SUPREME COURT OF QUEENSLAND

CITATION:	*Wolters v The University of the Sunshine Coast* [2013] QCA 228
PARTIES:	**GJENIE WOLTERS** (appellant) **v** **THE UNIVERSITY OF THE SUNSHINE COAST** ABN 28 441 859 157 (respondent)
FILE NO/S:	Appeal No 10069 of 2012 SC No 8439 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2013
JUDGES:	Margaret McMurdo P and Gotterson JA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The orders made on 5 October 2012 be set aside.** **3. That there be substituted in lieu, the following orders:** **(a) the defendant pay the plaintiff damages in the amount of $364,008.06;** **(b) the defendant pay the appellant's costs from 19 July 2010 of the proceedings to and including trial on the standard basis.** **4. The respondent to pay the appellant's costs of the appeal on the standard basis.**
CATCHWORDS:	EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – EVIDENCE – ONUS OF PROOF – where the appellant was employed by the University of the Sunshine Coast as a security guard – where the appellant claimed negligence against her employer for damages for personal injury based on an incident at her workplace as a result of another employee's conduct (Mr Bradley) – where the primary judge found that the University had failed to investigate an earlier incident involving the respondent and another employee – where the

University knew that Mr Bradley had verbally abused this other employee and that he had behaved in a threatening manner – where Mr Bradley undertook an informal discussion with respect to this incident from a person he regarded as a mentor – where the primary judge found that it was untenable to plead that the University took reasonable and appropriate steps to investigate the fellow employee's allegations, when it did not investigate them – where the primary judge found that a reprimand and counselling by the mentor would have been appropriate to fulfil the University of the Sunshine Coast's duty of care – where the focus of the hypothetical inquiry undertaken ought to have been upon whether the incident involving the appellant would have been avoided had Mr Bradley been reprimanded and counselled appropriately after the initial incident – where the same behavioural deficiency attended the incident the subject of the litigation – whether the hypothetical inquiry undertaken by the primary judge miscarried for failure to indentify the content of the reprimand and counselling that ought to have been given to Mr Bradley – whether the appeal should be allowed

Batiste v State of Queensland [2001] 2 Qd R 119; [2001] QCA 275, cited
Bennett v Minister of Community Welfare (1992) 176 CLR 408; [1992] HCA 27, cited
Chappel v Hart (1998) 195 CLR 232; [1998] HCA 55, cited
Flounders v Millar [2007] NSWCA 238, cited
Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335, cited
McLean v Tedman (1984) 155 CLR 306; [1984] HCA 60, cited
Seltsam Pty Ltd v McGuiness (2000) 49 NSWLR 262; [2000] NSWCA 29, cited
TC by his tutor Sabatino v State of New South Wales [2001] NSWCA 380, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: W Sofronoff QC, with M E Eliadis, for the appellant
R Douglas QC, with G O'Driscoll, for the respondent

SOLICITORS: Shine Lawyers for the appellant
Bruce Thomas Lawyers for the respondent

[1] **MARGARET McMURDO P**: I agree with Gotterson JA's reasons for allowing this appeal and with the orders he proposes.

[2] **GOTTERSON JA**: After a trial over five days, the appellant's claim in negligence against her employer, the respondent, for damages for personal injury was dismissed. She was awarded nominal damages of $100 for breach of contract. No

order as to costs was made. The learned primary judge assessed her damages at $364,008.06. Judgment in these terms was given on 5 October 2012.[1]

[3] By a notice of appeal[2] filed on 29 October 2012, the appellant challenges the basis on which her claim was dismissed. She seeks orders that the respondent pay to her the damages as assessed and her costs of both the proceedings at first instance and on appeal.

[4] The appellant's claim was based on an incident at her workplace on 14 March 2008. It involved her and another employee of the respondent, Mark Bradley. As pleaded, the appellant's case was that she sustained a personal injury in the form of a debilitating psychiatric illness as a result of Mr Bradley's conduct. The appellant alleged that she had been wronged by intentional torts and negligence on the part of Mr Bradley for which the respondent was vicariously liable.[3]

[5] At trial, the claims of intentional torts were not pursued.[4] The claim that the respondent was vicariously liable for negligence on the part of Mr Bradley was also dismissed. The primary judge was not persuaded that he owed the appellant a duty to take reasonable care to avoid causing her psychiatric injury or that, if he did, he had breached that duty.[5]

[6] The appellant also claimed that the incident (and thus her injury) was occasioned by negligence on the part of the respondent itself in:

> "(a) Failing to provide and maintain a safe workplace;
> (b) Exposing (the appellant) to a risk of injury which could have been avoided by the exercise of reasonable care;
> (c) Failing to take any or any adequate action in relation to the aggressive and distressing acts and conduct of Mark Bradley within the workplace of which it knew or ought reasonably have known when, in all the circumstances, a reasonable person in [the respondent's] position would have done so."[6]

[7] This claim was also dismissed. Argument on the appeal focused on the course of reasoning adopted by the primary judge to conclude that it should be dismissed. Before turning to those arguments, I propose to mention the factual circumstances in which the claim arose and aspects of the reasoning which led to its dismissal.

