm Foxcroft. Mr Corbin was not exhibiting signs of a tremor in that footage. As a lay person, I did not notice signs of anxiety, but I acknowledge the limits of my observation.
- [299] Of that day, Mr Corbin said he was –¹⁰⁶
- Extremely nervous and very sore after going through several appointments [though not on that same day]. Going in and talking to Dr Foxcroft, he pretty much put me at ease and talked to me – talked to me as a human, didn’t talk down to me, explained a lot of things. We had just general discussions, but he definitely made me feel a lot more relaxed and hopeful, I suppose, would be the best word. [When I came out of the appointment] I was feeling actually very relaxed and happy. It was like someone actually listened to me and actually understood what I was telling them and took notice ... So I was feeling pretty positive.
- [300] Mr Corbin was asked by his counsel about his facial tremor in the footage and how it compared to his experience of it at other times. He said that, for short periods of time, he could “stop it”. He said he was focused on crossing the road (as he is seen to do on the footage) and implied that, while focusing, his tremor was not apparent. In response to later questions from me, he demonstrated his ability to control his hand tremor, by concentrating, for a short period.
- [301] He said that he was extremely sore and wobbly as he walked down the stairs (as shown on the footage), and for that reason held onto the handrail. The pain was in his neck and back.

¹⁰⁶ Transcript 1 – 72, ll 15 37.

- [302] He said he went to McDonald's because he had to wait for his train. He said he did not want to sit "underneath", on the platform, because there were no surveillance cameras there and he was worried. He was holding his neck in the footage because it was "killing [him]". He said his eyes were darting back and forth in the footage as he was trained to do as a corrective services officer because he was "constantly on guard. Hypervigilant. Just worried. Don't want to get blindsided again". He said he was worried that he might run into Prisoner X. He said he had, in effect, performed reconnaissance before he entered McDonald's and identified a certain seat, from which he had a "line of sight", which is where he sat to eat his meal.
- [303] On the platform itself, he selected a spot to stand, "planted at the wall" so no one could come up behind him and he had a good line of sight up and down the platform.
- [304] He was cross-examined with a view to establishing that he appreciated that the worse his symptoms, the higher his damages. His answers to questions of that sort were to the effect that all he did was tell the truth. He agreed that crowds caused him to stress (and his involuntary movements increased). His attention was drawn to parts of the recording which showed no obvious involuntary movement, such as, for example, his using a ticket machine to get a ticket. His answers suggested that he was experiencing involuntary movements:¹⁰⁷

Would you agree with me that while you were pressing the buttons on that machine to recharge your go card, you have no observable tremor in your right hand? ---- To be honest, I – I do remember being there, and I was shaking the whole time through that, so I can't understand why your camera didn't pick that up. My head's shaking the whole time, and if your camera's that far away they can't pick that up, then I don't know.

You'd agree with me you couldn't see any tremor on the DVD ---- ? ---- I'm sure ----

---- in your right hand when you were at the ticket machine? ---- I'm sure even Michael J Fox under there probably wouldn't have a tremor either.

Mr Corbin, you would agree with me, wouldn't you, that when you were standing at the ordering counter [at McDonald's], looking at the menu on the counter (sic) above you, that you had no observable tic-like or bobbing movements of your head? ---- Honestly, my head is doing exactly what it is doing now. Like I said, I am – my head is shaking. I don't know if you can see it. I can feel it, and this is what it was doing. My neck was killing me, and when it gets really bad, I can actually grab the muscles in the back of my neck and squeeze really hard, and it will stop.

I suggest to you that the tic movement that you're – the bobbing of your head that you have here now as you speak to me, you didn't have that as you stood at the counter looking at what you were about to order? ---- Well, I disagree totally sir, because I'm exactly how I was that day.

¹⁰⁷ Transcript 2 – 32, ll 30 – 46.

- [305] The footage showed Mr Corbin using his mobile phone. He said, in effect, that he was required to hold the phone with both hands and while his hand did not appear to be shaking, it was.
- [306] He said it was incorrect that he had no tremor in his head. He referred to a jerk of his head. He said that he was looking to his left and right, in effect, on alert. He said his eyes were darting. He said that while it appeared that there were people close to him (something that caused him stress), people were not in fact close to him, although the camera angle made it look that way. He said he did not in fact have people close to him while he was leaning up against a pillar waiting for his food.
- [307] He claimed that he was scanning the restaurant for threats as he walked to a table with his food and drink. Even though it did not look like it, his drink was shaking, his recollection was that he had a tremor the whole time, but he could stop it while he concentrated for short periods to get his drink to the table for example. Although he had no apparent facial tic as he ate, he said the camera was too far away to pick it up. He believed his head was bobbing while he ate.
- [308] His evidence was to the effect that, while he had significant movements of his head, face and right arm during his consultation with Dr Foxcroft, Dr Foxcroft had calmed him and he left the consultation relaxed. He said, in effect, that although he was about to catch a train, he was heading home to his “sanctuary” and that was a different experience from catching a train into the “big, scary city”. He denied that he was exaggerating his symptoms during his consultation with Dr Foxcroft. He strongly denied that his present symptoms did not include arm tremors, facial tics and dystonic movements of his head. He denied that his “normal” state was as it appeared on the DVD and that he was able to work in a variety of jobs.

My observations of the surveillance

- [309] I studied the recording for signs of tremor or other abnormal movement in Mr Corbin’s head, arms and hands. I saw no sign of tremor or other abnormal movement. In contrast, Mr Corbin’s head was bobbing/nodding throughout almost all of his testimony and while he sat in the back of the court listening to other evidence.
- [310] On the recording, Mr Corbin seemed to walk slowly down some steps and he held on to a railing as he descended. His hands appeared to be stable as he used the ticket machine at the train station. His head was not moving in any abnormal way. He was bending down or leaning towards the ticket machine – it seems to read its instructions. He did not appear to find those movements difficult. There were no signs of tremor/abnormal movement.
- [311] Mr Corbin walked to McDonald’s at an apparently normal pace. His arms were by his side as he walked. He grabbed onto his neck at about 12:56:50 and held onto his neck for a short while. There was no head tremor/nodding as he read the menu board which he raised his head a little to read. It seems that he was standing with his hands on his hips as he read the board.
- [312] There was no sign of a tremor as he joined the queue at the counter. While I appreciate that the real distance between Mr Corbin and others might not be accurately displayed on the recording, he did not appear to be concerned when a man with a backpack

walked behind him to take his place in the adjoining queue. Nor did he appear concerned about the person beside him in the queue.

