SUPREME COURT OF QUEENSLAND

CITATION:	*White v Calstores P/L* [2006] QCA 535
PARTIES:	**SONJA WHITE** (plaintiff/respondent) **v** **CALSTORES PTY LTD** ACN 000 175 342 (defendant/appellant)
FILE NO/S:	Appeal No 5418 of 2006 DC No 46 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	12 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2006
JUDGES:	McMurdo P, Keane JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Judgment in favour of the respondent set aside** **3. Respondent's action against the appellant dismissed** **4. Respondent to pay the appellant's costs of the appeal**
CATCHWORDS:	TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - GENERALLY - appellant employed respondent as console operator at service station and convenience store - armed robbers held up shop while respondent was working - respondent suffered psychiatric illness as result of robbery - respondent brought action for damages for negligence and breach of statutory duty - respondent successful before learned trial judge - learned trial judge found need for permanent security guard - learned trial judge did not find that arrangements for random checks by security guards were not reasonably adequate - whether the learned trial judge's judgment in favour of the respondent can be sustained *Workplace Health and Safety Act 1995* (Qld), s 28 *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer* [2006] NSWCA 45, cited *Water Board v Moustakas* (1988) 180 CLR 491, cited

COUNSEL: D V C McMeekin SC, with M T O'Sullivan, for the appellant
J W Lee for the respondent

SOLICITORS: Bruce Thomas Lawyers for the appellant
Keith Scott & Associates for the respondent

[1] **McMURDO P:** I agree with Keane JA.

[2] **KEANE JA:** At about 8.00 pm on the night of 27 October 1998, armed robbers held up a service station and convenience store ("the shop") operated by the appellant at Kingston. The respondent was employed by the appellant as a console operator at the shop. The respondent suffered a psychiatric illness as a result of the robbery.

[3] The respondent brought an action for damages for negligence and breach of statutory duty against the appellant. The respondent's claim was upheld by the learned trial judge on the basis that the appellant had failed to employ a full-time security guard for the night shift at the shop.

[4] In this Court, the appellant contended that it was not open to the learned trial judge to uphold the respondent's claim on this basis, there being no pleaded case, or evidence, to support the conclusions that a reasonable or practicable response to the risk of injury to the respondent required the provision of a full-time security guard and that the employment of such a guard would have prevented the respondent's injury.

[5] I will summarise the respondent's case and the learned trial judge's findings before proceeding to a discussion of the appellant's contentions.

The respondent's case at trial

[6] On the night in question, an automatic door locking mechanism controlled entry into the shop. This mechanism was worked by remote control by the console operator to permit entry and egress to each customer in turn. According to the respondent, she was serving one of her regular customers, who was referred to as "W", when she saw the sliding doors of the shop open and "two dark figures standing there holding guns".[1] In response to the demands of the armed men, she put some money into a bag, and the offenders then left.

[7] The respondent's pleaded case was that the psychiatric injury sustained by her as a result of this harrowing experience was suffered by reason of the appellant's negligence in failing to provide her with a safe place of work and a safe system of work. These failures were particularised as relating to the adequacy of the respondent's training, the inadequacy of lighting in and around the shop, and the inadequate or defective security system in place at the shop. It was also alleged by the respondent that, although the appellant had engaged agents to conduct checks by a security guard on a random basis, the appellant had failed to comply with a request by the respondent that the security guard attend at the premises for a period of about 10 minutes at around 8.00 pm.

[8] The respondent also claimed that the appellant breached its duty to her under s 28(1) of the *Workplace Health and Safety Act 1995* (Qld) by its "failure to ensure the

---

1 *White v Calstores Pty Ltd*, unreported, DC No 46 of 2003, 2 June 2006 at [4].

health and safety at work of the [respondent]". In this regard, it was alleged that the appellant had failed to identify the workplace health and safety risks to which the respondent was exposed and did not take appropriate steps to eliminate those risks.

[9] At trial, the respondent gave evidence that she had trouble with the locking mechanism of the sliding glass doors about which she had previously complained to the appellant. As a result, so it was said, the robbers gained entry. The respondent's evidence-in-chief was that, at the time of the incident in question, the automatic doors had failed to lock, despite the respondent operating the remote control to lock the doors.

The trial judge's findings

[10] The respondent's evidence in relation to the failure of the automatic doors was not accepted by the learned trial judge. His Honour was unable to say why the doors were not locked when the robbers entered.[2] His Honour's difficulty in this regard is readily understood. In the respondent's cross-examination, she acknowledged that she was not sure that she had locked the doors to the shop before the robbers entered. Another employee of the appellant, who had been working in the shop before the respondent's shift commenced, gave evidence at trial that the doors were working well during her shift. This employee also gave evidence of a conversation with the respondent about the robbery after the incident. In this conversation, the respondent did not suggest that the robbers had been able to gain access to the shop because the doors malfunctioned. It was not suggested to this witness that her account of the conversation with the respondent was incorrect.

