SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v Miles* [2011] QCA 250
PARTIES:	**BRISBANE CITY COUNCIL** (appellant) **v** **RICHARD KENNETH MILES** (respondent)
FILE NO/S:	Appeal No 591 of 2011 DC No 1105 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2011
JUDGES:	Margaret McMurdo P, Margaret Wilson AJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – special relationships and duties – employer and employee – where the respondent was employed by the Brisbane City Council as a bus driver – where the respondent stopped his bus at 7 pm at the terminus to use toilet facilities only accessible by employees – where the footpath leading to the toilet facilities was overgrown with trees and shrubs and was inadequately lit – where the respondent carried the cash tray from the bus to the toilet facilities in accordance with the appellant's policy – where upon returning to the bus the respondent was ambushed when an assailant jumped from the bushes – where the assailant demanded the respondent hand over the bus money and his own wallet – where the respondent attempted to defend himself – where the respondent suffered physical injury and psychological symptoms – whether the risk of injury to the respondent was reasonably foreseeable TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – causation – generally – where the primary judge did not make a finding about the condition of the assailant – where appellant submitted the condition of the assailant was a factor of significance – where

there had been no similar incidents at the terminus – whether the appellant's breach of the duty of care caused the assault

Coca Cola Amatil (*NSW*) *Pty Ltd v Pareezer* [2006] NSWCA 45, considered
Lusk v Sapwell [2011] QCA 59, considered
White v Calstores Pty Ltd [2006] QCA 535, considered

COUNSEL: S C Williams QC and M X Kehoe for the appellant
L A Stephens for the respondent

SOLICITORS: Brisbane City Legal Practice for the appellant
Roberts & Kane for the respondent

[1] **MARGARET McMURDO P:** I agree with Mullins J's reasons for dismissing this appeal with costs.

[2] **MARGARET WILSON AJA**: I agree with the order proposed by Mullins J and with her Honour's reasons for judgment.

[3] **MULLINS J:** While employed by the appellant as a bus driver, the respondent was assaulted by an unknown assailant on 28 June 2006 and suffered an injury to his shoulder with consequent psychological symptoms. The respondent's claim against the appellant for damages for negligence was successful: *Miles v Brisbane City Council* [2010] QDC 501 (the reasons). The learned primary judge found that the risk of an assault to the respondent was reasonably foreseeable, the appellant had failed to take measures reasonably open to it to protect the respondent from that risk, and the breach by the appellant of its duty of care to the respondent was the cause of his injuries. The appellant appeals against the primary judge's finding of liability in favour of the respondent.

The primary judge's findings

[4] On the evening of the assault the respondent was working a shift as a bus driver when, at or about 7pm, he stopped his bus at the Balmoral bus stop located in Byron Street, near its intersection with Apollo Road. Toilet facilities that were accessible to employees of the appellant and were locked to prevent public use were located at the end of Apollo Road, approximately 50 to 60 metres from the bus stop. Consistent with the appellant's policy, the respondent was carrying his cash tray from the bus when he walked to the toilet to use the facilities. On his return to the bus, he was ambushed when the assailant jumped from a bush between the bus stop and the toilet facilities. The respondent was walking on the footpath on the side of Apollo Road that adjoins Byron Street and was overgrown with trees and/or shrubs. At the time of the assault the area was poorly lit. The assailant demanded the respondent hand over the bus money and his own wallet. The respondent attempted to defend himself and was struck on his shoulder by the assailant wielding a piece of wood or a branch.

[5] The primary judge found at [16] of the reasons:

> "It is neither farfetched nor fanciful that a man working alone at night carrying cash takings (as required by his employer) in a relatively remote, poorly lit, and materially overgrown dead-end area might be assaulted."

The primary judge described the incident at [25] of the reasons as "a very unsophisticated attempt at robbery" and that at the time of the assault the assailant was aware that the respondent had, or was likely to have, in his possession bus fare money as well as his own money.

[6] The primary judge was not satisfied on the evidence (at [26] of the reasons) that a lockable space provided by the appellant on the bus or, if it were otherwise the policy of the appellant, requiring bus moneys to be left on the bus, would have probably avoided the injury to the respondent.

[7] The allegation of negligence that the appellant had failed to take any or any adequate steps to provide security measures to protect its bus drivers from the risk of assault, including failing to provide adequate lighting at the bus stop and between the bus stop and the toilet facilities and failing to trim the trees and bushes at and between the bus stop and the toilet facilities was dealt with by the primary judge at [31] of the reasons:

> "As identified above, it was foreseeable that an attempted robbery and or assault might occur in the subject environment. It is also clear that the consequences of such criminal actions could be very serious. The evidence is clearly to the effect that at the date of the incident, the environment surrounding the facilities was inadequately lit and in an overgrown state, thus providing an environment where a person in the position of the plaintiff at night, was at risk of being robbed. The overgrown nature of the area not only provided a place of hiding but made even more ineffective the inadequate lighting that existed at the time. The fact that some of this growth, indeed even that which provided the initial hiding place of the assailant, was located on private property provides no adequate excuse in my view."

