SUPREME COURT OF QUEENSLAND

CITATION:	*Stokes v House With No Steps* [2016] QSC 79
PARTIES:	**KELLY MAI STOKES** (plaintiff) v **HOUSE WITH NO STEPS** **ACN 001 813 403** (defendant)
FILE NO/S:	BS3037/13
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	11 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28-31 July 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. the plaintiff's claim is dismissed.** **2. the parties may make submissions as to costs in writing limited to five pages on or before 19 May 2016.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – GENERALLY – where the defendant was a non-profit organisation providing services funded by the Queensland Government – where the plaintiff was employed by the defendant to care for a severely disabled client at a residential care house – where the client exhibited behaviours including grabbing and biting – where the client attacked the plaintiff and a struggle ensued – where there was only one carer at the house at a time – where the defendant did not have the means to provide a second carer – whether a reasonable person in the defendant's position would have taken the precaution of employing a second carer to manage NM in an emergency – whether a reasonable person in the defendant's position would have taken the precaution of providing a duress alarm to activate in an emergency – whether a reasonable person in the defendant's position would have taken the precaution of providing a swipe access card to make the office quickly accessible TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION –

GENERALLY – where the plaintiff must prove the breach of duty was a necessary condition of the occurrence of the injury – whether the plaintiff would have been assisted in time by an emergency response to a duress alarm – whether the plaintiff would have responded differently in the struggle and instead would have attempted to run from the client, whether or not faster access to the office was available with a swipe access card

Disability Services Act 2006 (Qld) ss 15-17, 19, 20, 23, 28
Workers' Compensation and Rehabilitation Act 2003 (Qld) ss 305B–305E, 306F(2), 306H(2), 306N-306P, 306L(2)
Workers' Compensation and Rehabilitation Regulation 2003 (Qld) ss 112D, schs 8-11

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, cited
Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301; [1986] HCA 20, cited
Bull v Capital Territory Health Commission (Unreported, Supreme Court of the ACT, Sheppard J, 9 July 1982), cited
Cross v Moreton Bay Regional Council [2013] QSC 215, cited
Czatyrko v Edith Cowan University (2005) 79 ALJR 839; [2005] HCA 14, cited
Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18, applied
Liftronic Pty Ltd v Unver (2001) 179 ALR 321; [2001] HCA 24, cited
Malec v J C Hutton Ltd (1990) 169 CLR 638; [1990] HCA 20, cited
Munzer v Johnston [2008] QSC 162, cited
O'Connor v Commissioner for Government Transport (1954) 100 CLR 225; [1954] HCA 11, cited
Paris v Stepney Borough Council [1951] AC 367, cited
PQ v Australian Red Cross Society [1992] 1 VR 19, cited
Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330; [2007] HCA 42, cited
Shaw v Thomas [2010] NSWCA 169, cited
State of New South Wales v Mikhael [2012] NSWCA 338, cited
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, cited
Tamar Park Pty Ltd v Smith [1999] TasSC 16, considered
Vozza v Tooth & Co Ltd (1964) 112 CLR 316; [1964] HCA 29, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, applied

COUNSEL: J Webb for the plaintiff
R Morton for the defendant

SOLICITORS: Hall Payne Lawyers for the plaintiff
HopgoodGanim Lawyers for the defendant

[1] **Jackson J**: The plaintiff's claim is for damages for negligence for breach of the defendant's admitted duty of care as her employer. The plaintiff was injured at work. She was employed by the defendant to care for a severely disabled client, NM, at a residential care facility operated by the defendant.The ultimate issues are whether the defendant was negligent, whether any breach of duty was the cause in fact of the plaintiff's loss and, if so, the quantum of the plaintiff's loss.

[2] On the question of liability my conclusion is that the defendant was negligent but the plaintiff did not prove that any breach of duty was the cause in fact of the plaintiff's loss.

[3] The issue of the quantum of the plaintiff's damages is more straightforward.

House With No Steps

[4] The defendant is a corporation, of the kind these days identified by the acronym "NGO", to identify a non-profit organisation which is also a non-government organisation.

[5] It carried on business supplying services to the Department of Communities, a department of the Queensland Government. The particular part of the department concerned was described as Disability Services Queensland.

[6] The framework for the defendant's service delivery was statutory. Neither of the parties referred to it in detail but the *Disability Services Act* 2006 (Qld) ("DSA") as amended to July 2010, regulated the services that were funded by the department and provided by the defendant to clients.

[7] Within the meaning of the DSA, the defendant was a non-government service provider, because it was a provider, other than the State, that provided disability services.[1] It was also a funded service provider because it was a service provider that received funds from the department to provide disability services.[2] The evidence did not specifically reveal whether the defendant was an approved non-government service provider, that is a corporation approved under pt 6 of the DSA to receive recurrent funding under pt 7,[3] but it seems quite possible that it was.

[8] The DSA contains some important background principles relating to the provision of services to clients (described in the DSA as consumers[4]) with disabilities. By way of example, s 19 provided:

> "**19 Principle that people with a disability have the same human rights as others**
>
> (1) People with a disability have the same human rights as other members of society and should be empowered to exercise their rights.

1 *Disability Services Act* 2006 (Qld) s 15.
2 *Disability Services Act* 2006 (Qld) s 17.
3 *Disability Services Act* 2006 (Qld) s 16.
4 *Disability Services Act* 2006 (Qld) sch 7 (definition of "consumer").

(2) People with a disability have the right to—
  (a) respect for their human worth and dignity as individuals; and
  (b) realise their individual capacities for physical, social, emotional, cultural, religious and intellectual development; and
  (c) live lives free from abuse, neglect or exploitation; and
  (d) participate actively in decisions affecting their lives, including the development of disability policies, programs and services.

(3) When using disability services people with a disability have the right to—
  (a) services supporting their achieving quality of life in a way that supports their family unit and their full participation in society; and
  (b) receive services in a way that results in the minimum restriction of their rights and opportunities; and
  (c) receive services in a way that respects the confidentiality of their information; and
  (d) receive services in a safe, accessible built environment appropriate to their needs; and
  (e) pursue grievances about services without fear of the services being discontinued or recrimination from service providers; and
  (f) support to enable them to pursue grievances about services; and
  (g) support, and access to information, to enable them to participate in decisions affecting their lives.

(4) People with a disability have the right to receive services, and information necessary to support rights, in ways that are appropriate having regard to their disabilities and cultural backgrounds.

(5) Subsections (2), (3) and (4) do not limit subsection (1)."

[9] Many of the following provisions are important. For example, div 2 of pt 2 of the DSA set out the principles that service providers were encouraged to apply and promote in the development and implementation of services for people with a disability.[5] Many of the provisions of the part set goals that services should be designed and implemented to meet, including:

> **"23 Focus on a lifestyle the same as other people and appropriate for age**
> Services should be designed and implemented to ensure that the conditions of everyday life of people with a disability are—
> (a) the same as, or as close as possible to, the conditions of everyday life valued by the general community; and
> (b) appropriate to their chronological age.
>
> **28 Inclusion in the community**

5 *Disability Services Act* 2006 (Qld) s 20(1).

> Services should be designed and implemented to promote the inclusion of people with a disability in the life of the community."

[10] These principles and goals reflected a significant change that occurred in the model of care and governmental involvement in the model of care provided to persons with disabilities, including those who were severely disabled. Fifty years ago, the general model of care was institutional. Opinion and policy changes reflected in the DSA resulted in the creation of NGO organisations such as the defendant. They were non-governmental organisations, but they were in effect providing services funded by government for the benefit of their disabled clients.

[11] This is reinforced by pts 3, 4, 5 and 6 of the DSA. Part 3 provided for the Minister to make standards to detail the way in which disability services were to be provided by funded service providers. Part 4 provided for the Minister to approve a process under which a service provider may be certified by an external certification body as meeting the service standards. Part 5 provided for a complaints process for services delivered by a funded service provider. Part 6 provided for a system under which the chief executive may approve non-government service providers that are corporations as being eligible to receive recurrent funding for disability services.

[12] Part 7 provided for the funding of non-government service providers for the purpose of enabling them to provide disability services in a way that best achieved the objects of the DSA, including approval of funding by the Minister. No funding was to be provided without a written funding agreement that complied with the requirements set out in s 58.

[13] Part 8 of the DSA provided that a regulation may prescribe requirements relating to the provision of disability services to people with a disability by funded non-government service providers. According to s 59(2) the subject matters for the regulation included:

> "(a) how a funded non-government service provider conducts its operations while providing a disability service, including operations relating to—
>
> (i) financial management and accountability; and
>
> (ii) corporate governance; and
>
> (iii) staff recruitment, employment and training; and
>
> (iv) compliance with the disability sector quality system…"

The relationship between NM and the defendant up to the incident

[14] This case is concerned with the arrangements for the care of NM, a severely disabled young man.

