IN THE COURT OF APPEAL **[1997] QCA 234**

SUPREME COURT OF QUEENSLAND

Appeal No. 10233 of 1996

Brisbane

[State of Qld v. Keeys]

BETWEEN:

THE STATE OF QUEENSLAND
(Defendant) **Appellant**

AND:

KENNETH MALCOLM KEEYS
(Plaintiff) **Respondent**

Davies J.A.
McPherson J.A.
Moynihan J.

Judgment delivered 5 August 1997

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

APPEAL DISMISSED.

CATCHWORDS: **NEGLIGENCE - master and servant - respondent/police officer suffered post-traumatic stress disorder - whether appellant's failure to warn respondent of threat received was breach of duty as employer.**

Counsel: **J. Griffin Q.C. with him E. Morzone for the appellant**
S. Doyle S.C. with him G. Mullins for the respondent

Solicitors: **Crown Solicitor for the appellant**
Quinn & Scattini for the respondent

Hearing Date: **23 May 1997**

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 10233 of 1996

Brisbane

Before McPherson J.A.
Davies J.A.
Moynihan J.

[State of Qld. v. Keeys]

BETWEEN:

THE STATE OF QUEENSLAND
(Defendant) Appellant

AND:

KENNETH MALCOLM KEEYS
(Plaintiff) Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 5 August 1997

In the course of his duties as a police officer, the plaintiff was driving a police vehicle along Lavarack Avenue in the Pinkenba area at night when he was struck by a bullet fired by an unknown assailant. The bullet did not enter his body; but afterwards, when the plaintiff discovered it had so nearly done so, he suffered a reaction which led to post-traumatic stress disorder disabling him from continuing in employment. On appeal, the question whether the defendant was liable for that injury was approached as turning on the issue of causation alone. The question posed was whether the injury sustained would have been averted had the plaintiff been warned in advance of the threat in a letter received by the Police Commissioner, for whose acts or omissions the defendant takes responsibility.

The threat was contained in an anonymous letter (ex. 5) addressed to the Police Commissioner and delivered through the mail some days before the shooting. It was expressed in the form of a "declaration of war" against the Queensland Police, and may fairly be considered as a threat to commit murder. Such threats to police are, it may be supposed, not altogether uncommon. However, in this instance the threat was in some respects specific to the plaintiff. He was a member of the police dog squad, who followed a practice of exercising his dog at Pinkenba. The threat asserted that police dogs had been "savaging" children, and the letter complained of "kidnapping our children at Pinkenba". The letter contained indications of having come from an Aboriginal, and some police had not long before been alleged to have participated in an incident involving an Aboriginal youth in the Pinkenba area.

The threat deserved to be taken seriously. In the ordinary way it would have been. The Commissioner has a procedure in place for alerting potential targets of threats of this character; but, through some oversight, the procedure was not followed in this instance. In consequence, the plaintiff was not warned of the threat. The question for determination at the trial was whether, if he had been warned, the outcome would have been any different; or, in other words, whether the plaintiff would have taken precautions that, on the balance of probabilities, would have averted the injury he sustained. It is in this sense that the issue for determination is said to be one of causation.

The findings of the learned trial judge, so far as relevant, are, first, that, although the plaintiff might well have been deterred from going to Pinkenba had he known of ex.5, his Honour "could not be satisfied on the balance of probability that he would have been deterred from going to Pinkenba that night ...". Secondly, even if he had known of the threat but had still gone to Pinkenba, he could have taken additional precautions which would "either have deterred the gunman, or made the ambush less effective". He could, said his Honour, have

used his spotlight and carefully examined the buildings as he went along Lavarack Avenue. Or he could have driven faster down Lavarack Avenue, and perhaps have avoided "backtracking". He might have arranged a rendezvous with another member of the dog squad, whose presence might have deterred the gunman. In one way or another, the plaintiff would have been more cautious and more careful and would have behaved differently. It was, however, his Honour added, "more difficult to know whether that extra precaution would have prevented the incident ... and again I do not think that I can be satisfied of this on the balance of probabilities".