Factual circumstances

[8] At the commencement of the reasons for judgment, the primary judge summarised the factual setting in which the claim arose. The summary, which it is convenient to adopt, incorporates a number of findings, reasons for which are given elsewhere in the judgment but which are not challenged on appeal. The summary is as follows:

> "[1] The plaintiff, Ms Wolters, was employed by the defendant ("the University") as a security officer. Her work impressed those who worked with her, including her supervisors who assessed her performance very highly. Ms Wolters took

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1 AB 975.
2 AB 976-979
3 AB 897-8; Amended Statement of Claim paragraphs 10-12.
4 Reasons for Judgment [13].
5 Reasons [110].
6 AB 898; Amended Statement of Claim paragraph 13.

pride in her work and planned to work as a security officer at the University for a long time.

[2] Mr Mark Bradley was instrumental in the construction of the University of the Sunshine Coast. As an employee of the University, and as part of a team that built it, he achieved remarkable results. The University's inaugural Vice-Chancellor, Professor Thomas, who worked closely with Mr Bradley, praised his professionalism in building the campus. He described Mr Bradley as a "very direct, hands-on person who got things done." Mr Bradley's background was in the construction industry. He held the position of Director, Capital Programs and Operations. In that role he had management responsibility for a variety of services, including security.

[3] On Friday, 14 March 2008 at around 8.25 am there was a power outage on the campus. During that episode Mr Bradley confronted Ms Wolters. He walked quickly towards her, yelled at her and waved his arms at her. He accused her of having abandoned her duties. He was wrong about that.

[4] During the confrontation Ms Wolters attempted to explain what she had been doing, but to no avail. Mr Bradley did not discuss matters with her. He ordered her to get on with her work, and stormed off.

[5] Mr Bradley's aggressive behaviour and his unfair accusation against Ms Wolters left her in a bad state. By the time of that afternoon's de-briefing of staff about the power outage, Mr Bradley had calmed down, and no mention was made at the de-briefing about any shortcomings in Ms Wolters' performance. Still, she was badly affected by Mr Bradley's behaviour that morning, and was so preoccupied by it that she inadvertently drove through a red light that afternoon when she had her children in her car. She struggled to work her rostered shift the next night, and after that she did not work another shift.

[6] On Monday, 17 March 2008 she was accompanied by a supportive work colleague to the Human Resources section where she complained about Mr Bradley's behaviour. It declined to investigate her grievance.

[7] Mr Bradley learned that Ms Wolters had complained about his conduct, and he had reason to be concerned about what might develop. A few months earlier he had engaged in similar aggressive behaviour towards a fellow employee, Ms Heather Carney. His verbal abuse of Ms Carney on 13 December 2007 proved to be the "final straw" for Ms Carney, who never returned to work.

[8] On 19 December 2007 she lodged with the University a formal complaint of workplace harassment and bullying

against Mr Bradley. This was never properly investigated by the University. On the same day she also lodged an application for workers' compensation. She alleged that on 13 December 2007 Mr Bradley verbally abused her, yelled at her, was physically red, waved his hands and threatened her position. The University did not contest these allegations. On 15 January 2008 it was informed in writing that WorkCover had accepted Ms Carney's claim for depression sustained on 13 December 2007.

[9] A few weeks later the University's Director of Human Resources met with Ms Carney. She remained seriously depressed and did not want to return to the University, where she would encounter Mr Bradley. On 6 February 2008 Ms Carney signed a Separation Agreement with the University, whereby she accepted a "separation package" that included a redundancy payment. She did not withdraw her complaint against Mr Bradley or indicate that she no longer wished it to be investigated.

[10] By Monday, 17 March 2008 Mr Bradley must have known that he was the subject of another complaint of having aggressively abused a female employee. The best form of defence was to attack. Rather than check his facts and apologise to Ms Wolters for what he had said and done on the Friday, Mr Bradley wrote to the Vice-Chancellor about Ms Wolters and accused her of "Unsatisfactory Performance". He accused her of a lack of judgment and inappropriate response during a "critical incident". This was said to be a matter of concern that required further training and mentoring for Ms Wolters. Mr Bradley recommended that until he was satisfied that Ms Wolters was "capable of responding to and has an understanding of a critical incident" she not be left in charge of a shift or be the point of call for security.

[11] If Mr Bradley had checked his facts before writing this damning letter he would have ascertained that Ms Wolters had not neglected her duties or helped a staff member with a computer problem. This unfair and unfounded accusation aggravated her condition. Understandably, she involved her Union. She claimed workers' compensation. Her claims were contested, and she engaged lawyers to pursue a claim for damages. Her psychological condition did not improve, and she saw psychiatrists, either for treatment or for them to assess her compensation claims.

[12] Ms Wolters became introverted and did not pursue the recreational activities, family life and friendships that had earlier been part of her life. An attempt to return to the workforce proved disastrous. WorkCover arranged for Ms Wolters to work in an aged care facility, and this experience added to her grief. She took up ginger farming

> on a small scale, more for therapy than for income, and gradually developed that small business. It provides her with a small and uncertain income. She has been diagnosed with a psychiatric illness."[7]

[9] The primary judge made more detailed findings with respect to the incident involving the appellant. To do so he had to resolve conflicts between the accounts of the witnesses. Generally, he accepted the evidence of the appellant.[8] He did not find Mr Bradley's recollection of events "to be particularly reliable, especially where it conflicts with the evidence of (a co-worker) Ms Gould".[9] The following paragraph contains a summary of a number of findings made by the primary judge which appear at paragraphs 28 to 33 of the reasons.

