SUPREME COURT OF QUEENSLAND

CITATION:	*Guorgi v Pipemakers Australia Pty Ltd* [2013] QSC 198
PARTIES:	**MICHAEL GUORGI** (plaintiff) v **PIPEMAKERS AUSTRALIA PTY LTD** (ACN 061 712 365) (defendant)
FILE NO/S:	BS 9525/11
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28, 29 and 30 May 2013
JUDGE:	Boddice J
ORDER:	**The plaintiff's claim is dismissed. I shall hear the parties as to costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – GENERALLY – where the plaintiff claims damages for psychiatric injuries caused by the defendant's negligence and/or breach of contract – where the defendant was aware it was commonplace for racial jokes and banter to occur in the workplace – where the plaintiff actively participated in the racial jokes and banter and made jokes referring to his own ethnicity – where two employees of the defendant wore Ku Klux Klan-like masks and created a makeshift toilet with the words "Arab bullshit bowl" – where the incident was reported and the two employees' employment terminated – where one of the employees was re-employed – where the plaintiff alleges he developed as a consequence, post-traumatic stress disorder and depression – whether the plaintiff has established on the balance of probabilities that it was reasonably foreseeable he would suffer a psychiatric injury as a consequence of the defendant's alleged breach of duty *Hegarty v Queensland Ambulance Service* [2007] QCA 366,

followed
Koehler v Cerebos (Australia) Ltd (2002) 222 CLR 44; [2005] HCA 15, followed
Lusk & Anor v Sapwell [2011] QCA 59, considered
Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471; [2007] NSWCA 377, followed
New South Wales v Fahy (2001) 205 CLR 434, cited
Purkess v Crittenden (1965) 114 CLR 164, cited

COUNSEL: R J Lynch for the plaintiff
M T O'Sullivan for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Jensen McConaghy for the defendant

[1] The plaintiff claims damages for personal injuries allegedly sustained in the course of his employment with the defendant. He alleges those personal injuries were occasioned by its negligence and/or breach of contract. The defendant denies the plaintiff suffered the alleged personal injuries and, further, that it was negligent or in breach of contract.

[2] The issues in dispute are the circumstances of the incident said to give rise to the personal injuries, the nature and extent of any personal injuries and whether those personal injuries were caused by any negligence or breach of contract on the part of the defendant.

Background

[3] The plaintiff was born in Melbourne on 11 November 1971. Both his parents were born in Egypt. After completing Grade 12, the plaintiff attended university but did not complete this course of study. Instead, he commenced full-time work. He moved to Queensland in approximately the year 2000. He undertook various forms of employment before moving to Brisbane in around 2007.

[4] The plaintiff initially commenced working for the defendant through a labour hire agency. He commenced full time employment with the defendant as an extruder operator on 3 September 2007. On commencement, he received an induction booklet containing various policies and procedures. One of those policies dealt with equal opportunities in the workplace. It required employees not to discriminate on the basis of race, and to inform management if the employee became aware of such impropriety. The plaintiff did not read the induction booklet.

[5] On 1 July 2008 the plaintiff received a formal final disciplinary warning for failing to follow correct quality procedure in respect of the defendant's product. At that stage, the plaintiff was working in the laboratory. The plaintiff received a further final warning on 14 May 2009 for incorrect product readings. At that stage, he was working on the factory floor in the position of a leading hand. He was demoted as a consequence of that disciplinary matter. The plaintiff remained in the defendant's employ as an extruder operator until he resigned his position in February 2010.

[6] The defendant manufactures plastic piping of various types and sizes for use in the building industry. It operates 24 hours per day, seven days a week, with two 12

hour shifts per day. Factory employees work four 12 hour shifts consecutively, followed by four days off. Each shift is overseen by a shift supervisor. That person answers to the factory manager, who usually only worked each week day.

[7] The defendant's workforce is multi-national. At the relevant time, it comprised a large number of Islanders, some New Zealanders and several Australians. The plaintiff was the only person of Middle Eastern descent.

[8] The plaintiff alleges the defendant did not develop or implement policies with respect to bullying, harassment and discrimination in the workplace, and condoned the use of racially orientated jokes and banter. Further, the defendant was aware it was commonplace for racially orientated jokes and banter to occur in the workplace.

Claim

[9] The claim arises out of an incident during a shift which commenced on the evening of Saturday, 14 November 2009 and finished on the morning of Sunday, 15 November 2009. There were a number of workers on the shift, including the plaintiff and employees by the name of Noble and Moore. The shift supervisor was Anthony St Clair.

[10] In the early hours of Sunday, 15 November 2009, the plaintiff found, in a lunch area adjacent to the factory, a mock toilet made from PVC material, complete with toilet roll holder and toilet roll. Written on the toilet seat were the words "Arab bullshit bowl". When the plaintiff returned to the factory to identify who was responsible for it, he saw Noble and Moore wearing Ku Klux Klan-like masks. The plaintiff alleges Noble said "we're going to hang you, you black cunt". Noble subsequently said "you're black, we're white and we're better and you're not" and allegedly threatened to tie the plaintiff to a four wheel drive and drag him through the carpark.

[11] The plaintiff immediately reported the incident to St Clair who told Noble and Moore to cease their behaviour and to destroy the masks. Neither Noble nor Moore were removed from the workplace. Both completed the shift, as did the plaintiff. The makeshift toilet remained in the lunch area.

[12] When the factory manager, Mark Hurley, next attended the factory, he called a shift meeting. Hurley later terminated Noble and Moore's employment. The plaintiff alleges St Clair informed Hurley of the incident involving Noble and Moore wearing Ku Klux Klan masks, and threatening the plaintiff.

[13] In about mid January 2010, the plaintiff was advised by Hurley that Noble was to be re-employed by the defendant. Approximately two weeks later, the plaintiff alleges Noble looked directly at him during a change of shift, and laughed. The plaintiff alleges he advised the defendant of Noble's conduct, and of the anxiety it was causing him and requested an apology from Noble. No apology was given at that time. The plaintiff alleges he developed anxiety symptoms thereafter.

[14] In about mid February 2010, the plaintiff tendered his resignation. The plaintiff alleges Hurley asked "what it would take to keep him on as an employee". The plaintiff requested an apology from Noble, and consideration of financial support for educational courses. A written apology from Noble was provided on 16 February 2010. No financial support was provided by the defendant.

[15] On or about 23 February 2010, the plaintiff applied for a leading hand position with the defendant. He alleges Hurley told him shortly after that he had been unsuccessful due to the recent discussions regarding the incident, and the plaintiff's discomfort at the defendant's decision to re-hire Noble.

[16] The plaintiff alleges that as a consequence of the incident and these subsequent events, he developed a post-traumatic stress disorder with prominent associated depression and, subsequently, major depression. He alleges his psychiatric injuries were caused by the defendant's negligence and/or breach of contract.

[17] The plaintiff alleges the defendant, through its servants or agents, knew or ought to have known that he was at risk of psychiatric injury having regard to the seriously offensive and deeply threatening incident, and the defendant's failure to take adequate steps to reprimand Noble and/or Moore and to remove the makeshift toilet constructed in the lunchroom. Further, the defendant, through its servants or agents, was aware the plaintiff was continuing to exhibit signs of anxiety and distress in the workplace, particularly following the decision to re-hire Noble.

[18] The plaintiff alleges the defendant, by its servants or agents, was negligent or in breach of contract in that it:

(a) failed to provide and maintain a safe system of work;

(b) failed to ensure that the plaintiff was not exposed to stresses which it knew or ought to have known would lead to psychiatric injury;

(c) failed to provide the plaintiff with any or any sufficient psychiatric or emotional support when it knew or ought to have known that the plaintiff was at risk of developing a psychiatric injury;

(d) failed to address the racially orientated jokes and banter being used in the workplace;

(e) failed to respond adequately or at all to the plaintiff's complaints of bullying, harassment and racial discrimination and vilification in the workplace;

(f) failed to provide any or any adequate training, education or instruction to employees regarding appropriate conduct and behaviour in the workplace;

(g) failed to take sufficient or adequate steps to prevent or minimise the risk of injury to the plaintiff when it knew or ought to have known that such circumstances were likely to cause risk of injury to the plaintiff;

(h) failed to intervene and protect the plaintiff when he was being racially discriminated against, harassed, bullied and verbally abused by Noble and Moore in the workplace;

(i) failed to implement any or any appropriate measures to stop bullying, harassment, racial discrimination or vilification and/or verbal abuse in the workplace;

(j) caused, allowed and/or permitted Noble and Moore to engage in behaviour that was inappropriate and unreasonable in all the circumstances when it knew or ought to have known that such behaviour was likely to cause risk of injury to persons such as the plaintiff;

(k) exposed the plaintiff to a risk of injury which was reasonably readily foreseeable to the defendant; and

(l) exposed the plaintiff to a risk of injury which could have been avoided by the exercise of reasonable care.