[15] NM became a client of the defendant. He was initially accommodated at a house at Morayfield, from 2006. The documents relating to that process were not tendered at the trial. A witness gave some evidence about the Morayfield house.

[16] The Morayfield house project was funded under what was described the Innovative Supported Housing Scheme. In other words, the facility was provided by the department. The supply of the disability services at the facility was provided by the defendant.

[17] There were four clients in the Morayfield house and two disability support workers or carers. The funding for the defendant's services was provided under the DSA. The process of approval will have involved a recommendation of support by a governmental assessment team, described as either the intensive behaviour support team or the "Specialist Response Service" team. The department determined how many people lived there.

[18] Possibly as a result of representations made by NM's mother to the effect that she would like to move him out of that environment, in November 2008 a proposal was developed to move NM to a three bedroom (smaller) house at Deception Bay. There were only two clients, NM and another. There was only one carer at the house at a time, over a three shift roster per day. Again the documents relating to that process were not tendered at the trial, with the exception of a copy of a draft of a Shared Accommodation Support Proposal made by the defendant to the department, which appeared to be incomplete.

[19] In making the decision to provide disability services at the Deception Bay house, the defendant was aware that the department would not fund a proposal based on a staff to client ratio that was higher than one carer to two clients. It was the defendant who determined whether it would provide the services to NM and the other proposed client and who decided whether it could safely do so at the Deception Bay house.

[20] In managing NM's care, there were statutory restrictions under the DSA upon the restrictive practices or policies that the defendant was lawfully able to deploy. Though the details do not presently matter, to fulfil the statutory requirements the question of the appropriate strategies and practices was addressed by the departmental Specialist Response Service team.

[21] As well, the defendant had in place their own risk assessment using their workplace health and safety team. However, no evidence was adduced at the trial of any assessment by them.

[22] There is a summary of how NM was cared for in a document that was tendered at the trial called the Positive Behaviour Support Plan ("the Plan").

[23] The DSA provided for the preparation of such a plan,[6] which was an important document relating to NM's management. The Plan was undated but prepared as at or after January 2010. It was authored by a psychologist, speech pathologist and behavioural scientist employed in the Specialist Response Service. There were also contributions from others, including NM's mother, a director of Insight Disability Services (who provided support services to NM outside the Deception Bay house during the day), and a senior disability support officer from the defendant.

[24] As at 15 August 2010, NM was 25 years old, 163 centimetres in height and weighed about 47 to 48 kilograms. He had been disabled since infancy. He lived in early childhood with his mother and sister. He had been receiving Disability Services Queensland assistance in different forms since 1991.

[25] NM was diagnosed in early childhood with a Severe Intellectual Disability and Autism Spectrum Disorder. He had significant cognitive impairments and presented

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6 *Disability Services Act* 2006 (Qld) pt 10A.

with severe difficulties typical of autism in the areas of social interaction, emotional regulation, communication and behavioural adaption. He was non-verbal with severe limitations in his ability to communicate otherwise. He could follow a simple instruction, such as taking out the rubbish or retrieving something from his bag, but a two-step task was a challenge. He had some reasoning capacity but it was limited. He had memory skills and functions such as remembering faces and repetitive routines but significant impairment with working memory.

[26] From 2005, NM had severe seizures and was treated with anti-convulsant medication. For the twelve month period ending in about January 2010 he had eleven tonic and/or clonic seizures and eight absence seizures.

[27] As at 15 August 2010, NM had been living at the Deception Bay house for about two years and nine months. There was a well-established pattern for his care and activities, as recorded in the Plan. The information included a detailed description of them in a section headed "Information about the environment".

[28] Another section of the Plan was headed "Information about the behaviours". It recorded "[t]arget behaviours that cause a risk of or actual physical harm to [NM] and others". They included:

- Grabbing shirt/skin
- Biting staff
- Scratching staff

[29] Descriptively, it was recorded that "[t]he cycle of behaviour can begin suddenly and unexpectedly. If staff remain with [NM], it will continue and possibly get more intense through biting and scratching. [NM]'s determination to grab and grip onto you will also become more intense."

[30] A flow chart of the behaviours also recorded "[g]rabbing staff around the throat area, often by the shirt (collar bone area) or the bra strap of female staff … When [NM]'s grip is removed, he may escalate further and bite or attempt to bite OR cease attempts to grab and bite."

[31] Between January 2009 and January 2010, there were 10 incidents of the target behaviours, of which two resulted in the carer or person requiring first aid but not medical attention.

[32] Outside the Deception Bay house, because NM attended Insight Disability Services for approximately four hours per day on most weekdays, there were further recorded incidents of the target behaviours of a similar kind, described as more frequent but more limited in intensity than at the Deception Bay house.

[33] Historical information included in the Plan recorded that in 2005 NM's behaviour significantly deteriorated with increases in frequency of the target behaviours, and continued: "At this time, [NM] required 2:1 carer support at Insight Disability Services."

[34] It appears that starting from his relocation to the Morayfield house, over a period of years the target behaviours reduced in severity and frequency, including (or even

particularly) while at the Deception Bay house. The information set out above should be seen in that context. The Plan continued at a later point: "The frequency and intensity of [NM]'s behaviours have decreased significantly since … 2008 … [and] since February 2009, [NM] has only exhibited grabbing and hitting behaviours."

[35] The Plan described the response of staff as follows: "[S]taff will open [NM]'s gripped hand and push hands away. Staff will the[n] hold [NM]'s hands down so that he cannot grab again. Staff will then ask [NM] to go to his room to calm. If [NM] continuously attempts to grab staff, staff will remove themselves from [NM]'s sight through entering office and closing door."

[36] The Plan continued: "New staff or visitors can often get a surprise as the behaviour is unexpected. Behaviour is explained to all staff and ways of dealing with it."

[37] As to the effectiveness of these strategies the Plan provided: "These strategies have been effective in reacting to the behaviour but have not stopped the behaviour from occurring over time. [The defendant] has had difficulty determining a concrete function for behaviour."

[38] The Plan thus recorded the need on occasion for physical restraint of NM and endorsed that practice although recommending alternative strategies to be first deployed. It also provided for monthly review by the Specialist Response Service team but it appears that service withdrew support in or by July 2010.

[39] On 4 August 2010, managers of the defendant decided to cease the use of physical restraint as a strategy and to adopt instead evasion techniques but it does not appear that decision was communicated to the plaintiff before the incident the subject of her claim occurred.

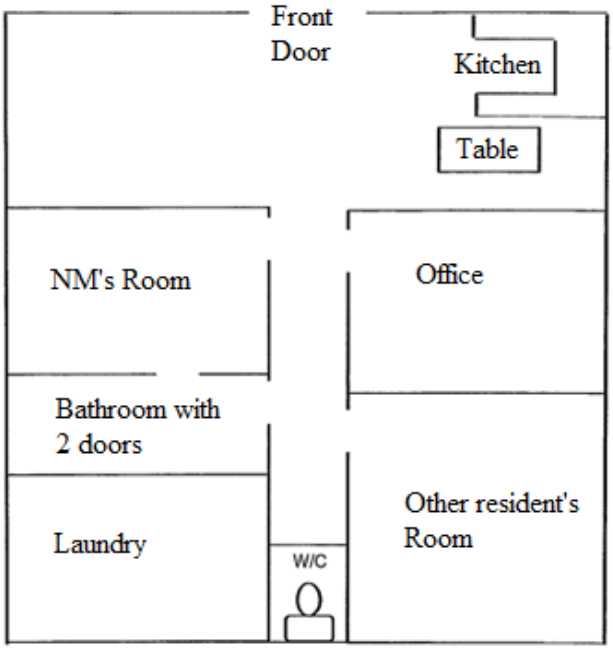
The incident

[40] On 15 August 2010, the plaintiff was a 48 year old woman, 157 centimetres in height and weighing approximately 80 kg. There was no evidence as to her fitness at the time. Prior to that date, the plaintiff had worked at the Deception Bay house as a carer for approximately eight months. Before then, in 2009, she had worked at the Morayfield house, but NM was not then a resident there.

[41] She was an experienced carer having worked in the industry sector for a number of years with previous training and experience.

[42] On 15 August 2010, the plaintiff went to work for the morning shift at the Deception Bay house, taking care of NM and the other resident of the house.

[43] One of the documents in evidence suggests that Deception Bay house was owned by the Department of Housing and rented by NM's mother. Be that as it may, the house was simple in plan and was laid out internally as follows:



[44] Although this diagram is not to scale, it assists to explain what occurred. Thus, there was a table in the eating area between the kitchen and the office. The door to the office was just around the corner into the hallway. NM's bedroom was opposite the office across the hallway. One of the two doors into NM's bedroom was opposite the door into the office.