- [313] No tremors were apparent as he collected his receipt and waited, leaning against a wall or a column, for his food to be prepared.
- [314] As he waited for his food, he appeared to be using his phone with one hand – his right – and appeared to be scrolling with his thumb with no difficulty. He appeared to be leaning on his left arm and against a column in such a way as to mean that he could not be using his left hand to also hold his phone – at least at first. His pose was relaxed. He looked up from his phone only occasionally. For the most part, he ignored the movements of persons around him.
- [315] He collected his food and a napkin and perhaps other accessories without apparent difficulty. He did look around while he was seated, but not in a way that suggested to me that he was anxious. (I note Dr Foxcroft’s different view.)
- [316] For some of the time, Mr Corbin was solely focused on eating. He did not appear concerned by what was going on around him. His hand movements seemed slow and relaxed (see for example at 13:10:43) but I acknowledge that I have no sense of his “normal” movements before the assault. There was no sign of a tremor while he was eating or as he packed up his food packaging.
- [317] Although he stood on the platform with his back to the wall, he was positioned among other train users (he did not isolate himself from them) and others stood in the same way, with their backs to the wall.
- [318] Mr Corbin’s suggestion that the camera was too far away to pick it up his abnormal movements is unpersuasive. He can be clearly seen while he is eating, drinking and wiping his mouth with a napkin at McDonald’s. The possibility that he might have *honestly perceived* constant movement although he was not in fact moving was not pursued with him or with any of the relevant experts.
- [319] I will deal with my conclusions about the surveillance evidence after reviewing the medical, psychiatric and psychological evidence.

Medical/Psychiatric/Psychological Evidence

Julianne Gardner – psychologist (plaintiff’s treating psychologist)

- [320] Not long before the assault, Mr Corbin was referred to Ms Gardner to improve his mood and manage his anxiety. She first saw him on 27 August 2013. Mr Corbin discussed with her the depression he had suffered on and off for many years, and his then recent anxiety and panic attacks which had worsened since the end of his relationship in December 2012. He discussed with her his variable mood states and his concern that he may have bi-polar disorder. On testing, he scored high for symptoms of bi-polar disorder; moderate for depression and stress; and extremely severe for anxiety. Ms Gardner engaged in cognitive behavioural therapy with Mr Corbin.
- [321] A few months after the assault, on 2 February 2014, Ms Gardner wrote to Mr Corbin’s general practitioner, advising her that she had been engaging with Mr Corbin in

psychological therapy to manage his social anxiety. She was aware that he had been advised to take 11 weeks holiday after his attempted return to work.

[322] Ms Gardner reported that Mr Corbin was still experiencing trauma symptoms (in February 2014) but he was managing them better. She considered his depression was in response to the medical and financial consequences of the assault. He reported to Ms Gardner better management of his social anxiety and much less fear associated with visiting crowded places. Having his son move to Australia to live with him (around January 2014) had heightened his stress.

[323] In a report to Q-Super, dated 25 August 2015, Ms Gardner noted the information provided by Mr Corbin at each of their treatment sessions and other relevant observations about his depression and anxiety scores. I note in particular the following –

- Mr Corbin’s stated desire to return to work (and the financial consequences of his not working);
- the positive prognosis of his treating psychiatrist (see note of appointment of 19 March 2014);
- things were going reasonably well for Mr Corbin during his return to work placement at a probation and parole office. His tics were present but they “weren’t bad” or bothering him (see notes of appointments of 10 April 2014 and 17 April 2014).
- on 17 April 2014, he reported experiencing no anxiety at all.
- on 1 May 2014, he was enjoying his work but his twitches had “come back and continued”;
- by 8 May 2014, the shakes were worse and were causing him stress. His employer wished him to return to work in a certain role about which he was not happy. His dystonic movements increased as he discussed that option. Ms Gardner wrote on that day to Mr Corbin’s general practitioner expressing her concerns about his movement disorder;
- in May and June 2014, Mr Corbin had financial concerns;
- Cranio-cervical dystonia was diagnosed in July 2014;
- Mr Corbin complained of pain around his left eye and into his forehead in July 2014. Mr Corbin was emotionally up and down thereafter in response to his dystonia and financial pressures;
- in August 2014, he reported his dystonia was “not as bad but still there”. He had been free of dystonic movements while visiting a friend in Wagga Wagga. He put it down to there being no stress and his Botox injections;
- in September 2014, it was reported that Mr Corbin’s dystonia was responding positively to Botox although Mr Corbin was concerned about it;

- in October 2014, Mr Corbin complained of shooting aches and pains in his neck;
- by November 2014, Mr Corbin was reporting that the only way he could get relief from his dystonia was to lie down with a pillow under his head. His twitching was severe and he was experiencing blurry vision, shaking and flashbacks;
- in December 2014, he reported feeling very anxious. He was experiencing trauma symptoms and expressed suicidal ideation. He scored in the severe range for depression and the moderate range for anxiety. He was in extreme distress and anxiety during his appointment on 13 December 2014, in response to the assault and the realisation that the Botox was not curing his dystonia, which was having a significant impact on his life.

[324] After what seems to have been some confusion about his diagnosis in the Medical Tribunal, in January 2015, Mr Corbin decided to institute these legal proceedings. His complaints in the early months of 2015 included complaints about his dystonia, problems with balance, exhaustion, constant headaches, nightmares, sleeping difficulty, crying more than usual, and feeling jumpy. He was afraid of being medically retired. He decided instead to “voluntarily retire”. In July 2015, he complained of the side effects of fluvoxamine, which he had been recently prescribed to assist him with sleep. He was experiencing flashbacks and occasional nightmares.