Defence

[19] The defendant admits that during the shift Noble and Moore set up the makeshift toilet bowl, and wore Ku Klux Klan masks in the factory. The defendant admits the toilet bowl and its words were deeply offensive to the plaintiff. The defendant denies Noble threatened to hang the plaintiff, or to drag him through the carpark. The defendant does not dispute Noble said words to the effect "you're black, we're white and we're better and you're not". The defendant denies the remarks made by Noble, together with the presence of the Ku Klux Klan masks, represented a threat against the plaintiff's life.

[20] The defendant admits the plaintiff reported the incident to St Clair, who verbally reprimanded Noble and Moore, and that Hurley called a shift meeting and subsequently terminated their employment. The defendant also admits that in mid-January 2010 the plaintiff was advised by Hurley that Noble would recommence work at the factory. The defendant disputes the circumstances surrounding the re-hiring of Noble, subsequent contact between Noble and the plaintiff, and the circumstances surrounding the appointment of a new leading hand.

Applicable legal principles

[21] There is no dispute the defendant, as an employer, owed to its employees a duty to take reasonable care to avoid the development of psychiatric injuries. What is in dispute is whether the plaintiff has established a breach of that duty, and that any breach was causative of the development of a psychiatric injury by the plaintiff.

[22] The factors to be considered under the admitted duty of care were discussed by the majority in *Koehler v Cerebos (Australia) Ltd*:-

> "[21] The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. …
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> [35] … The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. … that invites attention to the nature and extent

> of the work being done by the particular employee and signs given by the employee concerned." [1] (emphasis in original)

[23] In respect of the requirement of reasonable foreseeability, the majority said:-

> "[33] In *Tame v New South Wales* the Court held that 'normal fortitude' was not a precondition to liability for negligently inflicting psychiatric injury. That concept is not now to be re-introduced into the field of liability as between employer and employee. The central inquiry remains whether, in all the circumstances, the risk of a plaintiff (in this case the appellant) sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful." [2]

[24] Reasonable foreseeability involves more than mere predictability. The relevant principles were usefully summarised by Spigelman CJ in *Nationwide News Pty Ltd v Naidu*:-

> "[21] *Koehler* affirms the line of High Court authority, including, *Tame, Annetts* and *Gifford*, which focuses attention on the purpose for which the inquiry as to foreseeability is undertaken, namely, to determine what reasonableness requires by way of response and, therefore, whether legal responsibility for the conduct should be attributed to the defendant for the injury to the plaintiff.
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> [22] As Gleeson CJ said in *Gifford* supra at 276: 'reasonable foreseeability involves more than mere predictability'. In the same passage his Honour said 'advances in medical knowledge have made us aware of the variety of circumstances in which emotional disturbance can trigger, or develop into, recognisable psychiatric injury' and concluded:
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> > '[A]dvances in the predictability of harm to others … do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants.'
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> [23] The reasoning and result in *Koehler* confirms this analysis. It may well be the case that it is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough.

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1 (2002) 222 CLR 44 at 53 and 57 [21]-[35].

2 At 57 [33].

> [24] It does appear that over recent decades the helping professions and the pharmaceutical industry have medicalised many of the normal stresses of every day life, including working life. The law has not expanded legal responsibility for conduct in the same way. *Koehler* makes it clear that the common law of Australia will not do so, failing to follow such developments in other common law jurisdictions.
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> [25] An employer can be liable for negligence because of a failure to protect an employee against bullying and harassment. However, the existence of such conduct does not determine the issue of breach of duty. As Hayne J put it in *Tame* (at 417 [296]):
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> > '[A] plaintiff will not recover damages for an injury which psychiatric opinion recognises as a psychiatric injury by demonstrating only that such an injury was reasonably foreseeable and that the defendant's negligence was a cause of the injury which the plaintiff sustained.'
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> [26] One of the elements required to be assessed is the degree of probability that the risk of psychiatric injury may occur, even when the reasonable foreseeability test of a risk that is not far fetched and fanciful, has been satisfied." [3]

[25] What an employer, acting reasonably, must do to satisfy the requisite duty of care, "requires looking forward to identify what a reasonable employer would have done, not backward to identify what would have avoided the injury".[4] As Keane JA (as his Honour then was) observed in *Hegarty v Queensland Ambulance Service*:-

> "… 'litigious hindsight' must not prevent or obscure recognition that there are good reasons, apart from expense to the employer, why the law's insistence that an employer must take reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee's mental health, even in the most stressful of occupations. A statement of what reasonable care involves in a particular situation which does not recognise these considerations is a travesty of that standard." [5]

[26] The importance of recognising the prospective nature of the inquiry in cases involving psychiatric injury, was emphasised by Spigelman CJ in *Naidu*: -

> "The prospective nature of the inquiry as to breach has particular significance in the case of the risk of psychiatric injury. In any organisation, including in employer/employee relationships, situations creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. The law of tort does not

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3 (2007) 71 NSWLR 471 at 477-8 [21]-[26].
4 *New South Wales v Fahy* (2001) 205 CLR 434 at [31].
5 [2007] QCA 366 at [47].

> require every employer to have procedures to ensure that such relationships do not lead to psychological distress of its employees. There is no breach of duty unless the situation can be seen to arise which requires intervention on a test if reasonableness." [6]

Evidence

[27] The plaintiff gave evidence, and called Ian Rogers who was responsible for his subsequent employment with a competitor of the defendant, Vinidex. The defendant did not call Noble or Moore as witnesses at trial. Neither remain employed by the defendant. However, the defendant did call a number of employees, including St Clair and Hurley. Evidence was also called from medical and allied health personnel, including a number of expert psychiatrists.

Workplace

[28] The plaintiff said on the day he commenced work at the defendant's factory he was given the nickname "the Arab" by the senior technician responsible for training him. The plaintiff thought the nickname "funny". It caught on very quickly. Other senior employees referred to him by that nickname, including St Clair. The plaintiff said he never asked anyone to call him "the Arab", and did not ever introduce himself as "the Arab". The plaintiff accepted he was "a bit of a larrikin".[7]

[29] The plaintiff said there was no education about how to conduct yourself in relation to another's race. Nicknames were commonly used in the workplace. The atmosphere in the workplace was "pretty jovial". Everyone told jokes. A lot of the jokes were racial. No one was ever reprimanded by management for telling jokes.

[30] The plaintiff did not take offence at these jokes, and never raised any issue concerning any sort of racial conduct in the workplace prior to the incident. The plaintiff told jokes, including "Arab jokes". One joke related to blowing smoke into a shoe. The plaintiff also made jokes about being an Arab bomber, including pointing a pipe carried on his shoulder in the direction of others. The plaintiff said people made remarks and comments that when he carried the pipe on his shoulder he "looked like an Arab with a rocket launcher" which the plaintiff found "quite amusing".[8]

[31] The plaintiff said a laboratory technician once made makeshift product label stickers with Arab jokes written all over them. They were distributed throughout the factory. A printer in the laboratory was used to alter labels to include, instead of a number of products, the number of bodies. The plaintiff found it "very amusing".[9]

[32] St Clair described the plaintiff as a "top bloke" who was very happy, and told a lot of jokes, including jokes about Arabs. The plaintiff was known as "Arab" or "Mick".[10] St Clair said there were lots of jokes and banter, including racially connected jokes, told on the factory floor. He said when you have 12 men doing

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6 At 477 [20].
7 T2-52/20.
8 T2-56/35.
9 T2-57/45.
10 T3-48/25.

night shifts, seven days a week, they start telling jokes to break the boredom. He did not recall anyone being pulled up about such banter prior to the incident.

[33] Albert Mason was employed by the defendant as a granulator operator. He first met the plaintiff when he started at the defendant's factory. The plaintiff introduced himself as "the Arab".[11] He had a good relationship with the plaintiff. The plaintiff told jokes with an Arab background. The plaintiff would often have a short piece of pipe made up like a bazooka and either aim it at planes or aim it at Mason when going past on the forklift. Mason said after Noble and Moore had their employment terminated, management said that none of this would be tolerated by any of them. He could not recall seeing any formal directive or attending any meeting after the incident to educate workers.

[34] Benjamin McCreghan was employed by the defendant in its quality control laboratory. He first met the plaintiff when the plaintiff commenced employment with the defendant. After a few months on the factory floor the plaintiff worked in the laboratory. McCreghan referred to the plaintiff as "the Arab". The plaintiff said it was fine, "everyone calls me that".[12] The plaintiff made jokes with an Arab background. The plaintiff would also walk around the shed with a rag tied around his head "and a piece of pipe pretending to blow stuff up, like it was a bazooka".[13]

[35] McCreghan said the plaintiff asked him how he would go about changing product labels. The plaintiff wanted the name "Pipemakers" to be changed to "Bombmakers" and for the label to read, where it said 67 crates per length, "67 bodies per length". McCreghan did not want to change the labels but the plaintiff kept hounding him. He eventually agreed and made up five or six labels for the plaintiff. A couple of skulls with crossbones on the side were also added to the label. McCreghan gave them to the plaintiff saying they were for his own personal use. McCreghan did not ever see them again. He did not see any placed around the workplace or on any product. McCreghan said there was nothing sinister in the labels. It was a joke the plaintiff was trying to pull on one of the other workers on the factory floor. The plaintiff made jokes every day.