[10] The incident occurred in and near the office of Ms Gould. The appellant was driving past the office in a buggy when she noticed that Ms Gould was signalling her for assistance. A short time prior to that, she had heard a call on her radio-phone from the company that was responsible for the fire fighting system at the university. A fire alarm had been activated in the sports stadium. It was the appellant's responsibility to address that situation. She advised the company of the power outage and that she would organise an officer, Mr Gordon, to go to the stadium. She was making a mobile phone call to him just as she entered Ms Gould's office. At that point, Mr Bradley's voice came over the radio. He "berated" the appellant about the length of her communications. She continued to communicate with Mr Gordon at the same time making notes, as she was required to do, about her communications with the company and him. She was seated at Ms Gould's desk facing her. She looked outside and saw Mr Bradley waving his arms erratically. Through the double glazing, she could hear him yelling, "Get the bloody hell out of there." The appellant ended her telephone conversation with Mr Gordon and walked immediately out of the office into a breeze-way. She saw Mr Bradley walking quickly towards her. He was screaming and yelling things like, "What the hell do you think you're doing in there? There is a power outage and you're in there." The appellant said that Mr Bradley was rushing towards her and she felt frightened because she did not know if he was going to stop. He stopped about one metre away from her. She did not know what she had done wrong. He continued to yell at her and wave his arms around in an angry fashion. His face was red and flushed.

[11] His Honour found that in acting as he had, Mr Bradley had proceeded upon his own misapprehension of circumstances at the time. He described them as follows:

> "[39] Mr Bradley believed at the time he confronted Ms Wolters that she should not have been in Ms Gould's room and was not performing her duties, as required during a power outage. His belief in this regard was not based upon reliable information. Had he bothered to check with Ms Wolters or Ms Gould he would have appreciated that Ms Wolters was called by Ms Gould into her office and at the time Ms Wolters was not to know whether there was some kind of emergency that required her assistance. Whilst in the room Ms Wolters attended to necessary communications

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7 AB 935-937.

8 Reasons [20].

9 Reasons [21].

> and the recording of events. At some stage during the confrontation Mr Bradley may have misunderstood that Ms Wolters had gone into Ms Gould's room in order to help her with her computer. But this was not Ms Wolters' intention in going into the room, and she did not in fact help Ms Gould with her computer."

Evidence given by Mr Bradley himself supported these findings.[10]

Primary judge's reasoning

[12] Informed by decisions of high authority[11] his Honour stated the law to be that the relevant duty of care of an employer is engaged if psychiatric injury to the particular employee is reasonably foreseeable. That principle, he observed, invites attention to the nature and extent of work being done by the particular employee and signs given by the employee concerned.[12] He saw the "central issue" to the existence of a duty of care in this context as being "whether the employer knew or ought to have known of conduct which was likely to give rise to a risk of psychiatric injury to the plaintiff".[13] Neither party to the appeal takes issue with this statement of legal principle or the observations made by his Honour.

[13] To a very considerable degree, the appellant's case with respect to the existence, nature and content of the respondent's duty of care to her as pleaded in paragraph 13(c) of the Amended Statement of Claim, to which I have referred, was based on the incident involving Ms Carney and Mr Bradley to which his Honour's summary refers. That incident involved, as he found,[14] unfounded allegations against Ms Carney delivered by Mr Bradley in a verbally abusive and physically aggressive manner. The allegations were to the effect that Ms Carney had not arranged for payment of an invoice to a contractor who was pressing for payment. They were unfounded because the invoice was being held by another employee of the University, and not by Ms Carney. As his Honour pointedly observed, if Mr Bradley had checked his facts, he would have ascertained that the invoice was with the other employee.[15]

[14] At paragraphs [76] to [103] of the reasons, the primary judge then considered in detail the factual issue of the state of the respondent's awareness prior to 14 March 2008, that Mr Bradley was aggressive and was capable of arousing fear and distress in female employees and capable of causing injury to them. His Honour reached the following conclusions with respect to this issue:

> "[103] By February 2008, and well prior to Mr Bradley's confrontation with Ms Wolters on 14 March 2008, the University knew that Mr Bradley had verbally abused Ms Carney, behaved in a threatening manner and threatened her job. It knew that the incident on 13 December 2007 caused Ms Carney a workplace injury. It acknowledged this on 15 January 2008 in its communications with WorkCover.

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10 For example, AB 248-9; Tr4-36 L20 – Tr4-37 L46.

11 *Tame v New South Wales* (2002) 211 CLR 317 at [16], [61]-[62], [201]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33], [35].