[325] In August 2015, Mr Corbin reported that he was no longer bothered by his trauma symptoms and had come to terms with his dystonia. He was not distressed about his condition – rather he was distressed by the financial pressure he was under. On 20 August 2015, he told Ms Gardner that he was not concerned about crowds or going out in public. He discussed with Ms Gardner a panic attack which he had on a train, which he put down to its being hot and crowded. He acknowledged that he had suffered panic attacks before the assault at the time his marriage ended.

[326] Ms Gardner observed that Mr Corbin’s progress had been influenced by external factors. She was worried that he would relapse further if his financial situation worsened.

[327] In conversation with Mr Corbin’s legal representatives, on 5 April 2018, Ms Gardner confirmed that she was still treating Mr Corbin. She observed that his hypervigilance was not as extreme as it had been; his mood had improved (and he was no longer suicidal) but he still suffered from depressive symptoms. His flashbacks and nightmares had improved although he still experienced them.

[328] She confirmed that after three treatments, commencing in August 2013, Mr Corbin told her he was doing well and did not think he required further treatment. A week after that, he called her and told her he had been assaulted.

[329] In a conversation with Mr Corbin’s legal representatives on 11 April 2018, she stated that Mr Corbin’s presentation on the surveillance recording was not inconsistent with his presentation to her in the sense that the “extent” of his tremor varied over time and worsened when he was particularly stressed. He was able to go out in public, but reported that it was difficult for him and he avoided it when he could.

[330] I considered Ms Gardner's report of the plaintiff's symptoms to be the most reliable report of his symptoms because of the longevity of their therapeutic relationship.

Dr Donald Todman – neurologist (plaintiff's expert)

[331] Mr Corbin told Dr Todman, neurologist, that, after the assault, he had initially suffered bruising and discomfort around his face, left cheek numbness, mild headache and neck discomfort. Upon his return to work after a few days off, he developed a "woolly" feeling in his head and had difficulty concentrating. The numbness in his left cheek persisted. Within three weeks, he began to experience twitching and tremors around his head and neck. They began on his left side but extended to his right.

[332] He was referred for specialist treatment. Dr John O'Sullivan, diagnosed cranio-cervical dystonia, likely triggered by the trauma.

[333] Mr Corbin told Dr Todman, in 2015, that he felt that he had dealt with the stress of the incident. While he had occasional flashbacks and nightmares, he was not excessively stressed in himself.

[334] In his report dated 30 July 2015, Dr Todman observed Mr Corbin's symptoms which included prominent head and neck tremors and a restricted range of movement in his cervical spine. He noted a slight tremor in his right hand. Dr Todman diagnosed cranio-cervical dystonia with chronic tension type headaches, cervical muscle tension and a loss of sensation in the left B2 distribution.

[335] He recommended further treatment with Botox and medication, under the care of Mr Corbin's treating neurologist. He also recommended physiotherapy.

[336] In Dr Todman's opinion, the dystonia had been triggered by the trauma of the assault. Mr Corbin's bipolar disorder may have rendered him vulnerable to it. He suffered the following permanent impairments:

- a class 1 impairment of his right upper limb (table 13.16) and a 5 per cent whole person impairment;
- cervical spine symptoms: a DRE category 2 condition (table 15.5) and an 8 per cent whole person impairment;
- post traumatic headaches (table 18.1): an additional 3 per cent impairment (that is, pain related impairment which appeared to increase the burden of his condition substantially);
- left facial numbness: 2 per cent whole person impairment

[337] In Dr Todman's opinion, Mr Corbin was unable to work, and whether he might be able to work in the future depended on whether he improved with ongoing therapy.

[338] In his updating report, dated 31 January 2018, Dr Todman noted that there had been little improvement, although Botox injections provided temporary relief. He made no changes to his impairment ratings. He recommended Botox injections. He considered the prospect of employment to be remote.

- [339] He observed that, while the mechanism by which trauma caused dystonia was uncertain, post-traumatic cases of dystonia were well known in the literature. In Mr Corbin's case, it was Dr Todman's view that, on the balance of probabilities, the dystonia was a neurological condition, aggravated by psychological distress.¹⁰⁸ He said that with dystonia generally there was variability in its effect throughout the day, that is, variability in the dystonia – the fixed tone or position due to muscle overactivity – and the tremor, which was superimposed.
- [340] Counsel for the defendant questioned Dr Todman about Mr Corbin's apparent lack of tremor under surveillance. The effect of Dr Todman's responses to those questions was that there was more than one explanation for variability in the tremor and dystonia – apart from Mr Corbin's controlling it to his advantage. Stress or lack of stress could explain changes in it.
- [341] Dr Todman was not prepared to offer any opinion on Mr Corbin's being able to work in certain employment on the basis of a "tiny bit of video". All of the evidence had to be considered. Even if that video showed him walking down steps to McDonald's, he also had chronic neck pain, daily headache and psychological distress that had been diagnosed as a post-traumatic stress disorder.

Dr Gregory Ohlrich – neurologist (defendant's expert)

- [342] Dr Ohlrich provided seven reports about Mr Corbin over the period from 25 June 2014 until 10 April 2018. His reports revealed a change in his opinion over time about Mr Corbin's dystonia/involuntary movements.
- [343] In his first report, prepared for WorkCover, he concluded that there may be a physical neurological component as well as an emotional component to Mr Corbin's involuntary movement disorder. He concluded that Mr Corbin's symptoms were due to the assault.
- [344] On 3 July 2014, Dr Ohlrich was asked whether Mr Corbin's movement disorder was a "physical manifestation of his work related PTSD and exacerbation of [his] adjustment disorder with depressed and anxious mood". He said he was not convinced that the movement disorder was entirely related to Mr Corbin's psychiatric "problems". He described the involuntary movements as "major and disabling" and noted that Mr Corbin told him that his psychiatric symptoms were well controlled.
- [345] In July 2015, Dr Ohlrich thought that Mr Corbin's involuntary movement symptoms were less dramatic than they had been in July 2014. In his opinion, while the involuntary movement disorder may have had an organic neurological cause, he thought it was more likely functional in origin. He would however rely on Dr O'Sullivan's opinion (a movement disorder specialist – who did not give evidence at trial. He did not consider Mr Corbin fit for any work, and he was of that same opinion in October 2015.
- [346] Upon Dr Ohlrich's examination of Mr Corbin on 18 January 2018, he had more or less continuous nodding movements of the head and neck. Botox was helping but it did not stop the tremor. He complained of memory loss, pain and severe headaches. He said he had lost strength in his right arm and had difficulty with gait when his involuntary movements were severe. He was unsteady, and had difficulty with stairs and with

¹⁰⁸ Transcript 2 – 51, ll 6 – 15.

walking any distance. He was suffering from anxiety and panic attacks and was frustrated that he had not been able to fix the problem. His facial tics had caused his teeth to grind down. He had trouble with personal care. It was difficult for Dr Ohlrich to be sure, but he did not think the involuntary movements of Mr Corbin's head and neck were as "major" as they were in 2015. He did not appear to have involuntary movements of his facial muscles. Dr Ohlrich considered that the involuntary movements probably had a psychogenic or functional cause.