[36] McCreghan was initially friendly with the plaintiff but after a time had less contact with him. The plaintiff was not doing his job properly and McCreghan complained to his supervisor. The plaintiff was removed from the laboratory. McCreghan had little to do with the plaintiff thereafter. He thought that occurred around the start of 2009, well prior to the incident.

[37] In cross-examination, McCreghan agreed he was the plaintiff's superior and could have stopped him changing the stickers. He said after being pestered for over an hour he just "did it to get him out of my hair".[14] He denied making the labels was his idea. McCreghan said that he and the plaintiff were initially good friends. They would play golf and have a few drinks together. He stated:

> "I didn't think he was too bad of a bloke in the first few months I knew him, and then after a while he sort of started getting to me because he just kept carrying on and on about all this stuff and the

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11 T3-61/40.
12 T3-66/5.
13 T3-65/40.
14 T3-68/30.

> way the world is at the moment it's not the sort of jokes that I would sort of want to be involved in and that's when it all went downhill."[15]

[38] Daniel Cunning has been employed by the defendant as a mixer for about eight years. He met the plaintiff through work. The plaintiff was commonly called "Arab". The plaintiff never expressed any dissatisfaction with that nickname. The plaintiff regularly made jokes with an Arab background. He would refer to making his "little rocket launchers and little bombs as if he was going to blow things up".[16] People laughed at the plaintiff's jokes all the time.

[39] Vince Schade has been the defendant's quality and safety manager for approximately seven years. He met the plaintiff when he commenced work with the defendant. The plaintiff asked him to call him "the Arab".[17] Schade did not consider it appropriate but did hear other employees refer to the plaintiff directly as "the Arab" or "Arab". He did not take any action to ensure other people did not call the plaintiff the Arab. The plaintiff once told him a joke with an Arab background. Schade said the plaintiff worked well in the laboratory for six months but an issue arose when the plaintiff forged documents. The plaintiff was given a formal warning and moved to the factory floor.

[40] Mark Hurley has been employed as the defendant's factory manager for nine years. Up until the incident there had not been any issue in his tenure involving inappropriate racial conduct. Hurley said when he first met the plaintiff he referred to himself as "the Arab". That was the way he generally announced himself to everybody in the factory. The plaintiff had a "very out there personality" and was a very jovial sort of person.[18] He recalled the plaintiff telling a joke involving blowing smoke into his own shoe. He did not take offence at the joke. He did not ever see any labels involving bomb numbers or number of bodies displayed anywhere in the workplace.

The incident

[41] The plaintiff said on the evening of 14 November 2009 the joking went too far. Whilst there had been no adverse racial conduct during that shift prior to the discovery of the toilet, he found the mock toilet bowl excessive, and directed at him. It was particularly offensive having regard to the racial slur contained in the words on the toilet and "the fact that it attacked my ethnicity".[19]

[42] The plaintiff said as he walked back into the factory area, he observed Noble and Moore running around with Ku Klux Klan type masks they had made during the shift. The plaintiff took a photograph with his mobile phone. At that point Noble removed his mask and yelled out, pointing at the plaintiff: "we're going to hang you, you black cunt". The plaintiff said Moore and another employee, Daniel Cunning, were present at that time.

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15 T3-69/25.
16 T3-70/45.
17 T3-75/15.
18 T4-15/30-40.
19 T2-21/5.

[43] The plaintiff said although he had regularly worked with Noble and Moore in the past, and had never been threatened by them before this shift, he took the threat seriously and went over to confront them. He recorded the conversation on his mobile phone. In that conversation "they were joking about, they were going to tie me to the back of their four wheel drive and drag me through the carpark … They joked that I was black and they were white … That they're better and I'm not."[20] The plaintiff said he was "genuinely fearful" for his life as the masks and what they said "really frightened me".[21]

[44] The plaintiff reported the incident to St Clair who told Noble and Moore to get rid of the masks and "knock it off". The plaintiff did not tell St Clair about the toilet bowl. It remained in the lunch area for the rest of the shift. The plaintiff subsequently took a photograph of it. The plaintiff was "pretty upset" as a result of these events, but completed his shift.

[45] The plaintiff said the factory manager, Hurley, called a shift meeting the night after the incident. The plaintiff could not recall whether Hurley asked everyone if they understood what was discrimination and bullying. There was no discussion about the mask. He did recall Hurley asking who was responsible for the toilet bowl. Noble and Moore raised their hands. They were then taken into Hurley's office, who suspended them. The plaintiff subsequently heard Noble and Moore had lost their jobs. The feedback that went to the factory floor after the incident was that the defendant was not going to tolerate this type of behaviour.

[46] The plaintiff agreed that when he first spoke to Hurley regarding the incident, he told Hurley a "joke is a joke, but when it took the form of KKK masks, that was taking it too far". [22] He also told Hurley he had a voice recording of the statement "you're black, we're white, we're better, you're not". He could not recall whether he told Hurley they had said anything else. The plaintiff played the recording to Hurley. The recording was later lost when the plaintiff's telephone became water-logged. The plaintiff also showed Hurley a photograph of Noble and the mask.

[47] In cross-examination, the plaintiff accepted he had not recorded that Noble or Moore had threatened to hang him, or to tie him behind a 4WD and drag him through the carpark in his Notice of Claim, He also accepted that in his initial complaint to the defendant, and in his Notice of Claim, he only referred to Noble saying words to the effect "you're black, we're white and we're better, you're not". The plaintiff accepted that until the trial he had not previously alleged that Noble and Moore had said they were going to tie him up behind a 4WD and drag him through the carpark.

[48] The plaintiff denied the reason he had not put those contentions in the Notice of Claim was because they had not occurred at all. The plaintiff said he was quite sick at the time of the Notice of Claim. He accepted that if what was said by Noble was limited to "you're black, we're white, we're better, you're not" he would not have treated that as a threat to his health or safety.[23]

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20 T1-21/10-30.
21 T2-3/5.
22 T2-28/5.
23 T2-23/1.

[49] St Clair said he was in the supervisor's office when he looked out the window and saw Noble and Moore with a KKK hood. He went down and made them tear it up as "a little banter joke is all good but that was just way too far. That was beyond – beyond being a joke".[24] He told Noble that was pushing a joke way too far and was definitely not allowed. He also told Noble to apologise to the plaintiff. Noble and the plaintiff shook hands. The plaintiff told him everything was alright. St Clair was happy to leave it at that. Prior to that incident, everything in the workplace had been quite jovial, light hearted and joking. At previous team meetings, issues about racial conduct in the workplace had been "brought up" and everybody knew it was not allowed.

[50] In cross-examination, St Clair agreed that when he spoke to Hurley, he told Hurley that was not the whole extent of the goings-on on the shift, but would not elaborate further, telling Hurley he had sorted it out. St Clair said he had seen Noble and the plaintiff shake hands, and the plaintiff had said it was okay. He denied the extra goings on involved threats being made to the plaintiff. He was referring to the Arab and other jokes in the factory.

[51] St Clair agreed he had not included any reference to Noble's apology in his statement but said if it had not happened he would have "had management in there straight away".[25] He was sure they shook hands. St Clair agreed he was not demoted following the incident, although he was subsequently demoted in May 2010 for reasons completely unconnected to the incident. St Clair could not remember being reprimanded as a result of the incident or receiving any further special training or education.

[52] Cunning was present on the night of the incident. He saw Noble cutting out the mask. He didn't want anything to do with it. He did not ever see Noble or Moore wearing it. He did not think the plaintiff would take any offence to the mask. He thought he would laugh it off. He was accused after the event of saying something during the incident which he did not say. He went out with the plaintiff a few times after the incident. At no time did the plaintiff indicate he was upset about the event. He remained friends with the plaintiff until he left the defendant in February 2010. He accepted he may have been confused about his contact with the plaintiff after that event.

[53] Hurley first learned of the incident when he returned to the factory on the following Monday. As he travelled through the lunch area he saw the makeshift toilet seat. He was appalled by it. He had not seen anything like it before in his life and could not believe it. He immediately asked questions. He went to St Clair. At that stage he only knew about the makeshift toilet seat. He did not become aware of the mask until later that day.

[54] Hurley kept the whole shift back that morning. He asked if they understood what discrimination and bullying was, and their combined reply was "yes". He then asked who had made the toilet seat. When Noble put up his hand, he sent Noble to the office. After speaking to Noble, he sent him away saying he would speak to him the next day. Hurley said St Clair then advised him that was not the whole of what had gone on but refused to elaborate further saying he had sorted it out. Hurley

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[24] T3-49/18.
[25] T3-56/30.

later spoke to Moore and found that he had played a much bigger role. Hurley also had an interview with Cunning.