12 Reasons [64].

13 Reasons [72].

14 Reasons [89].

15 Reasons [85].

> By February 2008 the University knew that the injury was a serious one and Ms Carney was suffering debilitating depression. Her psychiatric injury was the result of Mr Bradley's aggressive behaviour on 13 December 2007. That behaviour had caused fear and distress to its victim and had left her with a psychiatric injury. Mr Bradley was capable of causing the same injury to another female employee, and the University was aware of this prior to 14 March 2008."[16]

[15] These factual findings provided the primary judge with a basis for the conclusion that he evidently reached that the respondent owed a duty of care to the appellant with respect to risk of injury to her arising from Mr Bradley's conduct. Whilst his Honour did not, at that point, expressly state the full content of the duty of care that he found had existed, later in the reasons he stated that the respondent "owed its female employees, including (the appellant), a duty to take reasonable care to avoid psychiatric injury".[17] An indication of the ambit of the duty, as his Honour perceived it, is revealed in the following observation he made as to what the duty of care required of the respondent:

> "[115] A reasonable person in the University's position would have contemplated that there was a risk of injury if Mr Bradley again engaged in the type of conduct which Ms Carney alleged. A reasonable person, confronted with that foreseeable risk of injury, would not have done nothing. …"[18]

His Honour posed for himself, and answered, the following question:

> "Did [the respondent] breach its duty of care to [the appellant] and breach its contract with her by failing to investigate Ms Carney's complaint and take appropriate action to reprimand and counsel Mr Bradley?"

[16] In answering the question, his Honour observed that reasonableness required, by way of response, in the first instance, the taking of reasonable and appropriate steps to investigate Ms Carney's allegations.[19] As noted, his Honour found that there was no proper investigation and, moreover, that had there been such, then the respondent would have discovered that Ms Carney's account was true.[20]

[17] The primary judge also found that, acting on an ill-founded conclusion that Mr Bradley had yelled at Ms Carney because she had failed to pay an invoice that should have been paid by her, Professor Thomas, the respondent's then Vice-Chancellor, took a "low key" response to her complaint.[21] His Honour set out his description of that response in the following words:

> "[120] According to Professor Thomas, he told Mr Bradley that raising his voice, as Mr Bradley explained he had done, was "not good management style", particularly with Ms Carney, and that "other people's perceptions of his management

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16 Reasons [103].
17 Reasons [126].
18 Reasons [115].
19 Reasons [115].
20 Reasons [117].
21 Reasons [119].

> style were just as important as his perception of what he was actually doing to expedite a building being completed". Professor Thomas told Mr Bradley that there needed to be a balance struck with more sensitivity on his part rather than having outbursts of that kind. Mr Bradley was told that he needed to carefully examine his management style so that the perceptions of other people were taken into account. This advice was given in an informal setting.
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> [121] According to Mr Bradley he was given general advice, rather than any direction. The advice was to be careful about those sorts of interactions and that "there are threats out there". By this Mr Bradley understood that Professor Thomas was counselling him that "people can sort of take advantage of those situations."
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> [122] I am unable to determine whether Professor Thomas or Mr Bradley's recollection of what was said by way of advice is the more accurate. One of the reasons I cannot resolve what was said is that this informal, general advice was not recorded in a contemporaneous note or confirmed to Mr Bradley in writing. Mr Bradley was not directed that if he engaged in similar conduct again then it would have serious consequences for him. Mr Bradley received no form of directive. The message that he took away was one about other people's perceptions and how people can take advantage of such situations."

[18] Against the background of those factual matters, his Honour then made significant findings as to the reasonableness of the respondent's response. They are set out in paragraph 123 of the reasons for judgment as follows:

> "[123] The course taken by the University was not a reasonable response. The risk that an employee, particularly a female employee, might sustain serious psychological distress, if not a psychiatric injury, as a result of being yelled at and threatened by Mr Bradley was reasonably foreseeable. The matter warranted investigation because Ms Carney's complaint had not been withdrawn and her complaint involved a serious matter. An independent assessment had concluded that Mr Bradley's behaviour had caused Ms Carney a psychiatric injury. Without a proper investigation into Mr Bradley's conduct there was a real risk that it would be repeated. A proper investigation was necessary in order to determine what should be done. A proper investigation would have resulted in findings that Mr Bradley had engaged in abusive conduct that resulted in a serious psychological injury to a female member of staff. Such a finding would have resulted in at least Mr Bradley being reprimanded and steps being taken that required him to address his aggressive behaviour."

[19] In the two paragraphs which follow, the primary judge elaborated why it was that the response that had been made was unreasonable and made observations as to what a reasonable response would have entailed. His Honour said:

> "[124] The informal discussion between Professor Thomas and Mr Bradley was not a reasonable response in all the circumstances. It was not reasonable because it did not follow an investigation that determined the facts. The general advice that Mr Bradley received was inadequate and fell short of the reprimand that would have followed any proper investigation. A formal reprimand by Professor Thomas, with or without a written warning that Mr Bradley would face more serious disciplinary action if he behaved that way again, would have been the response of a reasonable person in the University's position following an investigation into the matter.
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> [125] It would have been open to the University to provide Mr Bradley with additional counselling from a suitable provider of such services. However, whilst this was open by way of a reasonable response, I am not persuaded that the failure to require him to receive such counselling constituted a breach of duty. A reprimand and counselling by Professor Thomas, who Mr Bradley regarded as a mentor, after an appropriate investigation into the matter was the action that a reasonable person in the University's position would have taken in all the circumstances in response to the foreseeable risk of injury to one of its employees."