[8] Following the assault of the respondent, the appellant had one of its employees prepare a report of the incident (exhibit 6) which recommended improving the lighting at the toilet and bus stop and cleaning up overhanging trees and bushes. The primary judge found (at [32] of the reasons) that in response to that report the appellant carried out works, including trimming trees and further lighting. The primary judge did not find that the appellant constructed the fence on the Apollo Road boundary for the house property at the corner of Byron Street and Apollo Road (the corner property) from where the foliage had been overgrown or constructed a new footpath in Apollo Road. The primary judge observed (at [32] of the reasons) that:

> "Even disregarding the construction of the fence and new footpath, the physical difference in the environment before and after the proposed works is significant."

[9] The primary judge noted at [34] of the reasons that evidence of what occurred after the assault by way of remedial works could not constitute an admission of negligence on the part of the appellant, but it was relevant in considering what could have been reasonably done to prevent or reduce the risk of injury without interfering with the work requirements of the appellant.

[10] In relation to an argument advanced on behalf of the appellant that the respondent must fail because he had not established by expert evidence a causal link between

the alleged breach of duty and the assault, the primary judge concluded at [36] of the reasons:

> "I do not consider it necessary for an expert to give evidence to establish that the prospects of a robbery occurring at night would be materially diminished by the provision of adequate lighting and a significant reduction of hiding places. In my view, it would offend common sense to conclude that expert evidence was required to establish that such works would be likely to achieve a real reduction (even if not elimination) of the risk to the plaintiff. The defendant ought to have provided adequate lighting and otherwise a more open and safe area surrounding the facility, as a 'reasonable precaution' to address the risk of robbery at night."

[11] The provision of adequate lighting and reduction of hiding places was found (at [37] of the reasons) to provide a less attractive venue for any person inclined to commit robbery and gave the intended victim much better prospects of observing the assailant "earlier rather than later" and thereby having the opportunity to take appropriate action. The primary judge was satisfied (at [38] of the reasons) that the cost of carrying out the works was not unreasonable having regard to the risks involved.

Summary of the appellant's submissions

[12] The appellant submits that errors were made by the primary judge as:

(a) there was no reasonably foreseeable risk of injury to the respondent from an assault;

(b) there was no expert evidence to support either the characterisation of the risk of injury as foreseeable prior to the appellant's remedial action, or the extent to which that remedial action reduced that risk;

(c) there was no evidence to support a causal link between the appellant's failure to provide adequate lighting and a more open environment at the Apollo Road terminus and the assault.

[13] Reference had been made by the primary judge in the reasons at [11] and [15] to passages in *Sapwell v Lusk* [2010] QSC 344, a decision at first instance where an employer was found liable for damages for negligence where the employee was sexually assaulted by a customer of the employer's business, and which was overturned on appeal in *Lusk v Sapwell* [2011] QCA 59 (*Lusk*). The appellant is not critical of the primary judge's statement in the reasons of the relevant legal principles, but the application of those legal principles to the facts of this matter. The successful appeal in *Lusk* therefore does not dictate the outcome of this appeal.

Was there a reasonably foreseeable risk of injury from an assault to a bus driver at the Apollo Road terminus?

[14] The appellant accepts there was a risk of injury from an assault to a bus driver who was walking between the toilet block and the bus at the Apollo Road terminus, but submits that it was not a reasonably foreseeable risk of injury. The appellant relies on evidence that there had been no prior similar incidents or assaults at or near the Apollo Road terminus nor complaints by the staff regarding the condition of the terminus. Although the appellant also relies on evidence there had been very few similar incidents across the entire Brisbane Transport network, there was little

evidence before the primary judge of the conditions at other termini and the respondent's claim fell to be determined by reference to the condition of the subject location.

[15] The photographs tendered at the trial (exhibit 1) showed the state of the footpath in Apollo Road between Byron Street and the Apollo Road ferry terminal and the appellant's toilet block at the time of the assault and then after remedial works had been procured by the appellant and additional works undertaken by the owner of the corner property. There was evidence before the primary judge that at the time of the assault the overgrown foliage from the corner property obscured illumination from an existing light on the footpath. Even disregarding that it was not the appellant that caused the owner of the corner property to fence the property, the photographs of the site of the assault after remedial action had been undertaken show that the implementation of the recommendations in the appellant's report of the incident resulted in a clear (and well lit) footpath.

[16] The appellant submits that if a prospective analysis of the risk of a robbery had been undertaken prior to the assault, there were many aspects in the layout of the area that could have been identified for remedial action and the finding of the primary judge was based on hindsight after the assault, rather than a prospective analysis of the risk of injury in that location to the appellant's employees: cf *Lusk* at [22]-[24]. The appellant points out that there were a number of places that an assailant could hide, including the shed that forms the ferry terminal or behind the toilet block, so that cutting back the trees and shrubs overhanging the footpath and providing a well lit area in the vicinity would not eliminate all hiding places for an assailant.