[347] In March 2018, Dr Ohlrich was referred to Dr O'Sullivan's progress notes of his treatment of Mr Corbin. He was referred to Dr Harvey Whiteford's report of 6 March 2018. He was referred to Dr Todman's report of 31 January 2018 and an article attached to it about post-traumatic dystonia. Having regard to that material, he stated that he was uncertain about the cause of Mr Corbin's cranio-cervical dystonia. It was therefore difficult to ascertain whether he would be able to return to some form of paid employment. He would defer to the opinion of Dr O'Sullivan as to the nature of the involuntary movements. He acknowledged that psychological factors continued to their severity.

[348] Having watched the surveillance video, Dr Ohlrich observed that Mr Corbin's presentation on it was "completely inconsistent" with his past presentations to Dr Ohlrich. He concluded, having seen the video, that Mr Corbin did not have any neurological impairment or disability. He was – from a neurological point of view – fit to resume work in any capacity for which he was trained by suitability and experience, and fit to return to work immediately.

[349] Under cross-examination, Dr Ohlrich said that he was "very impressed" with the video surveillance "in terms of the normality in which Mr Corbin presented". He referred to Mr Corbin tapping away on his mobile phone and said:

... the video surveillance was so inconsistent with what I had observed when I examined him that it really swayed my opinion considerably. I do not think there is a neurological basis for his condition.

[350] He was referred to the part of the video in which Mr Corbin is on his phone for the purpose of seeking confirmation that Mr Corbin was supporting his phone with his left hand. Dr Ohlrich thought it unlikely and it did not look to him to be possible because Mr Corbin would need to have "an awfully long forearm" to do so. He also observed that there was "absolutely no involuntary movements of the head, neck or shoulders". He was shown that part of the video where Mr Corbin held the right side of his neck. Dr Ohlrich said it was "a pretty minor gesture" that he "wouldn't make much of". He was shown another part of the video where Mr Corbin was holding his neck for a longer period. He said, in effect, that while the neck holding was consistent with the dystonic movements causing neck pain, it was also consistent with other things. He said, in effect, he had had his suspicions from the start and had tried to watch Mr Corbin on the street (presumably after an appointment). He confirmed that he did not think Mr Corbin had a neurological disorder which included dystonia and involuntary movements. He did not think it would be "all that difficult" to mimic those types of involuntary movements over a long period of time to fool both treating and medicolegal practitioners. He emphasised that he had been told by Mr Corbin that he had the involuntary movements all the time and that the only time he achieved relief was when

he lay on a bed with a pillow behind his head: then 90 per cent of the involuntary movements would settle.

Dr Scott Campbell - neurosurgeon (plaintiff's expert)

- [351] Dr Campbell, neurosurgeon, prepared reports dated 16 March 2015 and 21 March 2018.
- [352] In 2018, Mr Corbin reported to Dr Campbell that his left facial weakness was exacerbated by fatigue and caused drooling from the left of the mouth. The numbness and weakness was associated with involuntary movements of the face. The neck pain was occurring most days of the week. It was mild to moderate, and occasionally severe. Neck pain was aggravated by prolonged sitting or standing, car travel and physical activities.
- [353] Neurological examination revealed numbness over the left cheek. There was titubation of the head and a mild to moderate resting hand tremor – greater on the left than the right. There was no evidence of facial weakness or drool.
- [354] In terms of whole person impairment, in 2015, Dr Campbell was of the opinion that the headaches amounted to a 3 per cent whole person impairment; and the left cheek numbness amounted to a 2 per cent whole person impairment. Dr Campbell was not qualified to offer an opinion about the percentage whole person impairment constituted by the tremors and stutters – deferring to the opinion of a neurologist. The neck complaint, which Mr Corbin emphasised in 2018, amounted to a 3 per cent whole person impairment.

Dr Peter Field – psychiatrist (plaintiff's treating psychiatrist)

- [355] On 30 September 2013, by letter to Mr Corbin's general practitioner, Dr Field confirmed his history of bipolar disorder.
- [356] He saw Mr Corbin on 14 October 2013 – four days after the assault, then not again until 12 August 2014. He had by then developed the severe tic and reported problems with headaches and concentration. Mr Corbin told Dr Field that his tic was all day, every day but was not as severe if he was relaxed or involved in an activity which was not stressful. It was then responding to Clonazepam. The tic was more severe if Mr Corbin was under stress or required to attend to a task that required a considerable amount of concentration. Those facts indicated to Dr Field that psychological factors played a part but he was reluctant to say whether the condition was functional or psychogenic.
- [357] On 1 September 2014, Dr Field replied to questions from WorkCover to the effect that Mr Corbin's movement disorder was not related to his pre-existing psychiatric condition (that is, his bipolar disorder).
- [358] On 18 November 2014, Dr Field stated that Mr Corbin had not made good progress and had been more depressed. His neck spasms had not improved and his last Botox injection was nowhere near as effective as his first.
- [359] On 17 September 2015, in a letter address to "To Whom It May Concern", Dr Field offered these observations:

Although there is no agreement from the neurologist and the psychiatrists about the cause of this man's symptoms, there seems to be no doubt that the attack by the prisoner played a crucial role. Dr Foxcroft's report gives a very good account of how psychological factors played a very important role causing this man's problems. I am not able to argue with his conclusion; however I find it very hard to understand how the Botox has such a significant effect if there is no neurological cause for his problems. Whether this condition is psychological or neurological, in my mind there is no question that the attack by the prisoner on 10 October 2013 was the cause of his problems.