[20] The primary judge then made the important finding that by failing to investigate Ms Carney's complaint and in failing to take appropriate action to reprimand and counsel Mr Bradley after such an investigation, the respondent breached its common law duty of care to the appellant.[22] His Honour also found that by that conduct, the respondent had breached its contract with the appellant. It was for that breach that the nominal damages were awarded.

[21] For the primary judge, what was determinative of the claim in negligence was the answer he was to give to the question of whether the incident involving the appellant would have been avoided had the respondent taken appropriate action to reprimand and counsel Mr Bradley. His Honour acknowledged that this question depended upon hypothetical considerations. He proposed that it was for the appellant as plaintiff to prove that performance of the duty would have avoided the harm, a matter that depended on the probabilities for and against.[23]

[22] His Honour considered this question at paragraphs 128 to 140 of the reasons. In the course of so doing, he stated:

> "[134] I find that Mr Bradley would have taken on board a reprimand and counselling that further, similar behaviour would not be tolerated. He would have tried to follow such counselling, especially if it had been given by the Vice-Chancellor. It is possible, even probable, that a reprimand and proper counselling would have significantly reduced the risk of Mr Bradley aggressively yelling at staff, particularly female staff, in the usual course of his administration.

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22 Reasons [127].

23 Reasons [129].

> [135] The issue, however, is whether, on the balance of probabilities, it would have avoided the incident with Ms Wolters. It is possible that it would have. However, I am not persuaded, on balance, that it would have. A reprimand and counselling might be expected to have some effect; otherwise it would not have been a reasonable response to the risk that Mr Bradley would yell at and verbally abuse staff, particularly female staff. However, I am not persuaded that it would have been effective to alter Mr Bradley's behaviour towards Ms Wolters on 14 March 2008. This was not a normal office situation, and Mr Bradley might have expected a security officer to accept robust criticism and emphatic directions. According to Professor Thomas, Mr Bradley had been involved in past confrontations and raised his voice with security officers. Professor Thomas did not regard this as bullying because the security officers had provoked the situation and were "strapping ex-forces guys who raised their voices on a regular basis" and were "quite different from the normal people who populate universities". Of course, Ms Wolters did not have that background, but her position as a security guard would have put her in a different category, so far as Mr Bradley was concerned, from a female office worker who might be less robust.
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> [136] More importantly, the incident did not evolve in the course of Mr Bradley's normal duties in an office. He was reacting to what he perceived to be a crisis. He perceived Ms Wolters to have abandoned her duties during such a crisis. He reacted to the situation impulsively.
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> [137] A reprimand and proper counselling in response to the Heather Carney incident, even if administered a few weeks earlier, was unlikely to have altered Mr Bradley's impulsive response to Ms Wolters' perceived dereliction of duty at the height of a crisis.
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> [138] I am not persuaded that Mr Bradley would have acted differently once he saw Ms Wolters sitting in Ms Gould's office. The confrontation would have been much the same. It is more probable than not that he would have acted towards Ms Wolters much the same way as he did. The incident still would have occurred and its aftermath would have been much the same."

[23] In light of these findings, the primary judge held that the appellant had not proven that if the breach of duty had not occurred, and instead the respondent had taken appropriate action to reprimand and counsel Mr Bradley, the incident would have been avoided.[24] Accordingly, he held that the appellant had failed to prove that the respondent's negligence and breach of contract had caused the incident.[25]

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[24] Reasons [139].

[25] Reasons [140].

[24] With respect to the appellant's psychiatric illness, the primary judge found that the incident was the cause of it.[26] It materially contributed to her condition, along with other factors.[27] His Honour assessed damages accordingly.

The appellant's submissions

[25] As might be expected, the appellant's criticisms of the judgment under appeal have focused upon the primary judge's consideration of the question to which I have referred at paragraph 20. The errors which the appellant submits attend that consideration fall into two broad categories, namely, misapprehensions of legal principle and misapplication of legal principle.

[26] The misapprehensions of legal principle, it is argued, are revealed in the following paragraph in the reasons for judgment:

> "[129] Questions of causation depend on hypothetical considerations, but unless these issues are resolved in the plaintiff's favour, on the balance of probabilities, the court cannot be satisfied that the conduct of the defendant caused the loss.[28] In a case such as the present, the plaintiff must prove that performance of the duty would have averted the harm, and this depends on the probabilities for and against. It is not sufficient to establish causation that the defendant's breach of duty increased the risk of injury.[29] All relevant circumstances, including an increase in the risk to the plaintiff from the defendant's breach of duty and the character and sequence of events, must be considered in deciding whether a defendant's breach of duty which is a possible cause of the plaintiff's damage materially contributed to that damage.[30] In some cases breach of duty coupled with an incident of a kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the incident did occur owing to the act or omission that constitutes the breach of duty.[31] In such a case, the inference leading to liability on the part of the defendant is more probable than any other inference. But the onus always remains on the plaintiff to prove causation. The mere fact that a breach of duty has occurred, followed by injury within the area of foreseeable risk, does not necessarily mean that the evidential onus is reversed.[32]"[33]

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26 Reasons [173].

27 *Ibid*.