Having said that, the learned judge went on:

> "That however is not the end of the matter, because it seems to me that the crucial question is not whether any particular alternative course would have been followed by the plaintiff had he received the warning, but rather whether it is more probable than not that, had the warning been received by him, the incident would have been avoided in one way or another. Accordingly, I think that these two possible ways of avoiding the incident should be treated as cumulative, so that the question becomes whether it is more likely than not that, had the warning been given, the plaintiff either would have stayed away from Pinkenba or if he had not done so, would have taken additional precautions which would have averted the injury. Approaching the matter this way, and not without some hesitation, I am satisfied that it is more likely than not that, had the warning been communicated to him, one way or another the injury would probably have been averted. I accept the evidence of both psychiatrists that the plaintiff developed his post traumatic stress disorder as a result of the shooting incident ... Accordingly I find on the balance of probabilities that the psychiatric injury suffered by the plaintiff was caused by the negligence of the defendant."

On appeal, it was submitted for the plaintiff that in this part of the reasons the learned judge was saying that, although considered separately, prior knowledge of the threat might not have deterred the plaintiff from going to Pinkenba and might not have resulted in his taking a precaution that would have averted the shooting, yet, taken together, being warned about the threat would, in one way or another, have enabled him to avert the injury; and, further, that, if the plaintiff had been apprised of the threat and the alternatives open to him, he would have adopted a course which would probably have succeeded in avoiding the event that ensued.

In my respectful opinion, the plaintiff's interpretation of the reasoning is correct. The trial judge did not, as the plaintiff was careful to emphasise, make a positive finding that the plaintiff, if warned of the threat, would not have gone to Pinkenba to exercise his dog. What his Honour said was that he was not satisfied on the balance of probability that the plaintiff would not have gone to Pinkenba. Confronted with what he might have assessed as the inefficacy of alternative methods of averting the danger, he might in the end have chosen not to go there on the night in question or on any other occasion. It was this which led the judge to find, in the extract quoted above from his reasons, that it was more likely than not that, had the warning been communicated to him, "one way or another the injury would have been averted".

Accepting, as I do, this version of his Honour's reasoning, it nevertheless seems to me that in the end the effect of the findings he made was essentially that the failure to warn the plaintiff of the threat deprived him of the opportunity of taking precautions to avert the injury which ensued. In the field of contract law, the result of such a conclusion would be that the court would assess the value of the opportunity or chance of which the plaintiff was deprived and compensate him accordingly: *Chaplin v. Hicks* [1911] 2 K.B. 786. That would have the consequence that (depending on the prospect of the chance eventuating or the opportunity being realised in full), the plaintiff in a contract case might receive the full amount or, perhaps more likely, something very much less, as in *Chaplin v. Hicks* itself.

In the field of tort law, it has not so far been the judicial approach, where questions of causation are involved, to arrive at an award for damages of personal injuries in that fashion. Cf., however, *Malec v. J.C. Hutton Pty. Ltd.* (1990) 169 C.L.R. 638, 643, which was, however, an instance of assessing damages rather than determining the issue of causation. In relation to causation, the orthodox attitude continues to be that the plaintiff bears the onus of proving that the defendant either "caused or materially contributed to" the injury complained of by the

plaintiff. See *March v. E. & M.H. Stramare Pty. Ltd.* (1991) 171 C.L.R. 506, 514, citing *Duyvelshaff v. Cathcart & Ritchie Ltd.* (1973) 47 A.L.J.R. 410, 417.

Using that test in the present case does not, however, make resolution of the problem very much simpler. To my mind, part of the difficulty arises from the way in which it has been sought here to abstract the single issue of causation from its surrounding legal and factual matrix and attempting to deal with it in isolation from other elements of the cause of action, such as duty of care and negligence. In *March v. Stramare Pty Ltd.* (1991) 171 C.L.R. 506, 535-536, McHugh J. criticised this tendency in the course of approving a proposition of Lord Denning in *Roe v. Minister of Health* [1954] 2 Q.B. 66, 85, that the question to be considered is whether the consequence complained of is "fairly to be regarded as within the risk created by the negligence. If so, the negligent person is liable for it: but otherwise not".