- [360] In conversation with Mr Corbin's legal representatives on 19 March 2018, Dr Field emphasised that he had not seen Mr Corbin since 2015 and that he was not a neurologist, nor was he treating Mr Corbin for anything other than his bi-polar disorder.¹⁰⁹ In re-examination, Dr Field agreed that, even if the movement symptoms were neurological, rather than psychogenic, they would vary in accordance with Mr Corbin's stress and anxiety.

Dr Malcolm Foxcroft – psychiatrist (plaintiff)

- [361] Dr Foxcroft prepared two reports about Mr Corbin, dated 17 March 2015 and 20 March 2018, as well as a report prepared jointly with Dr Harvey Whiteford dated 6 April 2017.
- [362] In 2015, Mr Corbin told Dr Foxcroft about the financial, physical, psychological and social consequences of the assault. He told Dr Foxcroft of his previous diagnosis of bi-polar disorder and his psychological treatment which assisted him to come to terms with the end of his marriage. Dr Foxcroft found that there was little in the way of pre-existing psychiatric impairment as a consequence of his "low grade" bi-polar disorder.
- [363] Mr Corbin presented to Dr Foxcroft in a dishevelled state. He wore a beard to cover the scar on his lip. His mood was appropriate. His cognitive functioning was intact on gross clinical testing, although he performed "serial sevens" poorly, was very distractible and ceased the test in frustration. His performance was consistent with an impairment in concentration at a clinical level.
- [364] Dr Foxcroft observed that Mr Corbin presented with a very marked tremor, with "constant nodding and shaking and dystonic movements of his head and also similar grasping and finger claspings movements of his right hand". These movement were involuntary but increased in frequency when he discussed the injury, the symptoms of his post-traumatic stress disorder or his anxiety.
- [365] In Dr Foxcroft's opinion, Mr Corbin had developed a post-traumatic stress disorder as a consequence of the assault. His PTSD symptoms were active, moderately severe, and severely disabling. He was withdrawn and socially isolated. He was fearful of being reinjured; of crowds and of other people. He had active symptoms of intrusive re-experiencing phenomena and related anxiety. His tic disorder occurred "secondarily" to his PTSD. Tic disorders were not uncommonly seen in post military service PTSD.

¹⁰⁹ Transcript 4 – 7, 133 – 4 – 8, 130.

- [366] In 2015, he rated Mr Corbin at 19 per cent on the Psychiatric Impairment Rating Scale (PIRS). His PIRS rating for his bi-polar disorder was 0 per cent.
- [367] In 2015, Dr Foxcroft considered Mr Corbin's prognosis to be poor. PTSD was difficult to eradicate and tended to have a chronic course. His ongoing physical symptoms (tics, pain and numbness) were reminders of his condition. His social and general withdrawal, and his avoidance, reinforced the symptoms of his PTSD. He was totally and permanently incapacitated for all forms of work.
- [368] Dr Foxcroft re-assessed Mr Corbin in 2018. Mr Corbin outlined his living arrangements – that is, with his elderly mother who provided him with supervision and support, despite her frailty. Mr Corbin reported, among other things, that his personal hygiene had decreased. He suffered from flashbacks and nightmares about the assault, but they had decreased in frequency. His hypervigilance and detachment had worsened. He said he had no friends. He had had only transient relationships. He was depressed. His concentration was poor and he had difficulty remembering what day it was. He suffered from panic attacks and mood swings. He wished he could return to the workforce.
- [369] Dr Foxcroft observed that the symptoms of his cervical dystonia had clearly worsened since 2015. Mr Corbin presented with very frequent, quite marked and, at time, painful muscle spasms and tics in his neck, face, head shoulders and arms. He was jumpy and hypervigilant.
- [370] Dr Foxcroft described Mr Corbin's PTSD as severe, with features of secondary cervical dystonia. His PTSD was the primary cause of his psychiatric impairment. Having regard to the worsened neurological symptoms, Dr Foxcroft considered Mr Corbin's impairment had increased to 24 per cent and that he was totally and permanently incapacitated for work. His current symptoms were severe. Dr Foxcroft said: "He reports extension of the symptoms [of dystonia] into his right forearm which [was] causing further difficulties and frustrations for him in day to day activities". He considered Mr Corbin to be experiencing the progressive effects of a chronic, severe, psychiatric disorder with ended his career path and disrupted his lifestyle. His condition could deteriorate in the long term.
- [371] Of the protracted, ongoing legal conflict, Dr Foxcroft said that it was causing Mr Corbin "continued clinical distress", risking his long term outcome and increased his risk of death by suicide.
- [372] Dr Foxcroft had seen the surveillance video of the plaintiff. He observed the following, from a psychiatric perspective:¹¹⁰

... I initially did not know that the videotape was taken after he left my rooms, but it made a lot of sense then. From watching the video, I think there's good evidence that's he's displaying symptoms of post-traumatic stress disorder. He's quite hypervigilant. He sort of scans the environment. He runs – when he walks down to the station, he runs along the rail along the wall, you know, say in a defensive kind of – that defensive sort of posture or position, stands against the wall when he's on the platform.

¹¹⁰ Transcript 3 – 86, 1 20 – 3 – 87, 116.

When he's eating his Macca's he – he is looking around the environment. So it's a consistent sort of video or consistent sort of display of someone who – who might be distressed or moderately distressed or sort of – just hypervigilant, someone with PTSD who's out of their environment. And he – he uses, like, the phone to keep himself distracted while he's waiting for the food. He did seem to struggle getting the ticket a bit, which I wonder whether that's due to his concentration difficulty. So, overall, I didn't really find any inconsistencies with his sort of presentation and the video. I mean, granted he is out of his own and so it had been my sort of expectation that he was having difficulty being out on his own, but then he does describe – display some symptoms which would – or some behaviours which could be consistent with him being, well, nervous and symptomatic ...