28 *Hegarty v Queensland Ambulance Service* [2007] QCA 366 at [52] citing *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Lusk v Sapwell* [2012] 1Qd R 507 at 516-517 at [33]-[40]; 523-524 at [74]-[79].

29 *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 280 [119]; *Batiste v State of Queensland* [2002] 2 Qd R 119 at 124 [10]; *Flounders v Millar* (supra) cf *Jovanovski v Billbergia Pty Ltd* [2010] NSWSC 211 at [68].

30 *E M Baldwin & Son Pty Limited v Plane* (1998) 17 NSWCCR 434 at 473 [77].

31 *Betts v Whittingslowe* (1945) 71 CLR 637 at 649 discussed in *Flounders v Millar* [2007] NSWCA 238.

32 *Flounders v Millar* (supra) at [34].

33 Reasons [129].

[27] The misapplication of principle which the appellant submits occurred is attributed to a failure to take into account cogent evidence which informed the content of the appropriate reprimand which ought to have been given to Mr Bradley. It is convenient to consider each category separately.

Misapprehensions of principle grounds of appeal

[28] The appellant submits that his Honour erred in proposing, as he did in paragraph 129 of the reasons, that the circumstance that the defendant's breach of duty increased the risk of injury is not sufficient to establish causation. It was suggested that the cases to which his Honour referred as authority for that proposition, do not support it.

[29] I understand his Honour to mean by these words that proof that a defendant's breach of duty increased the risk of injury does not, of itself, prove that the breach of duty caused the injury which the plaintiff sustained and for which damages are sought. In my view, that proposition is unobjectionable. Moreover, as the following illustrates, it accords with the authorities to which his Honour referred.

[30] In *Seltsam Pty Ltd v McGuiness*,[34] Spigelman CJ[35] observed:

> "There is a tension between the suggestion that any increased risk is sufficient to constitute a "material contribution", and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in *Chappel v Hart* and in the cases that suggest the former, the actual risk had materialised. The "possibility" or "risk" that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened *because* of X."[36]

[31] These observations were adopted by Thomas JA[37] in *Batiste v State of Queensland*[38] who expressed his entire agreement with them,[39] noting that they focus upon the issue whether an increased risk did cause or materially contribute to the injury actually suffered. His Honour then made the following observations of his own:

> "[10] For present purposes it is not necessary to discuss statements made in *Chappel v Hart*[40] and *Naxakis v Western General Hospital*[41] in the context of the particular problems on causation that emerge in medical negligence cases when a doctor fails to give a patient an opportunity that the patient might or might not have taken to avoid a particular risk. Those cases are now repeatedly referred to as supporting a low bench mark for the level of contribution necessary to establish causation when competing causes exist[42] but I do

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34 (2000) 49 NSWLR 262; [2000] NSWCA 29.
35 With whom Davies AJA agreed.
36 At [119].
37 With whom McMurdo P agreed.
38 [2001] 2 Qd R 119; [2001] QCA 275.
39 At [9].
40 (1998) 195 CLR 232.
41 (1993) 73 ALJR 782, 787, 797, 807; 197 CLR 269, 279, 296, 312.
42 *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157; [2001] QCA 223 para [10].

> not understand any new general theories of causation in tort and contract to have been laid down in *Chappel* or in *Naxakis* other than in respect of cases where those special problems arise. It remains the law that it is still necessary for a plaintiff to prove that a defendant's conduct materially contributed to the sustaining of the injury. This principle which forms part of the ratio of *March v Stramare (E & MH) Pty Ltd*,[43] has not been questioned in any subsequent case."[44]

[32] Spigelman CJ's observations were also adopted by Ipp JA[45] in *Flounders v Millar*[46] in a context in which his Honour described the notion that there is some equivalence between a material risk of increase of injury and a material contribution to the injury as one that has a difficulty.[47]

[33] It is noteworthy that the proposition under challenge by the appellant is also consistent with the observations of Keane JA in *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers and Ors*[48] where his Honour emphasised that the approach taken in *Chappel v Hart*, to which Thomas JA had referred in *Batiste*, is "one of logical inference of a causal link, not of a legal presumption which obviates the need for proof of a causal link."[49] By way of explanation, Keane JA observed:

> "[278] … The inference of causation is a deduction which may logically be made in a case where the risk created or increased by the defendant's breach of duty may operate, either alone or with other risks attending particular action or enterprise, to produce the loss. But it is not a logical deduction where the evidence, either shows that the removal of the risk created by the defendant's breach of duty would not have prevented the occurrence of the loss by reason of the operation of the other attendant risks, or gives reason to regard the possibility of such a result as equally probable. …"[50]

[34] Furthermore, a number of authorities counsel against the adoption of a formal reversal of proof in this context. Mason P[51] had rejected that course in *TC by his tutor Sabatino v State of New South Wales*,[52] saying:

> "… I remain of the view that Australian law has not adopted a formal reversal of onus of proof of causation in negligence, even negligence involving breach by omission. A robust and pragmatic approach to proof of causation permits, but does not compel, a finding of liability in cases of negligence by omission which (as Gaudron J points out in *Bennett*) is necessarily based upon a hypothetical enquiry. A defendant who exposes a plaintiff to a risk of injury or who, by

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43 (1991) 171 CLR 506.
44 At [10].
45 With whom Handley AJA agreed.
46 [2007] NSWCA 238 at [20].
47 At [21].
48 [2006] QCA 335.
49 Reasons [278].
50 *Ibid*.
51 With whom Beazley JA concurred.
52 [2001] NSWCA 380 at [59].