[17] The appellant's argument incorrectly assumes that the response of a reasonable person in the position of the appellant to the prospect of the risk of injury to its bus drivers from a robbery would be to eliminate all hiding places for potential assailants. As the primary judge noted in [37] of the reasons, addressing the risk of robbery is not only about reducing hiding places, but about making the environment more open, so that it was a less attractive venue for a robbery and a bus driver would have the opportunity to take appropriate action to avoid the potential robber.

[18] Having regard to the obvious remedial works of eliminating the overgrowth from the footpath and improving the lighting, the primary judge did not err in concluding that there was a reasonably foreseeable risk of injury from an assault to a bus driver at the Apollo Road terminus in the state that it was when the respondent was attacked.

Could breach of the duty of care be proved without expert evidence?

[19] The appellant submits that *White v Calstores Pty Ltd* [2006] QCA 535 (*White*) supports the proposition that empirical evidence of the extent of the risk of the criminal activity should have been called by the respondent to establish that the precautions which the appellant is alleged to have failed to take were reasonably necessary in the circumstances. In *White* the plaintiff who was employed as a console operator at a service station and convenience store had succeeded at first instance in proving the liability of the defendant for damages for negligence arising from an armed robbery, as the defendant as the operator of the business had failed to employ a full time security guard for the night shift at the shop. The judgment at first instance was set aside on the basis that the finding that the defendant was duty

bound to have a security guard in attendance at all times during the night in question was not the case which the plaintiff had sought to establish. Keane JA (with whom the other members of the court agreed) stated at [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 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."

[20] This observation of Keane JA was clearly not intended to require expert evidence in any case before an employee could prove breach of the employer's duty of care. The suggestion for empirical evidence in *White* was related to the very expensive precaution that was found by the judge at first instance as required of the employer. It must depend on the circumstances of the particular case as to whether expert evidence should be adduced by a plaintiff to prove breach of the duty of care.

[21] The primary judge's conclusion at [36] of the reasons was expressed as based on common sense after viewing the photographs of the subject location at the time of the assault and after the remedial works. That conclusion was supported by the evidence of the respondent who expressed his view (at AB 39) that the tidying and better lighting of the footpath would have eliminated the element of surprise that gave an advantage to his assailant.

[22] Again, the circumstances that gave rise to the risk of injury to the respondent were not outside the range of common experiences. The submission that the respondent could not succeed without the benefit of expert evidence to assist in the characterisation of the risk of injury or the effect of the remedial action on that risk of injury must be rejected.

Did the appellant's breach of the duty of care cause the assault?

[23] The primary judge did not make a finding about the condition of the assailant, but there was evidence from the respondent (at AB 35) that the assailant was incomprehensible when he first spoke to the respondent from which the appellant submits it could be inferred that the assailant was under the influence of drugs or alcohol and the attempted robbery was unplanned. The appellant submits that such condition of the assailant was a factor of significance that was not given any or any sufficient weight by the primary judge. In conjunction with evidence that there had been no remotely similar incidents at the Apollo Road terminus, similar incidents across the entire transport network in Brisbane were extremely rare, and there had been no complaints by any of the appellant's employees regarding safety concerns at the subject location, the appellant submits there was no causal relationship between the state of the foliage and lighting and the attempted robbery. This is on the basis that it was more probable than not that the attempted robbery was due to the intoxicated state of the assailant.

[24] The appellant relies on *Coca Cola Amatil* (*NSW*) *Pty Ltd v Pareezer* [2006] NSWCA 45 (*Pareezer*) where a contractor of Coca Cola Amatil (NSW) Pty Ltd (Coca Cola) involved in the refilling of machines dispensing soft drinks at a TAFE at 4pm on a week day was shot was unsuccessful in proving that Coca Cola's conduct was a cause of his injury. It was found that the contractor was shot by an

assailant who had no regard for human life and was prepared to take extreme risks for negligible financial gain and was violent and anti-social. It was held that the contractor did not establish that any reasonable precautions which Coca Cola might reasonably have taken to protect him from armed robberies would have been likely to have prevented his injury from an irrational assailant.

[25] The facts in *Pareezer* were extreme and put that case into a very different category to the facts of the assault on the respondent. The risk of injury to the respondent that was reasonably foreseeable arose from an assault by a robber, whether the robber was intoxicated or not. In the circumstances, it was open to the primary judge to find (at [36] of the reasons) that the failure of the appellant to take action in relation to the overgrown foliage and inadequate lighting at the Apollo Road terminus prevented the respondent from observing the assailant before the attack and having the opportunity to take appropriate action. There was therefore evidence to support a causal link between the appellant's failure to provide adequate lighting and a more open environment at the Apollo Road terminus and the assault on the respondent. There was no error in the primary judge's conclusion that the breach by the appellant of its duty of care to the respondent was the cause of his injuries.

Order

[26] It follows that the appeal should be dismissed with costs.