[45] While NM was having lunch at the table, the plaintiff sat with him and was attending to some paperwork. The plaintiff was sitting at the end of the table nearest to the office. NM was sitting at the other end of the table. The other resident was sitting at the side of the table nearest to the office wall during lunch. It did not appear from the evidence whether he remained at the table during what followed. The plaintiff stood and went from the table into the office, then returned to the table after only a very short time. Perhaps fifteen seconds. NM was standing and had the upturned plate in his mouth. He was biting down on it.

[46] The plaintiff was concerned that NM might break the plate and cut his mouth. She moved forward and asked NM what he was doing. She put her hand out to take the plate. He took it out of his mouth with his hand and began to hand it to her. She reached towards him to take the plate.

[47] Suddenly, without any warning, NM lunged at her and grabbed her around the throat. He was screaming. The plaintiff got the plate out of NM's hand and shuffled to the table to put it down while he had hold of her.

[48] NM grabbed the plaintiff's top. He shook her "like a rag doll". She was losing her balance. When she got back on her feet properly, she grabbed his wrist to hold him away. He was trying to bite her breast.

[49] She unpeeled his fingers from her throat and broke his grip. She then held both his hands by the wrists. She pushed down and held his hands down by his sides. He continued to try to bite and did bite her on the breast.

[50] The plaintiff moved NM into his bedroom while holding him in the manner described. She manoeuvred him onto the bed. She held him down by putting her leg over his legs. At one point the plaintiff released her grip on one of his hands while she was trying to calm him down. He grabbed at her again so she held his wrist again. The evidence did not reveal whether NM was on his back or front on the bed. The former seems more likely.

[51] Eventually NM's struggles slowed and he became quieter. She released him and he ran outside. The plaintiff went into the office and closed the door. She was deeply shaken. She telephoned for assistance and remained in the office until it arrived. She stayed until well after the change-over of the shift and then drove home still deeply distressed.

[52] She noticed that her back was aching and her knees and left wrist were sore. Her breasts were red and sore. She remained deeply distressed. She had some time off work but did not recover as might have been expected. She has not returned to work since.

Legal framework of liability

[53] Although the common law duty of care owed by an employer has much older and deeper historical roots, discussion of the duty of care at common law in a modern context often starts with the formulation in *Paris v Stepney Borough Council*,[7] of a duty to take reasonable care for the safety of the employee in all the circumstances of the case. That formulation was consistent with the common law of Australia as expressed in *Hamilton v Nuroof (WA) Pty Ltd*[8] that the duty is that of a reasonably prudent employer to take reasonable care to avoid exposing the employees to the unnecessary risks of injury. Later cases, such as *Vozza v Tooth & Co Ltd*[9] and *Czatyrko v Edith Cowan University*,[10] explicate but do not change the central question.

[54] Such statements of principle have two aspects: first that a duty of care arises in law out of the relationship of employment; second, that the standard of care required is that appropriate to an employer. The second aspect has generated statements as to the height ("not low") or weight ("heavy responsibility") of the standard of care required of an employer, such as those made in *O'Connor v Commissioner for Government Transport*[11] and *Liftronic Pty Ltd v Unver*.[12]

[55] There is no dispute that a duty of care was owed by the defendant to the plaintiff in relation to the risk of injury that she might suffer from NM's behaviours.

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7 [1951] AC 367, 384.
8 (1956) 96 CLR 18, 25.
9 (1964) 112 CLR 316, 319.
10 (2005) 79 ALJR 839, 842 [12].
11 (1954) 100 CLR 225, 230.
12 (2001) 179 ALR 321, 343 [85].

[56] At common law, the issue of negligence turned on whether the defendant failed to take reasonable care for the safety of the plaintiff as an employee in all the circumstances.

[57] Although it was not stated in an employment case, the "Shirt calculus" as it is now described, as set out by Mason J in *Wyong Shire Council v Shirt*,[13] is almost universally applied on the question of negligent breach of duty at common law. As Gummow J said in *Roads and Traffic Authority of New South Wales v Dederer*,[14] "an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt*". Kirby J, although in dissent, said much the same:

> "The principles expressed by Mason J in that decision have been applied in countless cases in this and other Australian courts since they were expressed. The attempt in *New South Wales v Fahy* to have this Court reconsider its authority in *Shirt* was rejected."[15] (footnotes omitted)

[58] Mason J's statement was as follows:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."[16]

[59] See also *Bankstown Foundry Pty Ltd v Braistina*.[17]

[60] However, the question in the present case does not fall to be decided by reference to the common law alone. Section 305B–305E of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("WCA") affect the question of liability. Broadly speaking, they correspond to ss 9–12 of the *Civil Liability Act* 2003 (Qld).

[61] Sections 305B-305E provided:

> "**305B General Principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—

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13 (1980) 146 CLR 40.
14 (2007) 234 CLR 330, 338 [18].
15 (2007) 234 CLR 330, 371 [134].
16 (1980) 146 CLR 40, 47.
17 (1986) 160 CLR 301, 306-308.

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
(b) the risk was not insignificant; and
(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
(a) the probability that the injury would occur if care were not taken;
(b) the likely seriousness of the injury;
(c) the burden of taking precautions to avoid the risk of injury.

305C Other Principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

305D General Principles

(1) A decision that a breach of duty caused particular injury comprises the following elements—
(a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);
(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—

> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.
>
> **305E Onus of proof**
>
> In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[62] Neither of the parties made any detailed submissions about the operation of the relevant statutory provisions. However, unless they are borne in mind, it is likely that the wrong question will be asked. The correct approach is illustrated by *Adeels Palace Pty Ltd v Moubarak*.[18]

Breach of duty - 305B

[63] In applying the s 305B framework to the facts of this case, first, it may be accepted that the risk of injury to the plaintiff from NM's behaviours was foreseeable within the meaning of s 305B(1)(a). The defendant knew of the risk. It had been specifically considered in the Plan.

[64] Next, the defendant does not submit that the risk was insignificant for the purposes of s 305B(1)(b). In my view, the probability that some injury would be suffered by a carer because of NM's behaviours was quite high. However, the probability of a serious injury was relatively low. The injuries suffered in earlier episodes by other employees only required first aid. The likelihood of a much more serious outcome was not identified by those who assessed the risk in the Plan.

[65] In any event, the frequency of NM's behaviours and the minor injuries that he had inflicted on other carers in the twelve months prior to the Plan being prepared showed that it was not unlikely that he would behave in a way that would cause some physical injury of the kind sustained by the plaintiff. NM's known propensity to grab at his carer's throat or shirt, or the bra strap of a female carer, indicated the risk of personal injury. That the extent of the injuries previously sustained as a result of these physical behaviours was minor does not affect that conclusion.

[66] Intermediate appellate court authority has twice stated that the statutory requirement that the risk is not insignificant "imposes a higher test than that imposed at common law, 'but … not by very much'".[19]

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18 (2009) 239 CLR 420, 437 [27]-[28].

19 *State of New South Wales v Mikhael* [2012] NSWCA 338, [79]; *Shaw v Thomas* [2010] NSWCA 169, [44].

[67] In my view, the risk of personal injury to NM's carers was not insignificant within the meaning of s 305B(1)(b).

[68] The next question, under s 305B(1)(c), is whether a reasonable person in the position of the defendant would have taken the alleged precautions. The focus must be upon the plaintiff's particular allegations of negligence. Although they were numerous, the real points narrowed to four allegations.

[69] First, the plaintiff alleges that the defendant failed to take reasonable care by employing the plaintiff to work alone as NM's carer because two carers were required to manage NM in an emergency. The relevant precaution was the provision of a second carer to be available in an emergency.

[70] Second, the plaintiff alleges that the defendant failed to take reasonable care as the plaintiff's employer by failing to deploy a system to provide the plaintiff with a portable alert transmission device or duress alarm, which the plaintiff could have activated in an emergency to call for police or other assistance. The relevant precaution was the provision of a duress alarm.

[71] Third, the plaintiff alleges that the defendant failed to take reasonable care as the plaintiff's employer by failing to provide electronic "swipe" card access to the office so that once inside it was locked against entry from the outside without use of the access card.

[72] Fourth, the plaintiff alleges that the defendant failed to take reasonable care for as the plaintiff's employer by failing to replace the crockery with plastic plates and bowls.

[73] In final submissions, the plaintiff only made submissions about first and second allegations, although it sought a finding of fact in writing that the office should have been fitted with a swipe access card. No finding of fact was sought nor was any submission made about failing to replace the crockery with plastic or other unbreakable plates and bowls.