> omission, fails to take reasonable steps to avoid or minimise that risk is not liable unless the risk comes home in the sense that the court is ultimately satisfied on the balance of probability that the defendant's breach caused or materially contributed to the harm actually suffered."

These views were subsequently endorsed by the New South Wales Court of Appeal in *Flounders*.[53]

[35] Next, the appellant submits that the primary judge erred in not proceeding as if the case before him was analogous with *McLean v Tedman*.[54] Had he done so, it is argued, the primary judge would have proceeded on the footing that an evidential onus lay on the respondent "to lead evidence to show that no kind of reprimand and no kind of counselling would have deterred Mr Bradley from engaging in his misconduct".[55] The appellant complemented this submission with a submission that the respondent, not even having pleaded a defence to that effect, had not discharged the evidential onus, and with an alternative submission that if the respondent's case was that Mr Bradley was "incorrigible" to a point of disregarding any such reprimand or counselling, then the respondent's duty of care ought to have been recast more extensively as one that required it to have dismissed Mr Bradley before the incident involving the appellant occurred.

[36] In *McLean*, a garbage collector sued his employer after he had been injured in the course of carrying out an employee-developed work practice in which the collecting truck would drive up one side of a road only and the collectors would pick up bins from both sides and take them to the truck. The plaintiff was injured as he crossed a busy suburban road carrying a garbage humper. It was not in contest that the driving of the truck up one side of the road and then down the other was a safe alternative way of collecting the garbage on that road.[56]

[37] The employee succeeded at first instance. The judgment in his favour was reversed on appeal to a Full Court of the Supreme Court of Queensland on the ground that the employee had failed to demonstrate that there was a reasonable and practicable safe system of work which would have avoided the injuries he sustained. His appeal to the High Court was allowed unanimously. The plurality judgment[57] contains the following observations:

> "It is said nevertheless that the alternative system was not practicable because the employees would have refused to accept it or to have carried it out, notwithstanding that its object and effect was to protect them from injury. We would reject the suggestion that the appellant bore the onus of proving specifically that the alternative system was acceptable to the employees and that they would have carried it into effect. In our view once the appellant was able to point to an alternative and safe system which was practicable in other respects and would have obviated the relevant risk of injury, it was for Brambles to establish that in the circumstances of the case it would have been unable to enforce compliance with the suggested system because its implementation would have been resisted by employees

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53 At [22], [93].
54 (1984) 155 CLR 306.
55 Appellant's written submissions paragraph 21.
56 At 313.
57 Mason, Wilson, Brennan and Dawson JJ.

> on the ground that the increase in the time taken to do the work would have damaged the men's prospects of taking a second job.
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> In fact, Brambles called no evidence on this issue. …"[58]

[38] These observations, which address the persuasive onus, are to be seen as made in a context in which the availability of an alternative safe system which, had it been adopted, would have avoided the employee's injuries, was uncontroversial. That is not the case here. It was not conceded by the respondent that had Mr Bradley been reprimanded and counselled, then the incident would not have occurred. That remained an issue for the primary judge to determine and upon which the appellant bore the onus.

[39] In my view, the appellant has not demonstrated a misapprehension on the part of the primary judge as to the evidential onus. Moreover, his Honour did not purport to find that for some reason, be it conscious defiance, lack of self control or something else, Mr Bradley could not be trusted to respond conformably with a reprimand and counselling. Such a finding played no part in the reasoning. To the contrary, his Honour found that a reprimand and counselling by Professor Thomas, whom Mr Bradley regarded as a mentor, would have been appropriate to fulfil the respondent's duty of care.[59]

Misapplication of principle ground of appeal

[40] As noted, in *Sabatino*, Mason P reminded, as Gaudron J had pointed out in *Bennett v Minister of Community Welfare*,[60] that in cases of negligence by omission, a finding of liability is necessarily based upon a hypothetical inquiry. Here, as principle required, the primary judge set about such an inquiry. It was into whether the incident (and hence injury) would have been avoided if the respondent had discharged its duty of care by taking appropriate action to reprimand and counsel Mr Bradley. That the incident occurred is a historical fact. Whether it would have been avoided is not, of itself, a fact. It is a conclusion with respect to the likelihood that the incident would have been avoided had the duty been discharged. The objective of the inquiry undertaken by the primary judge was to assess the likelihood of that.

[41] The frame of reference for such an inquiry is set by reference to that which the duty of care required have been done. The inquiry is undertaken by assessing all relevant facts and circumstances from which a conclusion is then drawn as to the likelihood that the performance of that which the duty required have been done, would have avoided the incident.

[42] The integrity of the inquiry is therefore dependent upon both a precise articulation of what it is that the duty of care required and an appraisal of all relevant facts and circumstances in order to assess likelihood. A failure to articulate the former or to undertake the latter risks a miscarriage of the inquiry and a resultant lack of legitimacy in the ultimate conclusion drawn from it.