... So he was on his own and, I mean, he's described difficulties being out on his own to me, which is then reflected in my first writing. But, I mean, he – he does display evidence of anxiety and so – I mean, the only thing that – the only thing that might be a bit different from my reports, based on that report, would be, yes, he – yes, he is out of his house on his own, you know, which he has some difficulties with, so probably you could argue the point about my rating on the PIRS rating for travel. But otherwise ... the video footage doesn't change my opinion.

- [373] He recalled that Mr Corbin was “pretty stressed” when he came in to the appointment in 2018, but settled down during it.
- [374] Under cross-examination, he agreed that under surveillance, Mr Corbin displayed no tremor in his right hand. Dr Foxcroft said that the tremor was a “very interesting symptom”. He said it was closely connected to levels of anxiety and the other symptoms of PTSD. The fluctuation in the appearance of the symptom was consistent with his views of it.
- [375] He agreed that there was no sign of Mr Corbin's facial tic while he was under surveillance, nor dystonic head movements. He agreed that Mr Corbin displayed no overt signs of distress, nor, while he was leaning waiting for his food, did he look to see who was next to him or behind him.
- [376] Dr Foxcroft did not agree with Dr Whiteford that the plaintiff would be able to return to work within six to 12 months after the end of the litigation. He did not think there would be any change. Mr Corbin had had a lot of symptoms for a long time. He thought it highly unlikely that Mr Corbin would be able to do administrative or console work which required him to leave his house, concentrate and interact with others.

Joint report – Dr Foxcroft and Professor Whiteford

- [377] In accordance with an order made by this court on 16 December 2016, Dr Foxcroft and Professor Whiteford spoke to each other on 5 April 2017 and produced a joint report.
- [378] They agreed that Mr Corbin suffered from PTSD. The difference in their PIRS ratings – 19 per cent (per Dr Foxcroft) 15 per cent (per Professor Whiteford) was not “major” and was explicable by a change in psychiatric symptoms over time and their emphasis

by
Mr Corbin at their separate assessments of him.

- [379] The psychiatrists agreed that Mr Corbin was unfit, when they assessed him, for any form of full-time work. They believed further psychiatric treatment was necessary, targeting his PTSD. Whether he could return to work depended on his response to treatment. They had not then (in April 2017) seen him since 2015 and could not comment on his current impairment.

Professor Harvey Whiteford – psychiatrist (defendant’s expert)

- [380] Dr Whiteford’s report of 13 July 2015 contains an extensive review of Mr Corbin’s history. His mental state examination of Mr Corbin then revealed evidence of clinically significant anxiety and depression. His dystonia was prominent and the frequency and severity of Mr Corbin’s movements was not influenced by conversational content. He met the diagnostic criteria for PTSD with secondary depression. Dr Whiteford deferred to Dr O’Sullivan’s diagnosis of craniofacial dystonia, triggered by the assault. He offered a guarded prognosis for his psychiatric impairment. On the PIR scale, he rated Mr Corbin’s psychiatrist impairment at 15 per cent with a rating of 5 per cent for his pre-existing disability.
- [381] Dr Whiteford re-examined Mr Corbin on 1 March 2018. In his report about that examination, he also discussed the conclave he had had with Dr Foxcroft – noting that the 4 per cent difference in their ratings could be explained by a fluctuation in Mr Corbin’s symptoms at each assessment. They held different views about Mr Corbin’s pre-existing impairment.
- [382] Upon re-examination, Dr Whiteford found that Mr Corbin’s PTSD symptoms had decreased but his neurological symptoms had increased. Dr Whiteford considered numerous reports about Mr Corbin’s neurological symptoms in the course of preparing his report dated 6 March 2018.¹¹¹ He concluded that the general consensus was that Mr Corbin’s dystonic movements were either wholly or partially caused by his psychological symptoms, aggravated by the distress of his involvement in his compensation claim and this litigation.
- [383] Mr Corbin reported his current symptoms to Dr Whiteford – nominating as the most debilitating his headaches with neck pain, poor memory, right hand weakness, an intermittent stutter and his involuntary movements. He also reported impaired cognition.
- [384] Dr Whiteford noted that Mr Corbin presented as very anxious at the start of the assessment, with a mild stutter. His anxiety lessened and the stutter became intermittent and then stopped during the examination. His anxiety did not fully remit during the examination. His cognitive ability fluctuated in accordance with the fluctuations in his anxiety.
- [385] From a psychiatric perspective, the diagnosis was generalised anxiety disorder with residual features of PTSD. Conversion disorder had to be considered as an explanation for his dystonia – the opinion of relevant medical specialists having moved towards the view that Mr Corbin’s movement disorder was not explained by a primary neurological disorder. Dr Whiteford rated Mr Corbin’s overall impairment at 15 per cent (of which he considered 5 per cent to be pre-existing).
- [386] Dr Whiteford requested further medical records which were provided to him. He noted that the records confirmed that his movement disorder was worse with stress. He expressed a belief that Mr Corbin could return to employment once the litigation was over. Mr Corbin was highly motivated to return to employment.

¹¹¹ Tab 22, trial bundle, pages 5 – 6.

- [387] In April 2018, Dr Whiteford was asked to consider Dr Foxcroft's 2018 report in which Dr Foxcroft concluded that Mr Corbin's overall condition had worsened and his impairment rating had increased from 19 per cent to 24 per cent. He noted that Dr Foxcroft considered Mr Corbin's dystonia to be secondary to his PTSD. Dr Whiteford observed that he was not sure that that view was shared by Dr O'Sullivan. He also noted the lack of consensus among the neurologists.
- [388] Dr Whiteford was also shown the surveillance footage. He observed no tremor, no anxiety and no dystonic movements. Mr Corbin's presentation on the video was completely inconsistent with his presentation during his recent assessment with Dr Whiteford. Having seen the surveillance recording, Dr Whiteford's opinion about Mr Corbin's PTSD did not change, but his impairment was, in Dr Whiteford's view, much less than the 15 per cent he had previously estimated. He did not believe that Mr Corbin was disabled from employment. He remained of the view that the litigation was a significant stressor and that upon its conclusion, Dr Whiteford expected Mr Corbin's anxiety and associated impairment to decrease.
- [389] Under cross-examination, Dr Whiteford agreed that the surveillance was "one brief snapshot" of Mr Corbin's presentation. Dr Whiteford was not able to say how Mr Corbin presented at other times.
- [390] It was suggested to Dr Whiteford that the surveillance did not show anything inconsistent with Mr Corbin's previous reports about what he was able to do. Dr Whiteford said, in effect, that it revealed inconsistency. he said:¹¹²

---- The video shows Mr Corbin interacting in a very relaxed manner without any overt signs of panic or anxiety, being able to negotiate all the things he needs to do to purchase at a busy outlet that he didn't avoid with no evidence of tremor or dystonic movements which were overt when I assessed him.