Second carer available in an emergency

[74] The first question of negligence is whether it was a breach of duty for the defendant to engage the plaintiff to work alone as a carer for NM in circumstances where there was no other carer at the house who could provide support in an emergency.

[75] The plaintiff submits that employing a second carer was required to avoid the risk of injury and that a reasonable person in the defendant's position would have taken that precaution. However, the plaintiff adduced no evidence that such arrangements were made in similar circumstances by other employers in the defendant's position in an environment such as that which existed at the Deception Bay house.

[76] Instead, the plaintiff relied on the evidence of an expert witness, an engineer with experience in risk analysis and the performance of workplace health and safety obligations. In this area of service provision by a specialist care provider under the framework of the DSA, I found his evidence less than helpful or of any real use on the question of the appropriate responses to the risk of injury presented by NM as a resident of the Deception Bay house. His training and expertise were neither relevant to that situation nor to any of the allied health care situations that might have provided a useful comparison, such as the management of voluntary patients in a mental health

facility where there is a risk of injury from violence, or the management of patients with dementia or other conditions that present a risk of injury from violence. He had no specific training and experience in any management practices to be followed in those environments.[20]

[77] Quite apart from the apparent lack of any specifically relevant expertise, the proffered expert's reports did not contain any expert opinion upon the plaintiff's primary case that the defendant failed to take reasonable care by employing the plaintiff to work alone as NM's carer because two carers were required to manage NM in an emergency situation.

[78] As well, the reports contained a large amount of irrelevant material. For example, the principal report included pages of text and data under a heading "Context of the Incident" that had nothing whatever to do with the incident, but purported to be an analysis of "the overall burden of injury in Australia" including the incidence of violence in the workplace. At no point was any attempt made to relate it to any issue in the case. It was ill-conceived in a report by an expert whose function is to give relevant evidence in accordance with the "duty to the court" referred to in r 428(3)(e) of the *Uniform Civil Procedure Rules* 1999 (Qld). Second, a large part of the principal report comprised the expert extracting parts of relevant documents and statements of fact made by the plaintiff. They are only relevant as assumptions on which any admissible opinion evidence might have been founded. Third, another large part of the primary report appears to represent the author having carried out a literature review of various documents, reports and standards employed by various organisations and authors, none of which appears to be in a field where the expert had any particular personal expertise by training or experience. Ultimately, after many pages of largely irrelevant material, the report purported to discuss three actions the author suggested could have been taken to manage NM's violent behaviours.

[79] Only one of them, the provision of a duress alarm, was pleaded or ultimately pressed in the plaintiff's case and, subject to an important qualification, I have paid attention to some of his evidence about this question, which shows that such an alarm system is available and how it would operate. The qualification is that he purported to give evidence about police response times had the defendant provided a duress alarm that the plaintiff could have activated. In doing so he referred to statistical averages of response times by the New South Wales police service. There was no expertise in purporting to do so. It was a simple attempt to tender as "expert" opinion what was hearsay summary factual material. It was not expert opinion and could not be tested because its authors were not called as witesses.

[80] Other discussion in the expert's principal report related to ultimately irrelevant suggestions as to physical holds and techniques that a carer might use to restrain an attack by NM, an area where the expert had no demonstrated personal training or expertise, either in using those techniques or in training others to use them. This gap is not made up by the statement in his curriculum vitae that he has investigated incidents involving assaults or workplace related violence.

[81] The defendant in the present case had a specific protocol relating to how to respond physically to an attack by NM and, broadly speaking, the plaintiff appears to have

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20 See, for example, *Bull v Capital Territory Health Commission* (Unreported, Supreme Court of the ACT, Sheppard J, 9 July 1982).

followed it, although it did not appear that she managed to turn NM around so that his back was facing her front at any point.

[82] I reject that whatever investigations the expert may have carried out of assaults in other instances qualified him to offer any opinions as to the appropriateness or otherwise of that protocol or the appropriate physical response to an attack by NM. It further showed a regrettable lack of objectivity that the expert purported to do so. Fortunately, the plaintiff's case, as pleaded and presented in final argument, raised no relevant question of this kind.

[83] The plaintiff sought to obtain assistance on the question as to whether the defendant was obliged to provide a second carer at the Deception Bay house from *Tamar Park Pty Ltd v Smith.*[21] The question in that case was whether an employer who operated a nursing home was negligent in failing to provide a third carer to assist the plaintiff and another carer when they were assisting an uncooperative patient to go to the toilet. In that case it was held that "there was no evidence that it would be costly … or cause any inconvenience if a third employee was required" and that "a person was readily available to assist the two carers".[22] The distinction on the facts of the present case appears below.

[84] The defendant does not submit that the probability of injury was so low that a reasonable person would not have taken the precaution of employing a second carer if it were otherwise appropriate to do so or that this was the critical factor in reaching a conclusion as to whether a reasonable person would have employed a second carer. In my view, it was right not to make that submission.

[85] Further, the defendant does not submit that the likely seriousness of the injury was so low that a reasonable person would not have taken the precaution of employing a second carer if it were otherwise appropriate to do so, or that this was the critical factor in reaching a conclusion as to whether a reasonable person would have employed a second carer. For the reasons previously mentioned, although the prior incidents were of relatively minor injury or injuries, I do not consider that the likely seriousness of injury was so low as to be the critical factor in negating a finding of breach of duty.

[86] However, the defendant submits that it was not reasonable, practicable or financially possible to employ a second carer to be available at all relevant times. Among other facts, it relied on the following:

(a) the defendant is a not for profit organisation dependant on government funding to conduct its activities including the provision of accommodation services to disable persons;
(b) the funding for the Deception Bay house services was provided by the department;
(c) the extra cost for a second carer at the Deception Bay house would have been $220,000 per annum or more;
(d) the defendant could not afford to fund that amount for a second carer at the Deception Bay house; and

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21 [1999] TasSC 16.
22 [1999] TasSC 16, [28] and [44].

(e) the department would not have funded a second carer at the Deception Bay house.

[87] Let these facts be accepted. There was evidence to support them. Under s 305B(2)(c), they suggest that the burden of taking the precaution of having a second carer at the Deception Bay house in relation to NM was excessively high.

[88] Philip Wright was the community service manager employed by the defendant at the relevant time. He gave evidence about the processes by which the defendant applied for and received funding from the department to provide services, including the services provided to NM and his co-resident at the Deception Bay house.

[89] The plaintiff submits that the evidence of Mr Wright supported the inference that if a request had been made, supported appropriately with expert opinion, it would have been granted. That general submission overreached the evidence. Mr Wright said that it was the department, not the defendant, who determined how many people lived in establishments such as the Morayfield house and the Deception Bay house. He also said that the department would not have funded an extra carer in the absence of a recommendation for an extra carer from the Specialist Response Service team and that experience showed that the department did not fund a proposal with a staff ratio of more than one staff member to two residents.

[90] Under s 305B(1)(c) and (2) of the Act, the question is whether a reasonable person in the position of the defendant would have taken the precaution of employing a second carer having regard to the degree of probability that the injury would occur if care were not taken, the likely seriousness of the injury and the burden of taking precautions to avoid the risk of injury.

[91] In *State of New South Wales v Mikhael*, Beazley JA said about the comparator provision in the *Civil Liability Act* 2002 (NSW):

> "Section 5B(2)(c) refers to the burden of taking precautions. Usually, reference is made to the cost of implementing a particular precaution. However, there is nothing in the words of the section, nor in the common law principles which stand behind s 5B, that requires this provision to be confined to the economic burden of taking any particular precaution. In a given case, s 5B(2)(c) may require consideration to be given to the burden of taking precautions to avoid a risk of harm. Such consideration may extend to factors such as time or distance or communication. It may be that a precaution, for some reason, would be difficult to implement. Depending upon the circumstances of a particular case, consideration may need to be given to less tangible burdens…"[23]

[92] The defendant submits that it was not reasonable or affordable to have two carers employed at the Deception Bay house.

[93] The plaintiff submits that the required standard of care is to be tested by reference to what an employer with adequate resources to conduct the enterprise in which the

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23 [2012] NSWCA 338, [82].

employer was engaged would do. The plaintiff relies by analogy upon *PQ v Australian Red Cross Society*,[24] where McGarvie J said:

> "It will be necessary to direct the jury in the present case that the compliance of the Red Cross with its duty of care to the plaintiff is to be tested by reference to a reasonable person with adequate resources available for the activity in which it was engaging. Such a direction is called for because there are in evidence, references to some financial constraints upon the Red Cross, and to some of its work being done by volunteers. It will be necessary to ensure that the jury do not test its compliance with its duty of care by reference to the standard which might be expected of a partly voluntary charitable or benevolent organisation with limited resources of finance or staff."