Applying that principle to the circumstances disclosed here does, to my mind, require an investigation, at least to some extent, of the duty or standard of care to be expected of a person in the position of the Police Commissioner in relation to an individual like the plaintiff who is subject to his command or under his discipline or control. Unfortunately, and possibly because of the peculiar position previously occupied by members of the police force in relation to the Crown or other authority employing them, the common law jurisprudence on this subject appears to be remarkably sparse. Foresight of the possibility of injury cannot, however, be the sole test; because, if one thing is plain about the nature of a police officer's duty, it is that the prospect of physical injury is not only foreseeable but constantly present. It may be that, in that respect, prison warders dealing with dangerous prisoners (who are, after all, simply the ones that the police have succeeded in capturing) is somewhat analogous. See *Ralph v. Strutton* [1969] Qd.R. 348, 355-356, referring to *Ellis v. Home Office* [1953] 2 All E.R. 149. No doubt the standard of care still remains much the same as in other cases; that is to say, there is a duty to take reasonable care to avoid exposing the officer to unnecessary risks of injury: *Ralph v. Strutton* [1969] Qd.R. 348, 355. Translated into the present context, however, it would follow that, even when injury is foreseeable, as in the case of police functions it often is, the duty of the Commissioner is, at the very least, to reduce the risk of injury as far as practicable; or, expressing it in the negative, not to do or omit to do anything which will have the effect of materially increasing the risk of such injury.

Approached in this way, it is clear that the oversight in warning the plaintiff about the receipt of ex.5 did in fact materially increase the risk of serious and potentially fatal injury to the plaintiff. It did so by appreciably reducing the small margin of relative safety under which his duties might otherwise have been performed. It exposed him to an unnecessary risk which he might otherwise have been able to avoid, and did so by depriving him of the only real opportunity he had of averting that risk. Forewarned is forearmed, as the saying goes. Before it eventuated, the risk that the threat would be carried out may have seemed slight; but it was a

slight risk of death or serious injury, which is not to be equated with an obvious risk of slight injury. See *Paris v. Stepney Borough Council* [1951] A.C. 367, 375, 380.

If, as McHugh J. recognised in *March v. Stramare Pty. Ltd.* (1991) 171 C.L.R. 506, 535, issues of policy tend to enter into the determination of questions of causation, then, in a matter like this, it is enough to say that the decision as to liability for the plaintiff's injury ought not to be left to rest on too exact or precise an analysis of what the plaintiff might or might not have done had he been given the opportunity, which everyone accepts he ought to have had, to take precautions for his own safety. The interests of those who, at some peril to themselves, act to protect other members of society from harm ought not to be weighed in too fine a balance in the scales of bare hypothesis. The consequences suffered by the plaintiff are, in my opinion, fairly to be regarded as within the risk created by the negligence for which the defendant is responsible.

I would dismiss the appeal with costs.

IN THE COURT OF APPEAL

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Brisbane

Before McPherson J.A.
Davies J.A.
Moynihan J.

[State of Qld v. Keeys]

BETWEEN:

THE STATE OF QUEENSLAND

(Defendant) Appellant

AND:

KENNETH MALCOLM KEEYS

(Plaintiff) Respondent

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 5 August 1997

The facts relevant to this appeal are fully set out in the reasons for judgment of the other members of the Court which I have the advantage of reading. It is therefore unnecessary for me to repeat them here.

The main question before this Court was one of causation; whether, if the respondent had been warned of the threat contained in the letter, he would probably have avoided the psychiatric injury which he suffered. Two alternative bases were relied on to establish that probability; either he would not have gone to Pinkenba on the night of the incident or he would have taken additional precautions which would have averted the injury.

The learned trial Judge resolved this question in the respondent's favour in the passages set out in the reasons of McPherson J.A. In short, he said that, whilst neither of these alternative possibilities, viewed separately, was a probability, it was probable that one or other

of them would occur. In the learned trial Judge's words, these alternatives should be viewed cumulatively.

As a mathematical proposition his Honour's reasoning is unexceptionable. Whilst the possibility of either hypothetical situation occurring, when looked at separately, might have been less than 50%, the possibility that one or other of them would occur might well have been more than 50%.