- [391] He agreed that Mr Corbin's looking around while he ate could be consistent with his hypervigilance and that he was likely to be less anxious on his way home than on his way to an appointment. The video revealed to Dr Whiteford that Mr Corbin's symptoms were not present all the time.

Dr Nicholas Burke – occupational physician (defendant's expert)

- [392] Dr Burke, occupational physician, prepared four reports about Mr Corbin – the first dated 9 April 2015 the last dated 10 April 2018.
- [393] Having examined Mr Corbin on 7 April 2015, Dr Burke concluded that he was unable to perform the duties of a custodial correctional officer. His capacity to work was affected by his PTSD and his craniofacial dystonia. Nor could he work in an alternative capacity within QCS. While he would defer to the opinion of a consultant psychiatrist, he considered that Mr Corbin should be permanently restricted from returning to operational duties as a CSO.
- [394] Dr Burke assessed Mr Corbin again on 1 February 2018. Mr Corbin reported his ongoing symptoms. His primary symptoms related to his involuntary movements. He

¹¹² Transcript 5 – 66, ll 12 – 16.

told

Dr Burke that he could do most things, but “paid” for it the next day.

- [395] Dr Burke found Mr Corbin to be a fit looking man in no significant distress. The level of jerkiness in his head was not as profound as he recalled it and there was no significant facial dystonia. He had a reasonable range of motion in his cervical spine. There was diminished sensation over the left maxillary region. There was no abnormality in his lumbar spine movements.
- [396] Dr Burke interpreted other reports as revealing general agreement that Mr Corbin’s dystonia was most likely related to psychosocial factors. He referred to a report by Dr O’Sullivan in which Dr O’Sullivan nominated Mr Corbin’s anxiety and depression as significant contributors to his current symptoms and disability.
- [397] Dr Burke’s general impression was that there had been improvement in Mr Corbin’s symptoms since his last review. He was lucid and cognitively aware and there had been improvement in his ability to perform his activities of daily living. His facial dystonia was “not constant”. It was “not too bad”. It would probably become worse if he was stressed.
- [398] Whether he was able to return to work was dependent upon psychiatric opinion about his PTSD. From a physical point of view, he could work in a driving position or in call centre work. He would need to avoid repetitive or forceful movement of the hand/wrist and prolonged or sustained lifting, carrying, pushing or pulling. Unless his PTSD precluded it, he could work as a security officer, roaming or in a control room.
- [399] Dr Burke was shown the video footage. Mr Corbin’s presentation in it was consistent with his presentation to Dr Burke. There was “minimal” evidence of tics and muscle spasms.
- [400] Under cross-examination, he clarified that from a physical point of view, Mr Corbin could drive, but from a psychiatric point of view, he might not be able to, for example, drive to the city. He considered that Mr Corbin would be able to manage his neck and back symptoms as a courier, including because he would be in and out of a vehicle. He considered Mr Corbin safe to drive. PTSD symptoms might prevent him from working in a busy and hectic call centre – but physically, he could undertake that work. His level of symptoms were not incompatible with that environment. Mr Corbin’s stuttering might – if severe – make it difficult for him to work in a call centre.

Inference to be drawn from the surveillance

- [401] Ms Gardner, who has been the plaintiff’s treating psychologist for many years, said that the plaintiff’s presentation during the recording was consistent with his presentation to her: his tremor varied; it worsened with stress.
- [402] The plaintiff’s expert neurologist said that the plaintiff’s presentation during the recording could be explained by stress or the lack of it.
- [403] The plaintiff’s expert psychiatrist said that the plaintiff’s tremor was a “very interesting symptom”, secondary to his PTSD and closely connected to his levels of anxiety and the

other symptoms of PTSD. The plaintiff's presentation during the recording did not change his opinion.

- [404] The defendant's neurologist found the plaintiff's presentation during the recording completely inconsistent with his past presentations. He concluded from it that the plaintiff did not have any neurological impairment or disability.
- [405] The defendant's psychiatrist was of the view that the plaintiff's dystonic movements were wholly or partially caused by his psychological symptoms, aggravated by his involvement in this litigation. His presentation during the recording was completely inconsistent with his presentation including on 1 March 2018.
- [406] The defendant's occupational physician, who assessed the plaintiff on 1 February 2018, found then his facial dystonia to be "not too bad" but it would probably worsen under stress. The plaintiff's presentation during the recording was consistent with his presentation to the physician.
- [407] I note the difference in the plaintiff's presentation to Dr Burke and Ms Gardner from his presentation to the other experts. I consider it unlikely that the plaintiff deliberately feigned his movement symptoms during his examinations by relevant experts. In reaching that conclusion, I have had regard to the time at which they first arose (that is, not long after the plaintiff attempted a return to work) and his distress upon learning that Botox was not reducing them. I find it likely that the difference in his presentation is explicable by reference to the stress of the neurological and psychiatric examinations, which Mr Corbin would have appreciated were particularly relevant to his monetary success in this litigation.
- [408] I have however formed the view that the plaintiff overstated his movement symptoms to the extent that he asserted that were constant or ever present unless he was lying down.
- [409] I do not have the benefit of the opinion of the plaintiff's treating neurologist, who is a movement specialist to whom the other experts said they would defer. In my view, the movement symptoms are more likely to be functional – but regardless, I find that they are aggravated by stress, particularly in the context of this litigation. I find that they are not ever present. Probably, when the plaintiff is feeling no stress or low stress they are not present. It follows that I consider there to have been some overstatement by the plaintiff of the other physical symptoms which arise as a consequence of the involuntary movements.
- [410] I note that the plaintiff claimed to be hypervigilant at the time of the surveillance recording. The absence of movement symptoms suggests otherwise. I am not persuaded by Dr Foxcroft's evidence that he was showing signs of PTSD during the recording. For example, Dr Foxcroft suggested that the plaintiff struggled to purchase a train ticket because of issues with concentration. In my view, there was nothing remarkable about the plaintiff's use of the ticket machine. And while he may have distracted himself with his phone while waiting for his food, there was nothing remarkable about that. Indeed, he showed no concern for those around him while he was focused on his phone and he adopted a relaxed position against a column at the time.