[94] In my view, s 305B requires the court to take into account the burden of taking precautions to avoid the risk of injury, not to set up a "normalised" standard based on an assumed capacity to provide precautions irrespective of cost.

[95] The social utility of the activity of caring for NM at the Deception Bay house was high. From the Plan, one can see the considerable efforts and resources that were employed to improve NM's quality of life and to maintain that high standard at the Deception Bay house. The basis of his care at the Deception Bay house was that of a two resident one carer model. Logically, in judging the social utility of an activity one must postulate the alternative set of conditions to those which obtain. The plaintiff simplistically says that there should have been a two carer two resident model of care. But there was no evidence of that model of care being available as a possible or practicable alternative at the Deception Bay house.

[96] There was some evidence of NM's residence at the Morayfield house from about 2006 where there was a second carer available. But that was a model of care involving two carers to four residents. If being in a four resident facility might have had a significant negative effect on NM's quality of life, when compared to a two resident facility, the social utility of caring for him at the Deception Bay house might assume greater importance. But there was no evidence on these matters.

[97] If the counterfactual conclusion could have been reached that the defendant had the means to provide a second carer at the Deception Bay house, or might reasonably have obtained them, I would have concluded further that the probability that some injury would occur if that precaution were not taken was relatively high; but the likely seriousness of injury was relatively low and the burden of taking the precaution in terms of cost would have been high, at a cost of approximately $220,000 per annum (to provide a second carer for 24 hours per day on a three shift per day basis).

[98] However, once it is accepted, as I do accept, that the defendant did not have the means and could not reasonably be expected to have obtained the means to provide a second carer at the Deception Bay house, the conclusion can no longer really be that the defendant ought to have provided a second carer at that house.

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[24] [1992] 1 VR 19, 33-34.

[99] It follows that I am unable to find that a reasonable person in the position of the defendant would have taken the precaution of employing a second carer at the Deception Bay house.

[100] Instead, the question is whether NM should not have been cared for in the Deception Bay house at all, but in another environment where there would have been a second carer available in an emergency. For example, before NM was placed in the Deception Bay house, he was resident in the Morayfield house with two carers employed hands on to care for the four clients who lived there (a third worker was a manager who did not work hands on). Would a reasonable person in the position of the defendant have taken the precaution of either not placing him in or removing him from the environment of the Deception Bay house?

[101] During closing addresses for the trial, I was concerned that it would be inappropriate for the court to further pursue that question in this case. The plaintiff did not specifically allege that the negligence of the defendant was that it should not have placed or continued the placement of NM in the Deception Bay house. The defendant did not specifically defend that as an allegation of negligence. The question is whether a possible finding is that the defendant was negligent in placing or permitting NM to remain at the Deception Bay house where there was only a single carer is nonetheless open on the pleaded issues as joined for trial.

[102] Paragraph 8(a) of the statement of claim as amended alleges that the breach of duty of the defendant was that it "undertook the care and management of [NM] without ensuring that it had and continued to have in place adequate staff and resources to properly and safely care for [NM] and to ensure the safety of staff…" In my view, that allegation is wide enough to raise the question whether NM should have been cared for in another environment where there was a second carer available in an emergency.

[103] The burden of taking the precaution of not placing or continuing the placement of NM in the Deception Bay house is not clear because of the absence of any evidence about it. The burden might have been affected by many factors. First, it is apparent from the Plan that NM's behaviours at the Deception Bay house, though challenging, were improved from his behaviours in 2005 and 2006, potentially including some of the period when he resided at the Morayfield house. A number of factors might have affected that, including that NM did not respond as well to larger group situations or people he did not know. However, the defendant adduced no evidence as to the likely effect on NM of living in a larger house environment. Second, there was no evidence as to whether it would have been possible to find a place for NM in an environment where there would have been a second carer available in an emergency, other than the fact that he had lived at Morayfield in such an environment in 2006.

[104] The decision in this case would have to be made without the benefit of relevant expert or other evidence about the assessment process to make a decision as to the suitability of a person such as NM for a two resident one carer model of care.

[105] What evidence there is shows the Specialist Response Service team did not come to the view that NM's continuing placement in the Deception Bay house was inappropriate because of the risk that he might injure a carer. But that question was not specifically addressed, so far as I can see. The Plan was not an assessment of whether he should be placed elsewhere. It was an assessment of the needs and risks

and appropriate management strategies for his care at the Deception Bay house and other environments (such as at Insight Services and on outings) in accordance with the objectives of the DSA.

[106] I have come to the conclusion that there is not sufficient evidence to draw the inference on the balance of probabilities that a reasonable person in the position of the defendant would have taken the precaution of either not placing NM in, or the precaution of removing him from, the environment of the Deception Bay house by declining to provide the services to him there on a one carer two resident model of care.

[107] That conclusion in this case says nothing about what the conclusion would be in another case, where the evidence lacking in this case might be available.

Breach of duty – duress alarm

[108] The plaintiff submits that it was negligent for the defendant not to have provided a duress alarm that the plaintiff could have activated by pressing a simple button so as to avoid the injury that she suffered. There was evidence as to the commercial availability of a duress alarm system or systems that might be used to activate an emergency response.

[109] The defendant submits that it was not negligent not to have a duress alarm.

[110] The defendant relies on the evidence that the initial cost of a duress alarm was $490.00 and there was a monitoring cost of $13 per week ($676 per year) for each alarm. The defendant further submits that to provide a duress alarm to the plaintiff it would have been necessary to provide a separate alarm for every employee who worked as a carer for the defendant at great expense.

[111] There was no foundation in the evidence for the submission that it would have been necessary to provide every employee with a duress alarm. First, there was no evidence that every resident presented a similar risk of injury to that presented by NM. For example, the other resident of the Deception Bay House appears to have been passive by comparison with NM. Second, in any event it is not apparent why there would have to be a separate alarm for every employee. An employee who was not at work or not caring in a similar risk environment would not need one. The hypothesis of the plaintiff's case was that a carer working alone at the Deception Bay house to care for NM required a duress alarm. Only one alarm would be needed for the Deception Bay house. It was not established that it could not be transferred from one carer to another at the change of shift. I find that it would not have been prohibitively expensive to provide a duress alarm.

[112] Below, I hold that the plaintiff has not proved that the provision of a duress alarm would have avoided the plaintiff's loss or damage. Nevertheless, in my view, in the absence of a second carer who could be called to assist the plaintiff in an emergency presented by NM's behaviours, a reasonable person in the position of the defendant would have taken the precaution of providing a duress alarm

[113] Accordingly, in my view, it was a breach of duty for the defendant to fail to do so.

Breach of duty – swipe access card

[114] The plaintiff made no submissions directed to this allegation apart from seeking a finding that the defendant should have fitted a swipe access card to the office at the Deception Bay house.

[115] The question is whether it was a negligent breach of duty for the defendant not to provide a swipe access card that would have made the office quickly accessible and provided the plaintiff with a safe place of refuge had she freed herself from NM's clutches.

[116] The defendant's existing protocols provided, as the plaintiff knew, that she should retreat to the office and lock it if she was threatened by NM and was not able to talk him down or otherwise manage the threat. However, it appears that the office door was locked when closed and opened by the use of a key. Although not developed in submissions, the plaintiff's case theory was that a swipe access card would have provided quick access to the office to enable the plaintiff to escape from NM's attack.

[117] The plaintiff's counsel opened that the plaintiff's evidence would be that the Morayfield house swipe access card was provided for the carer's safety. But the plaintiff gave no evidence about that.

[118] The plaintiff said that immediately before the incident she took her notes into the office where she was for about 15 seconds and then when she came back out NM was standing near the table in the eating area with the plate upside down in his mouth. The plaintiff was asked whether the office had a door and replied that it was a locked office. However, it was not entirely clear from that evidence whether she locked it after she emerged having been inside for 15 seconds. Her description of what happened after she released NM from her hold and he ran out was that she was fumbling around with a big bunch of keys, so it appears more likely than not that the office door was closed and a key was required to open it.

[119] Mr Wright was asked about swipe card access at the Morayfield house in cross-examination. He confirmed that there was a swipe card system at the Morayfield house, that it gave quick and easy access to the office and that it was used (apparently for that purpose) at the Morayfield house, but said cryptically that the Morayfield house was a "different environment".

[120] When it was suggested to him that a swipe access card system of entry to a locked office would have been appropriate at the Deception Bay house he responded that to lock a door to a the room of the house would be an impermissible restrictive practice, apparently meaning under the DSA. It was not explained how it was permissible to have a locked door at the Morayfield house but not at the Deception Bay house or how, if it was impermissible to do so, the existing practice at the Deception Bay house was to lock the door to the office. In any event, the Plan clearly provided for a carer to the locked office as a defensive strategy.