As a matter of law and commonsense[1] his Honour's reasoning was also correct. Causation, like negligence,[2] is a single issue to be established on the balance of probabilities. In deciding that issue in this case the Court had to evaluate alternative hypothetical possibilities. Unlike a factual finding, an assessment of a hypothetical possibility cannot be treated as having occurred if the possibility exceeds 50% and as not having occurred if it does not.[3] In saying that he could not be satisfied, on the balance of probabilities, that, if he had been warned, the respondent would not have been deterred from going to Pinkenba that night, his Honour was not, as the appellant submitted, rejecting the respondent's evidence that he would not have gone. The respondent was, after all, speculating, as his Honour had to do, about a hypothetical possibility, though with the advantage of some knowledge of how he would be likely to act in such a case. His Honour was saying no more than that he could not be satisfied, on the balance of probabilities, that the respondent's hypothetical opinion was correct; that his degree of satisfaction about that was something less than 50%.

The question before his Honour, however, was not whether one of these hypothetical possibilities could be established on the balance of probabilities but whether, having evaluated them, he should conclude that, if the respondent had been warned of the threat, either he would not have gone or he would have taken sufficient averting precautions. It was only that

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1 March v. E. & M. H. Stramare Pty. Ltd. (1991) 171 C.L.R. 506 at 514-5, 522.

2 Cf. Doonan v. Beacham (1953) 87 C.L.R. 346 at 352.

3 Malec v. J. C. Hutton Pty. Ltd. (1990) 169 C.L.R. 638 at 639, 642-3.

conclusion upon which, relevantly, his Honour had to be satisfied on the balance of probabilities.

It was not submitted by the appellant that, if his Honour's reasoning process was permissible, his conclusion was wrong. Nor could it have been. His Honour's conclusion depended very much upon his assessment of the respondent's personality as revealed by his oral testimony and his demeanour.[4]

The appellant's other contention before this Court was that the learned trial Judge was wrong in finding a breach of duty of care by the appellant to the respondent in failing to pass on a warning about the threat. First it was contended that the terms of the threatening letter were not such as to require a warning specifically directed to the dog squad or relevant to any activity of the respondent on the night in question. That is plainly wrong. As McPherson J.A. has pointed out in his reasons the letter contained indications of having come from an Aborigine, there had recently been an incident involving police and an Aboriginal youth in the Pinkenba area and the letter referred to the kidnapping of "our children" at Pinkenba and to two children having been savaged by police dogs. It was therefore specifically directed at the police dog squad and, in particular, at the respondent who regularly exercised his dog in the Pinkenba area. Secondly it was contended that, without the benefit of hindsight the letter was not reasonably likely to have been characterized as a prediction of a shooting incident of the nature which occurred. Nevertheless it plainly predicted violence, of some kind or another, to police squad members in relation to the Pinkenba area. Other contentions of lesser weight were made. It is unnecessary to deal with these specifically. The risk which the threat posed was, as McPherson J.A. has also pointed out, one of serious and potentially fatal injury to the respondent. It was plainly a breach of the appellant's duty of care to him not to have passed it on.

I agree that the appeal should be dismissed.

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[4] Cf. Zuvela v. Cosmarnan Concrete Pty. Ltd. (1996) 140 A.L.R. 227 at 229.

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[State of Qld v. Keeys]

BETWEEN:

THE STATE OF QUEENSLAND
(Defendant) Appellant

AND:

KENNETH MALCOLM KEEYS
(Plaintiff) Respondent

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 5 August 1997

The respondent was a police officer and a member of the police dog squad. At about 2.30 a.m. on 30 November 1994 he was driving a marked police vehicle of a kind associated with the dog squad along Lavarack Avenue Pinkenba when, without warning, a .22 bullet shattered the driver's side window. The respondent notified the police operations centre by radio. He travelled some distance and stopped. He put on a bullet-proof vest and a tracking harness on his police dog and returned to the point from which he thought the shot had been fired. While he was carrying out investigations there, other police arrived on the scene. Shortly after this he removed the bullet-proof vest and began to dust down the front of his overalls to remove some of the glass from the broken window, he then noticed two holes in the breast pocket of his overalls and found that his police notebook, which he carried there had

been damaged. The trial judge found that the damage was caused by the bullet which had been fired at the vehicle and that the plaintiff suffered a severe reaction to this discovery, he felt totally sick and did not take any further part in the investigation; he was later diagnosed as having developed post-traumatic stress disorder.