[11] The learned trial judge did not accept that the respondent's training had been inadequate or that the shop was insufficiently lit. His Honour found that the respondent had followed the appellant's instructions "so far as was practicable during the course of the evening to keep the doors to the shop premises locked so as to control the entry of persons into the shop".[3]

[12] The learned trial judge went on, however, to find that:[4]

> "it is common knowledge that such premises are high risk venues and become soft targets for such offences, more particularly where there is only one operator on duty at such a time as in the instant case … the employer breached its duty of care to provide a safe place of work; safe system of work and to ensure the health and safety at work of the [respondent] in that when it required the [respondent] to work alone in the shop premises at night it should have provided her with the assistance of a security guard to police and/or secure the premises during the night shift at which time there was a foreseeable risk of injury to the [respondent] from the type of occurrence which in fact occurred …"

The arguments on appeal

[13] The appellant argued that there was no basis in the respondent's pleaded case, or in the evidence called on her behalf, to support the learned trial judge's conclusion.

---

2 *White v Calstores Pty Ltd*, unreported, DC No 46 of 2003, 2 June 2006 at [35.11].

3 *White v Calstores Pty Ltd*, unreported, DC No 46 of 2003, 2 June 2006 at [35].

4 *White v Calstores Pty Ltd*, unreported, DC No 46 of 2003, 2 June 2006 at [35].

[14] It was a matter of criticism by the appellant that the learned trial judge did not expressly advert to whether the use of a full-time security guard was reasonably necessary or practicable. The appellant contended that the learned trial judge had wrongly concluded that the appellant was negligent in not providing a full-time security guard without holding that the random checks made by security guards were not a reasonably adequate response to the risk of robbery in all the circumstances. In this regard, in addition to the automatic doors, there was video surveillance of the shop, the premises were well lit, and the shop had a duress alarm.

[15] The respondent sought to answer the appellant's criticisms of the learned trial judge's reasons with the argument that the appellant was in error in attributing to the learned trial judge the conclusion that the appellant's negligence lay in its failure to provide a full-time security guard. The respondent contended that his Honour had founded his decision upon a narrower case advanced by the respondent at trial, viz that there should have been further protection afforded the respondent by a visit by a security guard at about 8.00 pm on the night in question. On the respondent's behalf, it was contended that she did not assert, and that the learned trial judge did not hold, that the appellant's negligence lay in its failure to provide a full-time security guard.

[16] The problem with the respondent's argument is that the learned trial judge's decision is intelligible only on the footing that the appellant was duty bound to have a security guard in attendance at all times during the night in question. While the respondent accepts that it did not, and could not, argue that the appellant was not duty bound to provide the respondent with the protection of a full-time security guard, the respondent is not able to identify any other rational basis on which it can be said that the appellant breached its duty of care to the respondent in failing to have a security guard check the premises at about the time of the robbery.

[17] In this regard, the learned trial judge did not find that the arrangements made by the appellant for random checks by security guards were not reasonably adequate, in combination with the other precautions taken by the appellant, to address the risk of armed robbery at night. There was no reason why a random visit by a security guard should have occurred at about 8.00 pm, rather than at some other time in accordance with appropriate random checks. The respondent gave evidence that she had asked the security guard to visit the shop at about 8.00 pm; but there was no suggestion that she relayed this request to the appellant or that there was any other reason why the appellant should have known that the random security checks were not sufficient by way of reasonable precautions for the respondent's safety.

[18] Accordingly, if the appellant was to be held liable to the respondent because no security guard was present at 8.00 pm on the night of the robbery, that could only be because random checking by a security guard should, as a matter of reasonable precaution, have been replaced by a full-time security guard.[5] Only in that way could the presence of a security guard at the precise moment of the robbery been guaranteed.

[19] It may well be that empirical evidence of the extent of armed robberies of service stations at night, either generally or in the area in question, would justify the conclusion that a full-time armed guard was reasonably necessary to allay the risk of

---

5 *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer* [2006] NSWCA 45 at [84] – [91].

operating this service station at night. But that was not the case which the respondent pleaded, or sought to establish by evidence, in this case. I am, therefore, compelled to conclude that the judgment in favour of the respondent cannot be sustained on the basis found by the learned trial judge.[6]

[20] The respondent sought to sustain the judgment in her favour by arguing that the automatic doors were defective; but this line of argument is foreclosed by the learned trial judge's inability to find that a defect in the operation of the automatic doors led to the intrusion of the robbers. As I have mentioned, there were substantial evidentiary difficulties in the way of such a finding, and it cannot be said that his Honour erred in failing to make the necessary finding of fact in the respondent's favour. It is certainly not open to this Court to bridge the gap in the respondent's case by making a finding of fact which the learned trial judge, for good reason, was not prepared to make.

Conclusion and orders

[21] I am, therefore, of the opinion that the judgment in favour of the respondent cannot be sustained and the appeal must be allowed.

[22] I propose the following orders:

1. The appeal is allowed and the judgment in favour of the respondent set aside.
2. The respondent's action against the appellant is dismissed.
3. The respondent must pay the appellant's costs of the appeal.

[23] **CHESTERMAN J:** I agree with Keane JA.

---

6 *Water Board v Moustakas* (1988) 180 CLR 491 at 496 – 498.