[121] I find that it would not have been impermissible to have fitted a swipe access card at the Deception bay house.

[122] Would a reasonable person in the position of the defendant have taken the precaution of fitting a swipe access card to guard against the risk of injury to the plaintiff if NM attacked a carer?

[123] I have previously dealt with the probability of and likely seriousness of injury.

[124] The defendant expressly does not submit that the burden of taking a precaution to avoid the risk of injury by fitting a swipe access card to the office would be high in terms of cost.

[125] In the absence of a second carer who could be called to assist the plaintiff in an emergency presented by NM's behaviours, in my view, a reasonable person in the position of the defendant would have taken the precaution of providing swipe card access, as a quick method of access to the office where a carer would be protected from NM's targeted behaviours if he attacked.

[126] Accordingly, in my view, it was a breach of duty for the defendant to fail to do so.

Causation in fact – second carer available in an emergency

[127] Under s 305D(1)(a) the element of factual causation is that "the breach of duty was a necessary condition of the occurrence of the injury".

[128] The High Court has twice stated that the statutory requirement that the breach of duty is a "necessary condition" means that in the case of an omission the question of causation in fact is whether the harm would have occurred but for the omission.[25]

[129] Second, by s 305E, the plaintiff bears the onus of proving on the balance of probabilities any fact relevant to the issue of causation.

[130] In *State of New South Wales v Mikhael*,[26] Beazley JA said about the comparator provision in the *Civil Liability Act* 2002 (NSW):

> "As the concern at this point is with factual causation, the respondent was required to establish some underpinning factual circumstance that either of itself, or by inferential reasoning, enabled the court to find that 'but for' the negligent omission, the harm to the respondent would not have happened. I have referred to the difficulty of establishing 'but for' causation in the case of negligent omissions and as *Adeels Palace Pty Ltd v Moubarak* amply illustrated, the presentation of a range of possibilities is insufficient."[27]

[131] In my view, if the defendant had provided a second carer at the Deception Bay house who would be available in an emergency, more likely than not the plaintiff's injury would not have occurred. This is because if a second carer was in attendance at the Deception Bay house they would have been close by to assist.

[132] The plaintiff proves factual causation on that alleged breach of duty, but did not prove the breach itself.

Causation in fact – duress alarm

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25 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [45]; *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190-191 [18]-[20].

26 [2012] NSWCA 338.

27 [2012] NSWCA 338, [96].

[133] Where the alleged breach of duty was the omission to provide a duress alarm, the question of factual causation resolves to whether the plaintiff's injury would have been suffered but for the absence of a duress alarm.

[134] The defendant submits that failure to provide a duress alarm did not cause the plaintiff's loss or damage because the plaintiff had not proved on the balance of probabilities that a response would have arrived in time to avert the substance of the incident and the plaintiff's loss or damage.

[135] First, the defendant submits that because the plaintiff said in cross-examination that she did not have time to reach for the mobile phone because her hands were occupied with trying to restrain NM, it should be inferred that she would not have been able to activate a duress alarm if one had been provided. Being able to press an alarm button either once or a few times is not the same as being able to retrieve a mobile phone and make a call. It should be remembered that the plaintiff said that the mobile phone was most likely in the office. In any event, the defendant did not squarely ask the plaintiff to assume the conditions that might have obtained had a duress alarm been provided and she had been trained in its use. I am not persuaded to draw the inference that the defendant seeks.

[136] The assessment of causation in fact is of a past hypothetical fact. But, in my view, the ordinary and objective expectation from the circumstances is that the momentary release of the plaintiff's hold on one of NM's wrists that would have been required to press the button on a duress alarm would not only have been possible but is something she would have done.

[137] But the question whether a response would have arrived in time remains. Although the plaintiff said that the incident lasted for half an hour, that was an after the fact estimate of time which is not of a reliable kind. Although it was not directly relevant to the likely response time at the Deception Bay house, the plaintiff said that it took twenty minutes or more for the police to respond to a call to the Morayfield house when she worked there. Mr Wright said the response time was shorter at Morayfield, six to eight minutes, but could not say what the time would have been at the Deception Bay house.

[138] The local police station was 5.8 km away from the Deception Bay house. There was no evidence during what hours it was manned, or that any response would be from there, or what time it would be likely to have taken from the time of receipt of a duress alarm signal from the Deception Bay house by whoever would have received that signal until police would have been able to enter the Deception Bay house.

[139] If I accept that the incident lasted even for twenty minutes, it is not proved to any degree of likelihood that the plaintiff would have been assisted in time by an emergency response to the alarm when activated.

[140] There was, therefore, no evidence that it was more likely than not that an emergency response would arrive at the Deception Bay house in twenty minutes or less and there was no evidence that interrupting NM's behaviours after a shorter period than in fact occurred would have avoided the loss and damage suffered by the plaintiff.

[141] In *Cross v Moreton Bay Regional Council*,[28] I attempted to summarise some of the relevant common law principles according to which the decision of causation in fact for the tort of negligence falls to be decided where there is a gap in the evidence.[29]

[142] The present case does not fall for decision under the common law. The question must be decided under s 305D. The operation of an indistinguishable provision in s 5D of the *Civil Liability Act* 2002 (NSW) was discussed by the High Court in *Strong v Woolworths Ltd*.[30] It is necessary to set out a lengthy passage from that case, where the majority said:

> "The determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence…
>
> The division of the causal determination under the statute into the distinct elements of factual causation and scope of liability is in line with the recommendations in the Final Report of the Committee convened to review the law of negligence ('the Ipp Report') … The policy considerations that inform the judgment of whether legal responsibility should attach to the defendant's conduct are the subject of the discrete 'scope of liability' inquiry … In particular cases, the requirement to address scope of liability as a separate element may be thought to promote clearer articulation of the policy considerations that bear on the determination…
>
> Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm. This is pertinent to the appellant's attack on the Court of Appeal's reasons, which is directed to para 48 of the judgment:
>
> > 'Now, apart from the *'exceptional case'* that s 5D(2) recognises, s 5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words *'comprises the following elements'* in the chapeau to s 5D(1). *'Material contribution'*, and notions of increase in risk, have no role to play in s 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall

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28 [2013] QSC 215.

29 [2013] QSC 215, [111]-[125].

30 (2012) 246 CLR 182.

> within s 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether section 5D(1) is satisfied in any particular case.' (Emphasis in original)

The appellant submitted that the Court of Appeal had proceeded upon a view that factual causation under s 5D(1)(a) excludes consideration of factors making a 'material contribution' to the harm suffered by a plaintiff. This interpretation was said to require that the defendant's negligence be the 'sole necessary condition of the occurrence of the harm' and to have prompted a differently constituted Court of Appeal to disagree with it. The latter submission was a reference to the observations made by Allsop P in *Zanner v Zanner*, to which reference will be made later in these reasons.

The reference to *'material contribution'* (Court of Appeal's emphasis) in the third sentence of para 48 was not to a negligent act or omission that is a necessary, albeit not the sole, condition of the occurrence of the harm. So much is clear from the sentence that follows. Any confusion arising from the Court of Appeal's analysis may be the result of the different ways in which the expression 'material contribution' has come to be used in the context of causation in tort. The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century…

In *Bonnington Castings Ltd v Wardlaw*, the expression 'material contribution' was employed in determining the causation of the pursuer's pneumoconiosis, a disease caused by the gradual accumulation of particles of silica in the lungs. There were several sources of exposure: the pneumatic hammers, the floor grinders and the swing grinders. The employer's breach of statutory duty lay only in exposing the pursuer to the dust generated by the swing grinders. The greater proportion of the pursuer's exposure to silica dust had come from the use of the pneumatic hammers. Lord Reid characterised the 'real question' as whether the dust from the swing grinders 'materially contributed' to the disease. The swing grinders had contributed a quota of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease.

The Ipp Report distinguished the concept of 'material contribution to harm' applied in *Bonnington Castings* from the use of the same expression merely to convey 'that a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm'. Allsop P made the same point in *Zanner v Zanner*:

> '[T]he notion of cause at common law can incorporate 'materially contributed to' in a way which would satisfy the 'but for' test. Some factors which are only contributing factors can give a positive "but for" answer.'

His Honour illustrated the point by reference to two negligent drivers involved in a collision that is the result of the conduct of the first, who drives through the red light, and of the second, who is not paying attention. His Honour went on to observe:

> 'However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the 'but for' test) such as in *Bonnington Castings Ltd v Wardlaw* are taken up by s 5D(2) which, though referring to 'an exceptional case', is to be assessed "in accordance with established principle".'