[55] Noble and Moore's employment was terminated the next day. Hurley said they were not terminated until the day after because as part of the disciplinary system "we have to let the people go away and have 24 hours to think about what they've done".[26] Neither Moore nor Noble were allowed to continue at work on that Monday. Cunning received a warning, although Hurley was unable to locate any record of that warning.

[56] Hurley also spoke to the plaintiff about the incident. The plaintiff told him a joke is a joke but when it took the form of the mask it had been taken too far. He also told Hurley he had photographs of Noble carrying the mask as well as voice recordings of Moore and Cunning making verbal assaults. Hurley recorded what the plaintiff told him had been said: "your (sic) black, we are white and we are better". Hurley could not recall if the plaintiff played any recording to him but he was shown the photograph. The plaintiff did not make any mention of a threat to hang him or to tie him to the back of a 4WD. Hurley would definitely have made a note if there had been such threats. The plaintiff also asked when the "racial shit" was going to finish. Hurley asked the plaintiff if he was happy to remain working there. The plaintiff replied "yes, I like it here".[27]

[57] Schade was not present on the night of the incident. On the following Monday he was informed Hurley was conducting an investigation. For the following week all shifts were brought in and given a run-down that this type of behaviour was not acceptable. He conducted annual audits of workplace health and safety and did not ever assess racial misconduct as a risk. No one had ever raised any issues at shift meetings prior to the incident as to any racial problem in the workplace.

Aftermath

[58] The plaintiff continued to work at the factory, but said he struggled with the incident. He thought about it every day. He had flashbacks and violent nightmares. At no time after the incident was there any discussion about appropriate behaviour in the workplace. The plaintiff was also not offered any counselling, and no person in management made an inquiry of him as to his state of mind.

[59] In mid-January 2010, the plaintiff was advised by Hurley that Noble was to be re-employed by the defendant as experienced operators were hard to find. The plaintiff could not believe Noble would be given his job back but felt he was not in a position to say yes or no. The plaintiff did not articulate any disagreement to Hurley. He told Hurley it would be "water under the bridge" and he would get on with his job as long as Noble was not put on the same shift. Hurley assured him that would not happen.

[60] The plaintiff said that whilst Noble did not work shifts with him after his re-employment, a couple of weeks after Noble's re-employment, at a shift changeover, Noble "pissed himself laughing at me. He laughed right at my face".[28] The

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26 T4-21/35.
27 T4-23/35.
28 T1-25/40.

plaintiff was "extremely offended". He felt like he had been stripped of all his respect. He immediately walked into Hurley's office and demanded an apology.

[61] The plaintiff said that following this incident he decided to hand in his resignation. He did so in writing on 10 February 2010. Hurley asked what it would take to keep him as an employee. The plaintiff wanted a written apology from Noble, and the defendant to consider providing him with financial support for a management diploma. That course was designed to enhance the plaintiff's skills as a bridge "between going from a leading hand to a management position, to a team leader's role". The plaintiff received the written apology from Noble a few days later. He did not hear anything further in relation to the request for financial assistance. The plaintiff asked "a couple of times" and was told by Hurley it was still being considered by the defendant.

[62] In late February 2010, the plaintiff applied for a leading hand role. He felt he was one of the most qualified people to do that role. He had undertaken it in the past for the defendant. The plaintiff felt there was a lot less respect for him in the factory since Noble and Moore had lost their jobs over the incident. He was going downhill. This was "a last ditch effort". Hurley advised him his application was unsuccessful as the recent events "were all too fresh in people's minds". The plaintiff submitted his resignation for a second time.

[63] The plaintiff went to see his doctor as he was "too stressed, too anxious, drinking too much". He consulted a psychiatrist, Dr Hocking, in March 2010. The plaintiff also applied for and received WorkCover benefits. He was later placed on a return to work programme but found it difficult. One of the workplaces had a similar racial atmosphere and he felt picked on.

[64] In cross-examination, the plaintiff accepted he falsely claimed self-education expenses in tax returns for the years ended 30 June 2008, 2009 and 2010. The Australian Taxation Office had required him to repay those amounts. He was doing so by a repayment plan. He also accepted he presented a CV to Vinidex, which suggested he had completed a business management diploma when that was untrue, and completed a health assessment questionnaire when joining Vinidex which was inaccurate. The plaintiff accepted he was prepared to be dishonest about his history when it suited him. The plaintiff said he was "not entirely honest".[29] The plaintiff also accepted he was less than frank to the court when relaying the true circumstances of the false claims for self education and expenses in his tax return.

[65] The plaintiff accepted that until he requested the letter of apology from Noble he had not made any suggestion to the defendant or anyone else that he was having adverse symptomatology as a consequence of the incident. He denied he only decided to take action in respect of the incident after he was unsuccessful in obtaining the leading hand position. The plaintiff said he was disappointed he did not get that job. It was the last straw. He could not cope thereafter. The plaintiff denied he first sought legal advice before attending a medical practitioner.

[66] The plaintiff accepted that after the incident he socialised with Daniel Cunning, one of the employees said to have been involved in the mask incident. The plaintiff explained that Cunning was not involved in the incident. The plaintiff also accepted

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29 T2-36/10.

that apart from the debt to the Taxation Office he owed some $8,000-$9,000 for past traffic fines. The plaintiff said his finances were the least of his worries. He denied avoiding looking for work because it would reduce his legal payout.

[67] Hurley said after the incident the plaintiff continued in his role in production. The plaintiff did not give any indication he was not coping with his duties. He seemed to be the same person every day.

[68] Hurley said that as a result of a downturn and then the need to produce more pipe, he required more personnel in early 2010. Noble was looking for work. He spoke to Noble to ensure that nothing like the incident would ever happen again. Prior to re-employing him, Hurley spoke to the plaintiff to see how he would feel if Noble returned to the factory. The plaintiff said "it's all water under the bridge. Let's just basically get on with it and everything will be okay".[30] He asked the plaintiff if he required an apology from Noble. The plaintiff said he did not. Hurley arranged for the plaintiff to transfer to another shift. He did this deliberately so that he could separate the plaintiff and Noble.

[69] On 10 February 2010, the plaintiff handed in his written resignation effective 25 February 2010. Hurley asked the plaintiff why he was resigning and was told he wanted to move on. He asked the plaintiff if there was anything he could do but as the plaintiff seemed to have made up his mind he accepted his resignation.

[70] On 15 February 2010 the plaintiff decided to retract his resignation. At the time, the plaintiff asked for a written apology from Noble and some financial assistance with some part-time study. Hurley said he would consider the request. Hurley arranged for the apology which Noble was happy to give. The plaintiff was happy with the apology.

[71] During this discussion, the plaintiff said he did not want a vacant leading hand position because he did not want to be seen as getting preferential treatment. Hurley appointed someone else to the position. Hurley said if the plaintiff had been interested in the leading hand position he would have been looked at for that position. The person who was appointed to the position was on a par with the plaintiff. Hurley accepted that on 22 February 2010 he received from the plaintiff a resume for the leading hand position. He could not explain why the plaintiff had given him his resume if he was not interested in the position.

[72] In cross-examination, Hurley accepted that apart from the contents of the induction booklet, he was not able to produce any other document that evidenced any system employed by the defendant designed to minimise harassment, bullying or racial vilification in the workplace. Hurley said after the incident there were meetings held with the defendant's entire workforce in relation to racial discrimination and bullying. He could find no diary entry of any such shift meeting.

[73] Hurley accepted that when he first spoke to the plaintiff he did not record everything that was said despite it being a very serious incident. He was sure he did get a version from the plaintiff. He does not recall the plaintiff at that stage mentioning anything about the mask.

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30 T4-24/40.

[74] Hurley agreed he did not ever direct St Clair to tell him the whole extent of the goings on. He could not explain why he did not give such a direction. St Clair did not tell him about the mask. He believes Noble was the first person to tell him about the mask. He did not take any action against St Clair afterwards in relation to the incident.

[75] Hurley agreed that at the conclusion of his investigation he determined Noble was responsible for making the makeshift toilet seat with the offensive words on it and participated in making the mask. He also made the verbal slur, "you're black, we're white, we're better". He believed the plaintiff told him he had voice recordings of Moore and Cunning making verbal assaults. That was the reason Cunning was given a final written warning. He did not understand Cunning was involved in making the mask. As he thought Cunning played a far lesser role, he did not terminate his employment. Hurley agreed he initially issued Moore with a final warning. At that stage he understood his behaviour was confined to the toilet seat and verbal slurs. When he discovered Moore had been involved in making the mask, he terminated Moore's employment.

[76] In re-examination Hurley agreed that after his interview with Cunning he interviewed Noble who told him he had said the words "you're black, we're white and we are better". He could not recall whether as a result of that interview he reviewed whether Cunning should receive any final warning.