[43] A criticism made by the appellant is that the primary judge did not identify the form of reprimand or counselling that discharge of the duty required. In my view, the criticism is a valid one with consequences for the outcome of this appeal. I have formed this view for the following reasons.

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58 At 314.

59 Reasons [125].

60 (1992) 176 CLR 408 at 420; [1992] HCA 27.

[44] Consideration was given by his Honour to the identity of the person by whom the reprimand and counselling ought to have been undertaken. He was of the view that engagement of an external service provider, though open as a reasonable response, was not necessary. He concluded that reprimand and counselling by Professor Thomas would have been appropriate.[61]

[45] However, no consideration was given to the content of the reprimand and counselling required. Critically, no consideration was given to specific aspects of Mr Bradley's conduct about which he should have been counselled, that would have been identified in the course of a proper investigation of the incident involving Ms Carney. Those aspects would have set the parameters for both the reprimand and counselling that he ought to have been given.

[46] It is abundantly clear that had that incident been properly investigated, then it would have been ascertained that Mr Bradley had acted in an aggressive way towards Ms Carney on a mistaken factual assumption on his part that she was holding the unpaid invoice. He acted without first ascertaining the true facts.[62] This serious deficiency in his behaviour had an immediate consequence in his aggression towards Ms Carney. It follows logically from this that the appropriate reprimand and counselling that Mr Bradley would have been given would have placed considerable emphasis upon bringing that deficiency to his attention and counselling him to check his facts first before criticising other staff members. He should also have been counselled that any warranted criticism should not be made aggressively but calmly, rationally and courteously, although with the full authority of his office.

[47] A focus for the hypothetical inquiry undertaken ought therefore have been upon whether the incident involving the appellant would have been avoided had Mr Bradley been reprimanded and counselled in these terms. That focus would have triggered in the mind of the inquirer a recognition that the same behavioural deficiency attended the incident the subject of the litigation. Again, Mr Bradley acted upon his own misapprehension of circumstances;[63] again, he failed to check his facts first; and again, he acted aggressively, instead of with authoritative courtesy.

[48] I consider that the hypothetical inquiry undertaken by the primary judge miscarried for failure to identify the content of the reprimand and counselling that ought to have been given to Mr Bradley. This flaw deprives of legitimacy the ultimate conclusion reached from that inquiry.

[49] It will be recalled that the ultimate conclusion that his Honour reached was that it was more probable than not that Mr Bradley would have acted towards the appellant in much the same way even if he had been reprimanded and counselled.[64] It is this conclusion that, in my view, ought to be set aside.

Remedy

[50] This Court is in as good a position as the primary judge to reach an ultimate conclusion on the hypothetical inquiry.[65] The appropriate frame of reference is that to discharge its duty of care, the respondent, via Professor Thomas, ought to have reprimanded Mr Bradley in a way that highlighted that he had wrongly criticised

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61 Reasons [125].

62 As the primary judge had found at Reasons [85].

63 See paragraph [10] of these Reasons.

64 Reasons [138].

65 *Warren v Coombes* (1979) 142 CLR 531 at 551.

a co-employee without first checking the facts on which he based the criticism and counselled him to check facts first before attributing fault to a co-employee. The counselling should have also highlighted that when reprimanding a more junior employee for good cause, he should do so calmly, rationally and courteously, although with the full authority of his office.

[51] His Honour found that Mr Bradley would have tried to follow any counselling given to him by Professor Thomas.[66] He also found that when Mr Bradley confronted the appellant at and near Ms Gould's office, he was acting upon his belief that she should not have been in the room and was not performing her duties as required during a power outage.[67] The belief, his Honour found, was not based on reliable information. Whilst in the room, the appellant was attending to necessary communications and recording events.[68] Had Mr Bradley acted as he had been counselled, he would have checked first with the appellant as to why she was in Ms Gould's room and what she had been doing. That there was the exceptional circumstance of a power outage does not provide a sound basis for seriously doubting that he would have done so. Furthermore, there is no reason to suppose that once Mr Bradley had been made aware of the true facts, he would have acted in anything like the aggressive way that he did.

[52] In my view, these considerations compel an ultimate conclusion from the inquiry that it was more likely than not that had the respondent taken appropriate action to reprimand and counsel Mr Bradley, the incident with the appellant would not have occurred.

Disposition

[53] When this conclusion is substituted for the ultimate conclusion that the primary judge made, it follows that all the elements for a successful claim in negligence for damages against the respondent is made out. The appeal therefore should be allowed and judgment be given for the damages as assessed.

Orders

[54] I would propose the following orders:

1. Appeal allowed.
2. The orders made on 5 October 2012 be set aside.
3. That there be substituted in lieu, the following orders:
   (a) the defendant pay the plaintiff damages in the amount of $364,008.06;
   (b) the defendant pay the appellant's costs from 19 July 2010 of the proceedings to and including trial on the standard basis.
4. The respondent to pay the appellant's costs of the appeal on the standard basis.

[55] **ANN LYONS J**: I agree with the reasons of Gotterson JA and with the orders proposed.

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66 Reasons [134].
67 Reasons [39].
68 *Ibid*.