This observation is consistent with the discussion in the Ipp Report of cases in which an 'evidentiary gap' precludes a finding of factual causation on a 'but for' analysis and for which it was proposed that special provision should be made. The Ipp Report instanced two categories of such cases. The first category involves the cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable. *Bonnington Castings* was said to exemplify cases in this category. The second category involves negligent conduct that materially increases the risk of harm in circumstances in which the state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff's harm. *Fairchild v Glenhaven Funeral Services Ltd* was said to exemplify cases in this category.

Section 5D(2) makes special provision for cases in which factual causation cannot be established on a 'but for' analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this court. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.

The authors of the Ipp Report and Allsop P in *Zanner v Zanner* assume that cases exemplified by the decision in *Bonnington Castings* would not meet the test of factual causation under s 5D(1)(a). However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd v Booth* with respect to proof of causation under the common law. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of

> conditions necessary to the occurrence of that harm."[31] (footnotes omitted)

[143] Applying that analysis to the evidentiary facts previously discussed, in my view, the conclusion is that the plaintiff has not proved causation in fact under s 305D(1). In my view, there is nothing which suggests, and it is not submitted by the plaintiff, that this is an exceptional case to which s 305D(2) applies.

Causation in fact – swipe access card

[144] The defendant submits that failure to fit a swipe access card to the office did not cause the plaintiff's loss or damage because the plaintiff had not proved on the balance of probabilities that the plaintiff's loss or damage would have been avoided.

[145] Again, the defendant submits that because the plaintiff said in cross-examination that she did not have time to reach for the mobile phone because her hands were occupied with trying to restrain NM, it should be inferred that she would not have been able to use a swipe access card if one had been provided.

[146] Being able to retrieve a mobile phone and make a call is not the same as the plaintiff being able to free herself from NM's grasp so that she could locate the swipe access card while moving to the door, swipe the reader and enter the office without NM following. The defendant did not squarely ask the plaintiff to assume the conditions that might have obtained in that scenario and assuming that had she been trained to use that strategy. I am not persuaded to draw the inference that the defendant seeks.

[147] On the other hand, the question remains whether the plaintiff would have sought to free herself from NM's grasp to locate and use the swipe access card and thereby would have succeeded in avoiding the loss and damage that she suffered.

[148] The critical point is whether having the swipe access card would have motivated the plaintiff to do what she did not try to do in fact: namely, release herself from NM's grasp, retrieve the keys and move to the office door to open the office. The parties did not address this point either in the evidence or in submissions.

[149] I approach the question on the footing that the plaintiff bears the onus of proof to the standard of the balance of probabilities on this question as a matter of causation of fact. Nevertheless, it is a matter where it is permissible to draw a broadly based inference.

[150] In the result, I am left unpersuaded that it is more likely than not that the plaintiff would have opted to make a run for the office if there had been quicker access to that room using a swipe access card. It was just as likely, in my view, that the plaintiff would not have released her hold on NM until he had settled enough so that she could safely approach the door without the risk of him following her from behind and attacking her again, whether or not faster access would have been available using a swipe access card.

[151] In order to reach the contrary view, I would have expected the evidence to establish with some care the distances and times involved on the differing assumptions that the plaintiff could only get into the office using keys on the one hand and could have

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31 (2012) 246 CLR 182, 190-194 [18]-[27].

done so using a swipe card access on the other hand and the plaintiff's appreciation of any of those differences (whilst observing the prohibition in s 305D(3)(b) against direct evidence of what the plaintiff would have done). There was no evidence of that kind.

[152] Accordingly, I find that the plaintiff has not established that the defendant's failure to provide a swipe access card to enter the office caused the plaintiff's loss or damage as a matter of causation in fact.

Conclusion on liability

[153] The conclusion I have reached is that the plaintiff has not proved any breach of duty by the defendant that caused compensable loss.

Damages

[154] Because the defendant has succeeded on the question of liability it is not strictly necessary to decide the quantum of damages. Against the possibility of a successful appeal, it is appropriate to make findings as to damages but to do so as briefly as possible.

[155] As finally presented the plaintiff's claim for damages and the defendant's position on each category of loss was as follows:

Category	Plaintiff	Defendant	Difference
General damages	$17,900.00	$8,720.00	$9,180.00
Past economic loss	$304,953.80	$253,946.25	$51,007.55
Interest on PEL	$18,134.35	$1,141.66	$16,992.69
Future earning capacity	$478,427.60	$463,062.08	$15,365.52
Past Superannuation	$27,445.84	$18,089.60	$9,356.24
Future superannuation	$65,783.79	$50,936.83	$14,846.96
Workcover treatment - past	$15,695.79	$15,372.00	$323.79
Physiotherapy and/or psychology- past	$400.00	$400.00	nil
Dr White - past	$1678.10	$378.00	$1300.10
Travel - past	$1,863.00	$1,800.00	$63.00
Pharmaceutical - past	$1,791.24	$1,000.00	$791.24
Mowing - past	$1,664.00	nil	$1,664.00

Fox v Wood	$7039.39	nil	$7039.39
Interest on past expenses	$96.40	nil	$96.40
Psychiatric – future	$4,400.00	$3,600.00	$800.00
Mowing - future	$6,962.40	nil	$6,962.40
Travel – future	$5,000.00	$1,000.00	$4,000.00
Vocational	$4,000.00	$4000.00	nil
Pharmaceutical – future	$2,610.90	$840.00	$1,770.90
Medical - future	$7,000.00	nil	$7,000.00
SUB TOTAL	$972,846.60	$824,286.42	$148,560.18
Less Workcover refund	$68,648.06	$68,648.06	**N/A**
TOTAL	**$904,198.54**	**$755,638.36**	**N/A**

Although these amounts were calculated as at 31 July 2015, for clarity I will not adjust them as between past and future damages up to the date of judgment.

General damages

[156] As to general damages, the relevant provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) were as follows:

> "**306O Assessment by court of injury scale**
> (1) If general damages are to be awarded by a court in relation to an injury, the court must assess an injury scale value as follows—
> (a) the worker's total general damages must be assigned a numerical value (***injury scale value***) on a scale running from 0 to 100;
> (b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;
> (c) in assessing the injury scale value, the court must—
> (i) assess the injury scale value under any rules provided under a regulation; and
> (ii) have regard to the injury scale values given to similar injuries in previous proceedings.
> (2) If a court assesses an injury scale value for a particular injury to be more or less than any injury scale value prescribed for or attributed to similar particular injuries

under subsection (1)(c), the court must state the factors on which the assessment is based that justify the assessed injury scale value.

306P Calculation of general damages

(1) For an injury, general damages must be calculated by reference to the general damages calculation provisions applying to the period within which the injury was sustained.

(2) In this section—

general damages calculation provisions, applying to a period, means the provisions prescribed for the period under a regulation."

[157] Section 112D of the of the *Workers' Compensation and Rehabilitation Regulation* 2003 (Qld) ("the Regulation") had the effect that schs 8 to 11 of the Regulation provide the rules, including that sch 9 provides the range of injury scale value ("ISV") for particular injuries and sch 11 provides the psychiatric impairment rating scale ("PIRS") that may be used with sch 9. Sections 2-4 and 6 of div 1 of pt 2 of sch 8 to the Regulation provide:

"**2 Injury mentioned in sch 9**

(1) In assessing the injury scale value (***ISV***) for an injury mentioned in the injury column of schedule 9, a court must consider the range of injury scale values stated in schedule 9 for the injury.

(2) The range of ISVs for the injury reflects the level of adverse impact of the injury on the injured worker.

3 Multiple injuries

(1) Subject to section 9, in assessing the ISV for multiple injuries, a court must consider the range of ISVs for the dominant injury of the multiple injuries.

(2) To reflect the level of adverse impact of multiple injuries on an injured worker, the court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only.

Note—

This section acknowledges that—

- the effects of multiple injuries commonly overlap, with each injury contributing to the overall level of adverse impact on the injured worker; and
- the effects of multiple injuries commonly overlap, with each injury contributing to the overall level of adverse impact on the injured worker.

4 Multiple injuries and maximum dominant ISV inadequate

(1) This section applies if a court considers the level of adverse impact of multiple injuries on an injured worker is so severe

that the maximum dominant ISV is inadequate to reflect the level of impact.

(2) To reflect the level of impact, the court may make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV.

(3) However, the ISV for the multiple injuries—

(a) must not be more than 100; and

(b) should rarely be more than 25% higher than the maximum dominant ISV.

(4) If the increase is more than 25% of the maximum dominant ISV, the court must give detailed written reasons for the increase.

(5) In this section—

maximum dominant ISV, in relation to multiple injuries, means the maximum ISV in the range for the dominant injury of the multiple injuries.

6 Mental disorder

(1) This section applies if—

(a) a court is assessing an ISV; and

(b) a PIRS rating for a mental disorder of an injured worker is relevant under schedule 9.