Subsequent employment

[77] The plaintiff subsequently decided that if he gained some employment his situation may improve over time. In May 2011, he successfully applied for a position at Vinidex. It was a similar role, albeit at a lower level extruder operator. However, the plaintiff struggled with the employment. He was drinking too much, and was still on a lot of medications. He made mistakes, and his judgment was impaired. A few months into his employment he was charged with drink driving. He tendered his resignation.

[78] The plaintiff successfully sought re-employment with Vinidex in June 2012. This employment was an office based position, in the health and safety area. The plaintiff undertook further education. He was subsequently appointed to the role of Health Safety and Environment Co-ordinator for Queensland. He remains in that role to this day.

[79] The plaintiff said when he initially joined Vinidex he was subject to an induction process covering everything from smoking on site to bullying and harassment. There was a three page questionnaire at the end of the induction process to make sure that everybody had read and understood the induction booklet. Racial banter was not tolerated, and there was a formal grievance process in place. He accepted he did make jokes about his Arab background to an employee at Vinidex, once. It was "the same shoe joke".[31]

[80] Ian Rogers employed the plaintiff at Vinidex. He was not aware of any medical conditions at that time. He was impressed by the plaintiff's knowledge and abilities and offered him a probationary full-time role. The plaintiff's work as a new

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31 T2-60/5.

employee was very impressive and he was "running a production line by himself with no assistance" almost immediately.[32] The plaintiff passed his probationary period successfully and was appointed at a higher level as a full-time employee than he would normally have appointed other employees.

[81] During this period with Vinidex, there had been a discussion about the possibility of the plaintiff being appointed to the position of team leader should such a position become available. Mr Rogers would have signed off on such an appointment but it would have been a joint decision with the manufacturing manager. Team leaders were well paid and received special bonuses. In good years, those bonuses would be enough "to go out and buy a new car".[33]

[82] Rogers said after some period of time the plaintiff indicated he wished to resign. He was having difficulties with studies and had some personal problems. He wanted to dedicate himself towards his studies. The plaintiff had earlier approached him, "rather embarrassed", and advised he had been charged with drink driving. He sought his assistance in applying for a work licence.

[83] The plaintiff was re-employed by Vinidex at the beginning of June 2012. Prior to that time, Rogers had received a number of calls from the plaintiff asking if there were any vacancies in the factory. At the time of his most recent call, Rogers was looking for somebody with technical abilities on the floor to assist in writing some production and training manuals. He offered the plaintiff the position. Initially his appointment was as a casual.

[84] When Rogers decided to leave Vinidex the plaintiff was appointed as a Health and Safety Officer at Vinidex's factory site. Rogers accepted a resume[34] provided by the plaintiff may well have been submitted to the national manufacturing manager at the time the plaintiff was seeking appointment as an OHS resource officer. Rogers worked as a private mentor to the plaintiff until he left for his new position. After he left, the plaintiff would ring when he ran into any difficulties. Initially that was an almost daily occurrence. Thereafter it tapered down. The telephone calls are now very rare.

[85] On the occasion of the plaintiff's re-employment with Vinidex, the plaintiff very much expressed an interest in moving towards administration. Such a move would have been financially disadvantageous as the plaintiff would be being paid at least $20,000 to $30,000 a year less than a person on the factory floor, without consideration of the bonuses that may go with such a factory position. Rogers said a team leader role had its attractions as it involved a seven day fortnight, with a shift structure that allows for some sort of private life, and a pay that is far superior to most of the management within the site.

[86] Rogers said Vinidex had policies and procedures in relation to bullying, harassment and racial vilification. All employees, at their initial induction, are required to complete a computer program. They are also required to attend internal programs, including 15 minute quick training sessions, one of which pertained directly to workplace harassment and bullying. That process was repeated on an annual basis. Vinidex had a zero tolerance towards racial banter. Factory floors are now very

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32 T2-63/15.
33 T2-68/32.
34 Exhibit 19.

much a multicultural environment and there would always be a high level of tension such that racial intolerance was dealt with immediately. Even lighthearted banter was stopped immediately as you "just don't know where the border is".[35]

[87] In cross-examination, Rogers said there were a number of things in respect of the plaintiff's work performance which concerned him at times. The plaintiff would make small silly mistakes that should not be made by somebody with his level of ability. Rogers also accepted that within the manufacturing industry there have been a number of people made redundant around the country in different roles.

[88] Wayne Omundson is employed by Vinidex as an electrician. He first met the plaintiff when he was working at Vinidex as a casual machine operator. He referred to the plaintiff as "Aussie Mick". He heard the plaintiff introduce himself to others as "I'm Michael…the Arab".[36] The plaintiff regularly told jokes in the workplace. Some of those jokes were racist jokes. Omundson recalled one was when a plane was flying overhead, the plaintiff would pretend to shoot it down saying "I'm the terrorist".[37] Everybody treated it as a joke.

[89] Omundson said when the plaintiff returned to Vinidex as a health and safety officer, he did not notice any change in his behaviour. He was the same sort of jovial character. At Vinidex, they received training sessions about harassment in the workplace. They were required to sign off to say they had read the material. Notwithstanding that training, jokes still occurred in the workplace.

Damages

[90] The plaintiff said after the incident, he developed anxiety and depression. Prior to the incident, the plaintiff was "a social drinker". He would have a couple of drinks on the weekend but would never "get wasted" or "blind". He would always be sober enough to drive home. After the incident, he started to drink a lot more. He drank bottles of scotch, mostly at home.

[91] The plaintiff received treatment from Dr Hocking from March 2010 until July 2012. He was initially treated with medication. He was subsequently admitted to hospital for detoxification. He also underwent cognitive behaviour therapy. He stopped seeing Dr Hocking as he was taking a lot of medication and felt it was impeding his work. The antidepressants and sleeping tablets were making him very groggy. He found it difficult to concentrate.

[92] The plaintiff said he still suffers symptoms. He continues to be anxious and drinks a lot on his own. He is quite depressed at times. He still has flashbacks, and does not sleep well. He often self-medicates. He has a mask he puts on for work.

[93] In cross-examination, the plaintiff accepted it was always his intention to move from the factory floor to management. He also accepted that whilst working for the defendant he had received two final disciplinary warnings and had been demoted from the position of leading hand as a consequence of those mistakes.

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35 T2-67/40.
36 T4-10/15.
37 T4-10/35.

[94] The plaintiff denied he drank excessive alcohol prior to the incident. He denied telling hospital staff he consumed, on a daily basis, one bottle of wine/six pack of bourbon. He also denied regular use of illicit drugs, and that he told hospital staff he was a regular user of cannabis.

[95] Dr Hocking first saw the plaintiff on 19 March 2010. According to Dr Hocking's notes, this was after the plaintiff had sought advice from solicitors. The plaintiff reported he had ceased work 10 days before as a consequence of stressors. The plaintiff said he had enjoyed his work until approximately four months previously when an incident had occurred involved offensive racial jokes about Arabs, including a toilet with a sign "Arab shit hole" and Ku Klux Klan masks. He had been told "we're going to kill you, black cunt".

[96] The plaintiff reported feeling pervasively depressed with angry and morbid thoughts. He had a sense of hopelessness, worthlessness and low self-esteem. He also reported increased alcohol use, involving pre-mixed spirits and scotch. He drank on a daily basis, consuming one bottle of scotch every two days. Dr Hocking understood the plaintiff had previously only used alcohol on a recreational basis.

[97] Dr Hocking continued to see the plaintiff on a regular basis until 2012. In his opinion, the plaintiff developed a post-traumatic stress disorder as a consequence of the incident at work. The effects of the condition were ongoing, and continued to impact on the plaintiff's daily activities.

[98] In cross-examination, Dr Hocking was pressed as to whether the criteria for a diagnosis of post-traumatic stress disorder was satisfied in circumstances where the plaintiff had the presence of mind to take photographs of the masks and toilet bowl, as well as record the conversation. Dr Hocking considered it was, although he noted he had previously had a differential diagnosis of adjustment disorder.

[99] Dr Hocking accepted excessive alcohol consumption can have an adverse consequence on a person's psychological profile. It can also impair the effectiveness of treatment, and exacerbate symptoms of anxiety and depression. If the plaintiff was consuming one bottle of wine/six pack of bourbon daily prior to the incident this would constitute excessive alcohol use, and amount to an alcohol dependent person.

[100] Dr Hocking agreed that in a consultation on 13 July 2010 the plaintiff had told him he had a drug debt as a consequence of the purchase and use of amphetamines some three months previously, and that he had had to "hock" his motorcycle to pay the debt. He also agreed that in a consultation on 20 July 2010 he considered the plaintiff was minimizing the extent of his alcohol use. The two admissions to a drug and alcohol detoxification clinic, undertaken at Dr Hocking's request, were an attempt to have the plaintiff address his drinking behaviour.

[101] Dr Hocking agreed in subsequent consultations the plaintiff referred to an improvement in his social activities and to having commenced laughing again, although he continued to complain of persisting nightmares. Dr Hocking also agreed he expressed a concern in his notes that the plaintiff was applying for a disability support pension as an excuse not to work. Dr Hocking considered the plaintiff was avoiding work because he was able to put on a façade of happiness

socially but if he consumed himself with attending work his symptoms, anxiety and depression were exacerbated.