After the events of 30 November the respondent learned that on 15 November a letter had been received by the Police Commissioner. The letter was in evidence at the trial, it was headed "Declaration of War" and among other things was directed against the "Queensland Police". It also made reference to "police dogs" and to "Pinkenba" in the context of the declaration of war. There was ample evidence to found the trial judge's conclusion that the letter was not brought to the plaintiff's attention because the system, which would ordinarily have achieved that, broke down for some undiscernible reason in circumstances where there was no evidence that the failure was without negligence on the part of anyone for whom the defendant was responsible. No basis has been demonstrated for disturbing the judge's conclusion below that the failure to warn was a breach of the defendant's duty as an employer.

The principal issue below and on appeal was the issue of causation as between the defendant's breach, the bullet striking the respondent as described earlier and the consequences that its discovery had for his health.

The trial judge concluded that the person who fired the shot was either the same person who sent the letter or was acting with that person. No basis has been shown for disturbing that finding which was open on the evidence. Having dealt with the matters so far canvassed by these reasons, the trial judge turned to consider whether the warning, if given, would probably have prevented the injury from occurring. In doing so the trial judge recognised that on the basis upon which the case below was conducted, a warning might have operated in one of two ways. First, that the respondent would not have gone to the Pinkenba area on the night in

question. Secondly, that if he went with knowledge of the warning, he could have taken precautions which would have averted the injury.

The trial judge concluded that the respondent might well not have gone to the Pinkenba area had he received the warning but that he could not be satisfied on the balance of probability that he would not have done so. He then turned to consider whether the respondent might have gone but taken precautions which would have avoided the incident. In this context he concluded that had the plaintiff been warned, "things might well have been different" but he could not be satisfied of this on the balance of probabilities.

These findings were clearly open. Had the trial judge been satisfied either that the respondent would not have gone if warned, or that he would have gone but would have taken precautions which would have averted the event on the balance of probabilities, judgment for the respondent was justified. In the event, having found as he did, the judge correctly recognised that the crucial question was not whether any particular alternative course would have been followed by the plaintiff had he received the warning, but rather whether it was more probable than not that the incident would have been avoided one way or another had the warning been received.

The trial judge then turned to address the question of whether it was more likely than not that, had he received the warning, the respondent either would have stayed away from the area or gone but taken precautions which would have averted injury. He concluded it was more likely than not, that had the appellant been warned "one way or another, the injury would probably have been averted". The consequence is that an event found to have occurred (or not to have occurred) on the balance of probabilities is treated as having occurred (or not to have

occurred); *Mallett v. McMonagle*[5]; *Malec v. J.C. Hutton Pty Ltd*[6].

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[5] **[1970] A.C. 166 at 176.**

[6] **(1990) 169 C.L.R. 638 at 642.**

The trial judge went on to find that psychiatric injury suffered by the plaintiff was caused by the negligence of the defendant in failing to communicate the warning. These various findings were open on the evidence.

This case is analogous to *Doonan v. Beacham*[7]. There, the case had been taken from the jury because, analysing the particulars of negligence separately, the trial judge concluded the evidence did not found a finding that the defendant had been negligent in any of the respects particularised. The High Court supported the view of the Court of Appeal that:

> ". . the jury are entitled to consider the evidence as a whole and if, on the whole of the evidence, the jury can reasonably infer that the accident was due to the negligence of the defendant, then they can find for the plaintiff".

Cases involving the value of a lost chance as a basis for the assessment of damages consequent on a breach of duty were also referred to. They are in a different category from cases concerned with whether an event is to be taken as having occurred – in this case injury averted if a warning had been received. *Mallett*[8] and *Malec* are cases in the former category and have no direct application here. The distinction is illustrated in *Malec*[9] in the joint judgment of Deane, Gaudron and McHugh JJ. Liability issues turn on whether an event has (or has not) occurred in the past. If the occurrence is established on the balance of probability, it is treated as having occurred. Unless that is established the event is treated as not having

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[7] **(1953) 87 C.L.R. 346.**

[8] [1970] A.C. 166 at 176.

[9] **(1990) 169 C.L.R. 638 at 642.**

occurred. A different approach applies in assessing damages in the light of future events. In those cases the court values the lost chance once it can be said not to be speculative.

It has not been demonstrated that the trial judge erred in giving judgment for the plaintiff and the appeal should be dismissed.