(2) The PIRS rating for the mental disorder of the injured worker is the PIRS rating accepted by the court.

(3) A PIRS rating is capable of being accepted by the court only if it is—

(a) assessed by a medical expert as required under schedules 10 and 11; and

(b) provided to the court in a PIRS report as required under schedule 10, section 12."

[158] The parties agree that item 12 of sch 9 - "moderate mental disorder" – applies. There is no apparent contest that it is the dominant injury or as to the correct approach to the assessment required of same.[32]

[159] The plaintiff submits an ISV of 13 (an uplift of 3 from the maximum of 10) should be assessed while the defendant submits that an ISV of 7 (representing Dr Leong's PIRS rating of seven percent) should be assessed.

[160] There was no argument advanced by the plaintiff to justify the extent of the uplift sought. Accepting that the dominant injury would attract an ISV of 7, there should be an uplift for the effect of the orthopaedic aspects of the injuries.

[161] There is some difference of opinion as to prognosis. I tend to accept Dr Steadman's view that the orthopaedic symptoms should improve or resolve (or would have happened in any event). I also tend to accept the views of Dr Whiteford that the plaintiff's generalised anxiety is not a PTSD and is better diagnosed as an adjustment disorder. Without being in any way definitive, after all is said and done, still the incident was not of a kind which one would ordinarily expect to have produced a PTSD.

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32 See *Munzer v Johnston* [2008] QSC 162, [7]-[14].

[162] I would assess the ISV at 9. The result is that the general damages calculated in accordance with sch 12 of the Regulation is $11,540.

Past economic loss and interest and superannuation

[163] The largest monetary amount of the different calculations is $51,007.55 for past economic loss (and the related items of interest and superannuation). As to that, the evidence was, frankly, non-existent. The plaintiff's evidence consisted of a calculation attached to her statement of an amount claimed based on unidentified "comparative wage information". The defendant tendered no evidence in its case of the rates of actual pay for a person in the plaintiff's employed position but included in its submission that various rates were "agreed". The defendant in effect admits the rates of pay in the amounts in its written submission. As the plaintiff adduced no other evidence, I will adopt the defendant's figures.

[164] Since the period of the past wages (to 31 July 2015) was the same for both calculations, the hypothetical amount of past economic loss that the plaintiff would have earned had she not been injured was the defendant's calculation of $259,218.30 she would have been paid, less the sum of $58,222.67 that she was paid, namely $200,995.63.

[165] To that must be added the gross amount paid by Workcover Queensland by way of weekly benefit (that must be reimbursed), namely $52,950.64.

[166] The result is that the amount of past economic loss to 31 July 2015 was $253,946.27.

[167] As to interest on past economic loss, the relevant rate is required to be calculated in accordance with s 306N of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld). The plaintiff claimed 2 percent. The defendant admitted 1.42 percent over the period from 6 May 2011 when the plaintiff ceased to be employed (221 weeks to 31 July 2015). In the absence of evidence, the defendant's rate must be used. The relevant amount is $15,326 to 31 July 2015.

[168] As to superannuation on the past loss, neither party provided their supporting calculation, although they agreed that the amount would be calculated at 9 percent. I will adopt the defendant's amount of $18,089.60 in the circumstances.

Future economic loss

[169] Next, the difference for future economic loss is $15,365.52 (and the associated item of future superannuation). As to that, the plaintiff's calculation was said to be based on a net weekly loss of $1,330.00 for 14 years (to age 67) discounted at the rate of 5 percent (s 306L(2) *Workers' Compensation and Rehabilitation Act* 2003 (Qld)) , resulting in a multiplier of 529. The product was $703,570.00. The plaintiff then allowed discounts of 15 percent on that amount for the contingency that she would return to work, arriving at a rest of $598,034.50 and a further discount on the amount of the $598,034.50 of 20 percent for other contingencies to arrive at $478,427.60. In principle, it seems to me that the plaintiff's two step discounting is flawed, but I need not delay on that.

[170] The defendant's calculation was to allow a net weekly loss of $1,256.00 and to break the future economic loss from 1 July 2015 into two periods. For the first period of two years the defendant calculated the loss on the 5 percent tables arriving at a

multiplier of 231 resulting in $290,136.00 which it discounted by 15 percent for contingencies to arrive at $246,615.60 for the first two years.

[171] For the second period of nine years (to age 65) the defendant calculated the loss on the 5 percent tables arriving at a multiplier of 907 resulting in $432,892.96 which it discounted by 50 percent for contingencies and the "reasonable probability" that the plaintiff will have returned to employment to arrive at $216,446.48 for the nine years to age 65.

[172] In my view, the defendant's methodology and calculation results in an amount that is generous to the plaintiff. However, rather than reduce that amount by following the methodology required under *Malec v J C Hutton Ltd*,[33] I adopt the amount submitted by the defendant, totalling $463,062.08.

[173] It follows that I should also adopt the defendant's allowance for future superannuation benefits of $50,936.83.

Past and future mowing

[174] Next, the difference for the total claims for past and future mowing expenses represents $8,646.00. As to those, the defendant submits that damages for the cost of or value of the services are excluded under s 306F(2) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

[175] Section 306F is irrelevant. It applies if the worker performed particular services before the injury and the services are provided gratuitously to the worker after the injury. There was no evidence of services of that kind.

[176] The only evidence of the amounts claimed comprised the plaintiff saying that a gardener comes once or twice a month for $20 a visit as at the time of the trial and before. There was no evidence as to the time period over which that occurred or that it extended to before the incident. Accordingly, the services are paid services after the injury. Those services do not appear to be excluded by s 306H(2).

[177] However, the evidence in support of the claim was exiguous. I allow a global amount of $2,000.00 only.

Fox v Wood

[178] Next, the plaintiff claims the amount under *Fox v Wood*[34] of $7,039.39. The parties agree that the amount of damages must include the gross amount of income that was paid by Workcover (including tax) because the refund required is that amount.

[179] The defendant submits that was already included in the additions made in its calculation of past economic loss. But the amount of the add-back in its calculation of past economic loss was $52,950.64, whereas the amount to be deducted for the Workcover refund was $68,648.06. The difference was not explained, but could be attributable to other amounts. For present purposes I will assume so and not allow the sum claimed for *Fox v Wood*, but this assumption should be confirmed if the matter goes any further.

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33 (1990) 169 CLR 638.
34 (1981) 148 CLR 438.

Medical expenses

[180] Next, the plaintiff claims $7,000 for future medical expenses other than psychiatric treatment. In my view, the period in which the plaintiff's physical injuries from the incident require any treatment has expired and any future treatment for disabilities will be due to the underlying conditions as at the time of the incident. I allow no amount for this claim.

Future travel

[181] Next, the difference for future travel is $4,000.00 so as to obtain pharmaceutical items or attend medical appointments. The amount claimed is global and is only for the additional cost of any travel due to the injuries. I allow the defendant's assessment of $1,000.00.

[182] All the other amounts of difference are for individual amounts of less than $2,000.00. It is not useful to resolve them. I allow the differences at half.

Assessment

[183] Accordingly, the outcome of the assessment of damages is as follows:

Category	Plaintiff	Defendant	Allowed (rounded)
General damages	$17,900.00	$8,720.00	$11,540
Past economic loss	$304,953.80	$253,946.25	$253,946
Interest on PEL	$18,134.35	$1,141.66	$15,326
Future earning capacity	$478,427.60	$463,062.08	$463,062
Past Superannuation	$27,445.84	$18,089.60	$18,090
Future superannuation	$65,783.79	$50,936.83	$50,937
Workcover treatment - past	$15,695.79	$15,372.00	$15,534
Physiotherapy and/or psychology- past	$400.00	$400.00	$400
Dr White - past	$1678.10	$378.00	$1028
Travel - past	$1,863.00	$1,800.00	$1,832
Pharmaceutical - past	$1,791.24	$1,000.00	$1,396
Mowing - past	$1,664.00	nil	$832
Fox v Wood	$7039.39	nil	Not allowed

Interest on past expenses	$96.40	nil	$48
Psychiatric – future	$4,400.00	$3,600.00	$4,000
Mowing - future	$6,962.40	nil	$1,000
Travel – future	$5,000.00	$1,000.00	$1,000
Vocational	$4,000.00	$4000.00	$4000.00
Pharmaceutical – future	$2,610.90	$840.00	$1,725
Medical - future	$7,000.00	nil	Not allowed
SUB TOTAL	$972,846.60	$824,286.42	$843,694
Less Workcover refund	$68,648.06	$68,648.06	$68,648
TOTAL	**$904,198.54**	**$755,638.36**	**$775,048**

[184] I assess damages at $775,048.

Conclusion

[185] The plaintiff's claim must be dismissed. I will hear the parties on the question of costs.