[102] Dr Hocking considered there was a prospect the plaintiff would improve when the litigation was concluded in that he would feel "validated".[38] Dr Hocking accepted if the plaintiff had a previous alcohol abuse problem the depressive condition is likely to exacerbate those alcohol problems. Dr Hocking noted when the plaintiff had undertaken work as part of his rehabilitation, his symptoms of depression and anxiety became exacerbated and he increased his alcohol use.

[103] Dr Janis Carter examined the plaintiff at the request of WorkCover in 2010, and provided two reports.[39] In her first report, Dr Carter opined the plaintiff had developed a major depressive disorder, post-traumatic stress disorder and alcohol dependence as a consequence of the work related incident. Dr Carter considered the mechanism of the injury was that the plaintiff felt that Noble was "an extreme case of white supremacy, and doing such demeaning things towards him gave meaning to his derogatory statement 'we're going to hang you, you black cunt'". Dr Carter considered the plaintiff had not been able to recover, especially after the defendant re-employed Noble.

[104] In her subsequent report, Dr Carter opined the plaintiff had developed a post-traumatic stress disorder, where major depression had become a co-morbidity, as a consequence of the work related incident. The plaintiff had become permanently incapable of performing his job or any similar job, although he was capable of working in many other different fields. Dr Carter did not believe he would ever have the capacity to upgrade to full hours of work on a factory floor.

[105] In cross-examination, Dr Carter agreed the history provided to her indicated the plaintiff's consumption of alcohol prior to the incident was ordinary social consumption. She did not consider the fact the plaintiff had the foresight to take photographs of the incident detracted from a diagnosis of post-traumatic stress disorder.

[106] Dr Andrew Byth examined the plaintiff on 28 February 2011 and 26 March 2013. In his initial report, Dr Byth opined the plaintiff suffered from post-traumatic stress disorder with prominent associated depression. His depressive symptoms had become more severe such as to warrant an additional diagnosis of major depression. He also qualified for a temporary diagnosis of substance abuse disorder having regard to his heavy alcohol intake following the incident in 2009. The plaintiff would require ongoing specialist psychiatric follow-up for at least three years. Even with such treatment it is likely the plaintiff would be left with chronic moderate to marked PTSD and depression arising from the work incident. Dr Byth assessed his permanent impairment, as a consequence of the psychiatric illness, at 55% - 75%.

[107] In his most recent report, Dr Byth opined the plaintiff continued to suffer from PTSD, along with associated depression and alcohol abuse, although his psychological symptoms had partly improved with treatment. He recommended ongoing specialist psychiatric treatment for a further two years, at a cost of approximately $6,000. Whilst such treatment was likely to result in a further partial

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38 T1-47/15.

39 Exhibits 7 and 8.

improvement, the plaintiff was likely to be left with chronic, moderately severe PTSD and depression and alcohol abuse as a result of the incident in 2009. His capacity for work remained moderately impaired, and he would require an understanding employer. It is likely his PTSD would continue to fluctuate with exacerbations every three to six months being triggered by reminders of racial abuse and related situations. Dr Byth assessed the plaintiff's permanent psychiatric impairment at 25%-50%.

[108] In cross-examination, Dr Byth said drinking a bottle of wine a night, or a six pack of bourbon a day, would only be moderately severe drinking and was unlikely to cause a risk of dependence or neurological damage. Dr Byth accepted if a person is suffering depression, the use of alcohol impacts on the effectiveness of any treatment. Dr Byth's impression of the defendant was that he was a "moral person and a hard working person and he was proud of his ethic background".[40]

[109] Dr Byth considered the plaintiff satisfied the diagnosis of PTSD, even if he had not been threatened with hanging or being tied to a 4WD. The mask, together with the statement "you're black, we're white, and we're better, you're not", and the earlier toilet bowl incident, would be enough to cause PTSD. Those incidents were very insulting to the plaintiff, who had a strong feeling of being proud of his Egyptian background. As a consequence, the plaintiff found the incidents deeply insulting and threatening of his cultural integrity.

[110] In Dr Byth's opinion, a threat to a person's cultural integrity, that was felt very deeply, would satisfy the definition of PTSD. The Ku Klux Klan were historically related to lynch mobs. In those circumstances, he could understand the plaintiff feeling very threatened, frightened and isolated by the incident. Dr Byth did not consider the existence of any alcohol or substance abuse prior to the incident would impact on his opinion.

[111] Dr Byth agreed he had not been told anything about a threat to tie the plaintiff to the back of a 4WD and drag him around.[41] Dr Byth said:

> "…you've got to take his cultural background into account, because he's the only Arabic person there in the workplace and there's a sort of a massive sort of joke or insult directed only at him, so it's not just a practical joke, but it's a sort of isolating kind of incident that sets him apart and alienates him from the other people who are not Arabic in the workplace…I could understand it could have a huge impact on somebody and linger in their mind and he'd be looking to his employer for some support or resolution of it, which didn't come readily at all and these things remain and there you are, he has PTSD and is off work for ages."

[112] Professor Harvey Whiteford examined the plaintiff on 9 June 2011 and 23 May 2013. At the time of his initial examination, Professor Whiteford opined the plaintiff did not satisfy a diagnosis of post traumatic stress disorder as there was an absence of a criterion A event. However, Professor Whiteford did consider the plaintiff had an adjustment order with mixed anxiety and depressed mood.

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40 T3-8/10.

41 T3-11/15.

[113] At the time of his more recent examination, Professor Whiteford noted the plaintiff had had persisting, ongoing anxiety symptoms since his last examination, with a deterioration in his condition on the development of prominent substance abuse. Against that background, Professor Whiteford accepted the plaintiff had developed a chronic anxiety disorder consistent with post traumatic stress disorder. The plaintiff also satisfied a diagnostic criteria for substance use disorder.

[114] Although the plaintiff's ongoing substance abuse made him depressed, Professor Whiteford did not believe the plaintiff satisfied the criteria for an additional diagnosis of a depressive disorder. Professor Whiteford assessed the plaintiff's ongoing level of impairment as in the order of 10%. The stress of litigation was contributing to his persistent anxiety disorder. He recommended a return to treatment with Dr Hocking.

[115] In evidence, Professor Whiteford opined that if all that was said by Noble at the time of the mask episode was "you're black, we're white, we're better, you're not", that would not be sufficient to satisfy a criterion A event. Further, if the plaintiff, prior to the incident, was consuming one bottle of wine per night, or a six pack of bourbon per day, that constituted "clearly risky drinking, way above the recommended safe levels of consumption of alcohol by the National Health and Medical Research Council and would constitute alcohol abuse".[42]

[116] Professor Whiteford said the plaintiff's continued substance abuse, together with other stressors in life such as the ongoing litigation and any adverse financial circumstances, would each contribute to his ongoing anxiety and depression with the aggregate effect being significant for him. If there was no criterion A event, the work related stressor would be only a minor contributing factor to the plaintiff's ongoing depression and anxiety.

[117] In cross-examination, Professor Whiteford accepted people who are prepared to tolerate racial banter have a threshold. The plaintiff obviously considered the incident at work had crossed that threshold and perceived it as threatening and offensive. Professor Whiteford accepted the wearing of Ku Klux Klan masks conveys overtones of violence but did not accept the wearing of such masks without also vocalising a threat carried with it an implicit threat of physical violence. It was a big step "to take from racial bullying and threatening and vilification to physical assault and physical harm and injury".[43] Professor Whiteford accepted post traumatic stress disorder is occasioned by symptoms which wax and wane in their severity, which can be triggered by a reminder of the incident.

[118] Janice Paviour is a registered nurse working in the Damascus Unit of the Mater Private Hospital. She undertook an initial assessment of the plaintiff when he was referred to that unit for a second time. She was not involved in his previous admission. She did not take a longstanding history from the plaintiff in respect of the use of alcohol at that time. She did take a history of his past use of cannabis. She recorded a history of the plaintiff consuming two joints of marijuana two days per week for 10 years. The plaintiff had not consumed any for the previous three years. She also recorded the plaintiff had used speed on two occasions in 2009.

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42 T3-20/15.

43 T3-24/30.

[119] Dr Keasberry examined the plaintiff in the Mater Adult Hospital emergency department on 5 June 2009. The plaintiff was complaining of significant abdominal pain, which was believed to be related to a gall bladder issue. Dr Keasberry took a history from the plaintiff, including a past medical and social history. In that history, Dr Keasberry recorded an alcohol intake of one bottle of wine/six pack of bourbon daily. He believed that was a reference to alternate use. If the plaintiff had said that consumption was weekly he would have written weekly, not daily.

[120] Dr Keasberry noted the medical records recorded the plaintiff was on a waiting list for the outpatients department at the Mater Hospital in respect of surgery, and alcohol abuse. He recorded both these matters in a letter to the Mayfair Medical Centre following the plaintiff's attendance at the emergency department.