[411] Consistently with the report of Ms Gardner, I find that the plaintiff's PTSD symptoms are not as severe as they once were. However his symptoms are such that finding employment will be difficult for him.

General damages

- [412] General damages are to be assessed by reference to the *Workers Compensation and Rehabilitation Act 2003* and *Workers Compensation Rehabilitation Regulation 2014*.
- [413] The parties agree that the plaintiff's dominant injury is psychological. The parties acknowledge the difficulty in classifying (under the Regulation) the plaintiff's dystonia. The plaintiff argues that, because of its association with his PTSD, his mental disorder ought to be classified as serious, attracting an ISV of 31. The plaintiff submits that having regard to his neck pain, headaches and other injuries, his ISV should be at the top of the range for the dominant injury – that is, at 40.
- [414] The defendant submits that the plaintiff's mental disorder ought to be assessed as moderate, with an ISV of 8. Applying multiple injury uplift, the plaintiff submits the appropriate ISV is 12.
- [415] I consider an ISV of 20 appropriate – which leads to general damages in the sum of **\$34,100**.

Past economic loss

- [416] I find that the plaintiff experiences involuntary movements that vary from day to day and with stress. I find that he has some impairments of memory and concentration – although he gave his evidence with no particular sign of weakness in those fields.
- [417] I find that overall his psychological symptoms are not as intense as they were in 2015. I find that his psychological injuries are the primary impediment to his working in the fields in which he is suited or trained.
- [418] The defendant argues that I should assess the plaintiff on the basis of three years of incapacity, and beyond that, I should assess him as capable of the sort of work referred to by Dr Burke, which included security work, Uber driving or Taxi driving, courier work, or call centre work. I note that Dr Burke emphasised that his focus was on Mr Corbin's physical capacity and that his opinion was subject to the opinions of the psychiatrists about Mr Corbin's PTSD.
- [419] The plaintiff submits that I ought to proceed on the basis that Mr Corbin is completely unemployable.
- [420] I am satisfied that if the plaintiff had been able to find work he was capable of doing after the assault he was likely to have attempted it.
- [421] In my view, security work and Uber and Taxi driving (especially with passengers in the back seat) carry risks for the plaintiff similar to the risk of his returning to work as a CSO (which neither party suggests he can do). Courier work or call centre work might be possible but it depends on when it is reasonable for Mr Corbin to expect some relief from his PTSD. The evidence about this is unclear.
- [422] I consider the plaintiff to have been unemployable from the date of the assault until now, but will apply a discount of 15 per cent to my assessment of his past economic loss to reflect the risk that the plaintiff's pre-existing psychological condition and other

vicissitudes may have impaired his capacity to work, particularly given the stressful nature of custodial work; and, having regard to the uncertainty about his recovery from PTSD, a further discount of 5 per cent to deal with the possibility that some work (like call centre work) may have been available to him on a casual basis from time to time.

[423] From the date of the assault, 10 October 2013, until 1 May 2019 is about 5 years and 28 weeks (or 288 weeks). For 20 weeks, Mr Corbin was paid by his employer.

[424] I consider the calculation of past economic loss at the rate of \$950 per week for 268 weeks, discounted by 20 per cent to be appropriate: a sum of **\$203,680**.

Interest on past economic loss

[425] The plaintiff received WorkCover weekly benefits of \$39,965.08, to be subtracted from the sum above for the purposes of the interest calculation. That is, interest is to be calculated on the sum of \$163,714.92 – at the rate of (2.667 per cent divided by 2) for 5 years: a sum of **\$10,915**.

Past loss of superannuation

[426] At 9.5 per cent - **\$19,349.60**.

Future economic loss

[427] The defendant submits that the plaintiff ought to be treated as “not incapacitated for a variety of work, including call centre work and delivery driving”. The defendant submits that the difference between the likely income of those jobs and the plaintiff’s work as a CSO is \$200 a week.

[428] The plaintiff submits that he will never be able to work again – or if he can, it would be limited to light work for a limited number of hours per week. He submits that I should assume a loss of \$950 per week.

[429] I do not consider it likely that the plaintiff would have worked until he was 67 as a corrective services officer – given the nature of the work and his attitude to it as revealed in the IOMS. I consider it likely that he would have worked in that profession until he was 60.

[430] I consider that his psychological conditions and movement symptoms are likely to persist for some uncertain time into the future. He is an older person and it is reasonable to assume that the labour market would be challenging for him. I do not find that the surveillance represents the plaintiff’s presentation on a daily basis. I consider it an example of his presentation on “good” days. I consider his residual earning capacity to be limited.

[431] Assuming 10 more years of employment, at \$950 per week, and applying the multiplier of 413 (5 per cent) gives an amount of \$392,350, which I consider ought to be discounted by 30 per cent to allow for contingencies (including the prospect of some employment and the complications of the plaintiff’s pre-existing vulnerability). This results in an amount of **\$274,645**.

[432] I calculate the future loss of superannuation at **\$31,034**.

Past special damages (including interest)

[433] I accept the plaintiff's calculations: **\$37,228**.

Future special damages

[434] It is unlikely that the plaintiff will need psychiatric treatment into the future to deal with his psychological injuries (although he might occasionally need to see a psychiatrist for a review of his bi-polar medication). It consider the plaintiff's submission that he will require Botox injections until he is 80 to be speculative. I accept that he will have medication expenses and may benefit from some physiotherapy. A global assessment of **\$15,000** would be appropriate.