Findings

Generally

[121] Having regard to the differing views of the medical experts as to the satisfaction of criterion A of a diagnosis of post traumatic stress disorder, it is necessary to determine what actually occurred in the incident.

[122] The difference between the incident, as initially described by the plaintiff to Hurley and in his Notice of Claim, and that described by the plaintiff in evidence, raises a question as to the reliability and credibility of the plaintiff. I do not accept that that difference is explained by a simple oversight. A threat to hang the plaintiff, if made, was central to the plaintiff's reasons for fear in respect of the incident. It is inconceivable he would not relate that threat to Hurley, and in his Notice of Claim, which expressly asked him to "completely" describe the incident.

[123] The plaintiff's acknowledgement that he is not an entirely honest person and that he is prepared to say anything, whether true or not, to assist his cause, also raises serious concerns as to whether his evidence as to what occurred in the incident ought to be accepted as honest and reliable.

[124] The plaintiff admitted in evidence to making false claims to the Tax Office in respect of educational expenses, and as to his educational qualifications in his resume. Whilst such concessions may be said to indicate a frankness by the plaintiff, a consideration of the circumstances in which those admissions were made reveals an entire lack of frankness on the part of the plaintiff.

[125] When the plaintiff was initially cross-examined in relation to his claims for educational expenses, in his 2008, 2009 and 2010 tax returns, he did not indicate those claims were false. Instead, he said he was unable to now recall what those expenses related to, and what qualification he was seeking at that time. Such responses were disingenuous, at best.

[126] It was only upon repeated questioning in respect of this issue that the plaintiff conceded those claims were false. That is not the concession of an honest person. It exhibited a predilection to only making concessions when the plaintiff believed he would be otherwise caught out. Such a person is neither credible nor reliable. I am satisfied the plaintiff is not a witness of credit.

[127] By contrast, Hurley impressed me as honest and reliable. He left me with the strong impression he was genuinely appalled by what had occurred on the factory floor in the early hours of 15 November 2009, and genuinely set about attempting to appropriately deal with an investigation into that incident. He freely conceded the imperfections in that investigation, and his note taking.

[128] Notwithstanding those concessions, I have no hesitation in accepting Hurley's evidence that the plaintiff did not advise him of any threat by Noble or Moore (or indeed anyone else), to "hang him". I am satisfied if the plaintiff had related such a threat Hurley would have recorded that threat in his notebook. I am also satisfied Hurley accurately recorded what the plaintiff told him was said, namely "your (sic) black, we are white and we are better".[44] I am also satisfied Hurley did not re-employ Noble before first asking the plaintiff his views. I accept the plaintiff assured Hurley he had no difficulty with that course.

The incident

[129] It is not in dispute Noble created the makeshift toilet, with the offensive words "Arab bullshit bowl", and placed it in the lunch area adjacent to the factory floor. It is also not in dispute Noble and Moore, in the course of the shift, created Ku Klux Klan masks which they wore on the factory floor. I accept that when confronted by the plaintiff, Noble uttered words to the effect "you're black, we're white and we're better, you're not". I am satisfied that is the extent of what occurred in the early hours of 15 November 2009.

[130] I do not accept the plaintiff's evidence that Noble or Moore, or anyone else, uttered words to the effect "we're going to hang you, you black cunt", or threatened to tie the plaintiff to a four wheel drive and drag him through the carpark. The plaintiff contended I ought to draw an adverse inference, in accordance with the principles in *Jones v Dunkel*,[45] in respect of the defendant's failure to call Noble and Moore as witnesses. I am not prepared to draw such an inference. The plaintiff did not report such words in his initial discussions with Hurley. The plaintiff did not record such words in his Notice of Claim. Against that background, and having regard to my rejection of the plaintiff's evidence as to those words being said, no adverse inference is properly to be drawn from any failure to call Noble and Moore.

Aftermath

[131] While the plaintiff was critical of Hurley's investigation, and his response to the incident, I accept Hurley acted to the best of his ability, and promptly, in response to what he appropriately regarded as an appalling episode. That response included terminating the employ of Noble and Moore, thereby conveying to the balance of the workforce that such behaviour would not be tolerated by the defendant.

A breach of duty?

[132] There is no doubt the incident in the early hours of 15 November 2009 was grossly offensive to the plaintiff. The toilet bowl, and accompanying words, were clearly directed to him, and him alone. The words uttered by Noble, whilst wearing the mask, were also directed at him and made reference to his ethnicity.

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44 Exhibit 28.

45 (1959) 101 CLR 298.

[133] The making of such grossly offensive remarks in the workplace involves totally unacceptable behaviour. It can clearly constitute bullying and harassment. An employer's duty of care extends to a duty to exercise reasonable care to ensure that such bullying and harassment does not take place in the workplace.

[134] The evidence of all of the employees of the defendant called to give evidence, was that the defendant's workplace regularly involved joking and banter with racist overtones. This was contrary to the defendant's policies and procedures. It was known to senior management. No action was taken to stop it. The failure to do so constitutes a breach of the relevant duty of care in all the circumstances.

[135] That conclusion is not, however, determinative of the plaintiff's claim. The issue to be determined is whether the development by the plaintiff of a psychiatric injury as a consequence of that breach of duty was reasonably foreseeable. In considering that issue, a number of factors are particularly relevant.

[136] First, the plaintiff actively participated in the joking and banter with racist overtones. Whilst a person who is subject to bullying and harassment, understandably, may participate in such conduct in an effort to be accepted, the plaintiff's conduct went far beyond that level of participation.

[137] Evidence was led that the plaintiff introduced himself to fellow employees, at the defendant's factory, as "the Arab". I accept that evidence. I found each of the witnesses who gave evidence in respect of that matter credible and reliable. Further, such behaviour was consistent with evidence from Omundson as to the plaintiff's use of similar terms at his later employer, Vinidex. I accept the plaintiff used that term at Vinidex. I also accept the plaintiff regularly told jokes at the defendant's workplace which referred to his ethnicity. I accept he also regularly engaged in behaviour involving the use of a pipe replicating a bazooka.

[138] Such active participation on the part of the plaintiff in racist joking and bantering in the workplace, on a daily basis, is unlikely to place an employer, exercising reasonable care, on notice that the plaintiff was at risk of psychiatric injury from racist bullying and harassment.

[139] Second, there is no evidence the defendant was ever informed, either directly or indirectly, that its failure to ensure the racist joking and banter ceased, was placing the plaintiff at risk of psychiatric harm. The plaintiff accepted that prior to the incident, he had never raised any concerns in relation to conduct in the workplace. He went further and said he found the behaviour "funny". He also accepted he enjoyed working there and he had not previously felt threatened.

[140] Third, the incident on this night was very different to anything that had previously occurred on the factory floor. This conclusion is apparent from St Clair's immediate intervention, and Hurley's subsequent investigation and termination of the employment of Noble and Moore. Whilst St Clair's conduct in refusing to detail all of the circumstances to Hurley was unsatisfactory, it must be viewed against the steps he took that night. St Clair required the masks to be immediately destroyed, and required Noble to apologise to the plaintiff. St Clair said he observed Noble and the plaintiff shake hands, and the plaintiff told him that everything was okay. I accept St Clair's evidence in respect of those matters. I reject the plaintiff's evidence to the contrary.

[141] Having regard to what St Clair knew of the plaintiff's willingness to refer to himself as "the Arab", and to tell racist jokes, it is understandable St Clair felt he had dealt with the matter and that was the end of it. This is particularly so having regard to the fact that St Clair, at that stage, did not know about the makeshift toilet bowl.

[142] Having regard to the abovementioned factors, and all of the circumstances, and applying the applicable legal principles, the plaintiff has not established, on the balance of probabilities, that it was reasonably foreseeable he would develop psychiatric injury as a consequence of any failure on the part of the defendant to exercise reasonable care to ensure he was not placed at risk of developing psychiatric injury.

[143] This conclusion renders it unnecessary to consider whether the plaintiff did suffer psychiatric injury. Had it been necessary to consider that matter, I would not have been satisfied, on the balance of probabilities, that the plaintiff had suffered a recognised psychiatric injury as a consequence of the incident, or its aftermath.

[144] The evidence the plaintiff suffered post traumatic stress disorder, and a major depressive disorder, was premised upon an acceptance of the plaintiff's account of the impact of the incident on him. I do not accept the plaintiff's evidence in that regard. The plaintiff's conduct at Vinidex is inconsistent with such a history. The plaintiff continued to refer to himself as "the Arab", and told Arab jokes. This is similar conduct to that engaged in by the plaintiff before the incident. A person with post traumatic stress disorder would normally avoid reminders of that condition's trigger.[46]

[145] Further, the plaintiff's report of developing alcohol dependence as a consequence of the incident is inconsistent with the notations in the Mater Hospital records as to his daily intake of alcohol prior to the incident. I accept the accuracy of those records. The nature of the condition which caused the plaintiff to present to the hospital suggests there was good reason why the plaintiff would have been pressed for an accurate history on matters such as consumption of alcohol. Further, Dr Keasberry impressed me as a careful medical practitioner. His detailed history specifically recorded the daily intake of alcohol. I accept that record accurately recorded the history given by the plaintiff. I do not accept the plaintiff was referring to his weekly intake. The plaintiff's report of limited alcohol use prior to the incident is also inconsistent with the history he gave on presentation to the Queen Elizabeth II Hospital in June 2009. That history was of drinking about half a bottle of whisky a day.[47]

[146] Whilst the records of the plaintiff's general practitioner do not record any difficulties with alcohol, and there is no evidence the plaintiff failed any random alcohol testing at work, I accept the plaintiff accurately told Dr Keasberry of his daily intake of alcohol in or about June 2009. I accept the consumption of one bottle of wine/six pack of bourbon per day involves excessive alcohol use. I do not accept Dr Byth's evidence to the contrary. It is inconsistent with the evidence of the other psychiatrists, whose evidence I prefer. I also accept it is inconsistent with what was said to be recognised appropriate alcohol usage.[48]

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46 T3-25/40.

47 Exhibit 22.

48 T3-3/30

[147] A finding that the plaintiff had alcohol abuse problems prior to the incident is significant when considering the evidence as to his mental health following the incident. All the psychiatrists accepted that alcohol abuse exacerbates any depressive condition, and impacts on the success of its treatment.

[148] Finally, post traumatic stress disorder can only be properly diagnosed if the criteria for that condition is met. Professor Whiteford opined if the incident did not include any actual threats it would be insufficient to satisfy the criteria for such a diagnosis. I accept Professor Whiteford's evidence in this respect. I found his explanation as to the importance of such criteria, and as to why that criteria would not be met in such circumstances, highly persuasive.

[149] I do not accept the contrary opinions expressed by Dr Byth and Dr Hocking. Dr Byth's opinion was very much framed by his acceptance of the plaintiff as an honest person. I have found he is not honest. Dr Hocking's opinion was also formed on an acceptance of the accuracy of the plaintiff's account of his past history. That is understandable as he is the plaintiff's treating psychiatrist.

[150] Importantly, their opinions that if physical threats were not made, the presence of the masks, and the reference to "you're black, we're white, we're better and you're not", would be sufficient to satisfy the criteria for the diagnosis of post traumatic stress disorder, were inconsistent with the express evidence of the plaintiff. He accepted that without the making of the physical threats he would not have felt threatened by the incident.

Quantum

[151] My conclusions in respect of liability render it unnecessary to assess quantum. However, I shall briefly set out what my conclusions in respect of quantum would have been if I had found in the plaintiff's favour on liability.

[152] The plaintiff's claim is based on an assertion that he continues to suffer ongoing symptoms of depression and anxiety as a consequence of developing post traumatic stress disorder. The plaintiff's lack of credibility significantly impacts upon any acceptance of that assertion.

[153] In that respect, the observations of Muir JA (with whom Margaret Wilson AJA and Ann Lyons J agreed) in *Lusk & Anor v Sapwell* are apposite:-

> [64] … The respondent was less than frank when on oath about a matter which she must have realised had a substantial bearing on the outcome of her damages claim. When it became apparent to her that it was likely that the cross-examiner was aware of her job interview she disclosed it explaining 'well, I'd actually forgotten about Franz, to be perfectly honest'. She then commenced to pretend that she didn't know, that her meeting with Ms Crilly was a job interview. She first said 'I didn't realise it was a job interview until I got there'. A little later she said "I actually went to see if I could do it' in response to the query 'but you went to the interview'. She later claimed 'it wasn't really even an interview, Sharon just talked to me'. The substance

> of this evidence was contradicted by Ms Crilly whose evidence was discussed earlier.
>
> [65] When this blatant disassembling is coupled with her failure to disclose her resume, and the difficulties with her evidence concerning her mental history it is impossible to regard the respondent as a witness of credit. ... The following observations of McPherson JA in *Collings & Anor v Amaroo (Qld) Pty Ltd* explain the difficulties to which the respondent's lack of credit gives rise:
>
> > 'A plaintiff who is guilty of dishonesty or misstatements to his legal advisors, his medical consultants, and the court hearing this claim necessarily places himself in a difficult position if his deceit is discovered. It leaves the court with the impossible task of attempting to assess his true condition by reference, not to what he has said about it, but to what he and others might have said if he had told the truth.'" [49]

[154] The plaintiff's claim of ongoing symptomatology is inconsistent with the observations of others. Omundson gave evidence of no apparent change in the plaintiff's attitudes and performance after joining Vinidex. I accept that evidence. Omundson impressed me as being frank in his evidence. There appeared no ill will towards the plaintiff. Further, the plaintiff's continued use of the expression "the Arab" at Vinidex, and his continued telling of "Arab" jokes in a workplace which is said to have a zero tolerance in respect of such banter, is completely inconsistent with the continuing existence of post traumatic stress disorder. Such banter is a likely trigger of reminders of the incident said to have caused that condition.

[155] I do not accept the plaintiff's evidence that he has ongoing symptoms due to any ongoing effects of the incident. Any ongoing symptomatology following the incident revolves around excessive alcohol consumption and stress and anxiety.

[156] Each of the psychiatrists who gave evidence at trial accepted that excessive alcohol intake exacerbates the symptoms of stress and anxiety, and limits the effectiveness of attempts to treat that condition. I am satisfied any symptoms of stress and anxiety suffered by the plaintiff are likely to have been ineffectively treated as a consequence of his excessive alcohol intake.

[157] The fact the plaintiff engaged in excessive alcohol consumption following the incident is entirely consistent with a pre-existing condition. I accept the onus is on the defendant to establish the existence of such a pre-existing condition.[50] I am satisfied, on the evidence, the defendant has discharged that onus. The defendant has also established, on the balance of probabilities, that any ongoing stress and anxiety suffered by the plaintiff was as a consequence of a pre-existing condition.

[158] Once that conclusion is reached, the plaintiff is entitled to only a small award of general damages to allow for the fact that the incident caused him stress and anxiety

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49 [2011] QCA 59 at [63]-[65].

50 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

in the months following the incident. On that basis, the plaintiff's award of general damages, including any interest component, would be no more than $10,000.00.

[159] The plaintiff's claim for economic loss, in the past and the future, is also affected by my findings as to the cause of his stress and anxiety and inability to work. The length of time during which the plaintiff was unemployed following his resignation from the defendant's employment and prior to his initial employment at Vinidex was, to a significant extent, affected by his alcohol abuse and the need for admission for detoxification. I am satisfied the period of unemployment would otherwise have been far less. I am satisfied it would have been less than six months. The claimed loss of $1,000 net per week should only be allowed for 20 weeks.

[160] The plaintiff ceased his employment with Vinidex in circumstances where he had been charged with an alcohol related driving offence. I am satisfied that that period of unemployment was as a consequence of his pre-existing alcohol abuse. I allow no sum for that period.

[161] As the total amount allowed for past economic loss is less than the amount paid by WorkCover, there is no basis for any award of interest on past economic loss.

[162] The plaintiff's claim for further economic loss is premised on an assertion that the plaintiff will be unable, in the future, to perform a leading hand role due to his ongoing post traumatic stress disorder, and that the inability to do so results in the plaintiff earning less than he would otherwise have received for his employment. I do not accept the plaintiff has any ongoing symptomatology which is due to any condition other than a pre-existing condition. Further, Rogers clearly indicated that when he employed the plaintiff on the subsequent occasion the plaintiff was seeking to undertake educational courses with a view to moving from the factory floor to management. Against that background, I do not accept the plaintiff would have undertaken a leading hand role in the future.

[163] Whilst Rogers expressed the view that the financial incentives associated with the conditions of employment of a leading hand caused him to consider making application for such a position in the past, I am satisfied the plaintiff had made a conscious decision that he wished to move from factory related work into management. It is apparent he is well suited to a managerial position, and enjoys that work. I would allow no sum by way of future economic loss, including any future superannuation loss.

[164] The plaintiff also claimed an amount of $6,000.00 by way of future treatment of his ongoing psychiatric condition. As previously indicated, I do not accept the plaintiff has any ongoing symptomatology as a consequence of any condition other than a pre-existing condition. I would make no allowance for future treatment.

[165] Special damages were agreed in the sum of $51,482.65. It was agreed the interest bearing component of that sum was $3,519.45. Interest on that sum, at 5% per annum for 170 weeks, is $575.29.

[166] In summary, if the plaintiff had succeeded on liability, I would have assessed his damages at $85,577.39. This sum is less than the WorkCover refund, which is agreed at $91,574.53. Accordingly, even if the plaintiff had succeeded on liability,

he would have failed to recover damages in excess of the refund owed to the defendant. His claim would have been dismissed in any event.

Orders

[167] The plaintiff's claim is dismissed. I shall hear the parties as to costs.