DISTRICT COURT OF QUEENSLAND

CITATION:	*Colwell v Top Cut Foods Pty Ltd ACN 010 650 281* [2018] QDC 119
PARTIES:	**JAMIE WILLIAM COLWELL** (Plaintiff) and **TOP CUT FOODS PTY LTD ACN 010 650 281** (Defendant)
FILE NO/S:	D270/15
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	27th June 2018
DELIVERED AT:	District Court at Brisbane
HEARING DATE:	19, 20, 21 and 22 March 2018
JUDGE:	Kent QC DCJ
ORDER:	**1. Judgment for the plaintiff against the defendant in the amount of $584,995.09;** **2. I will hear the parties as to costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – OTHER CASES – where the plaintiff suffered personal injuries during a work place assault – where the assault is said to have been caused by the negligence of the defendant employer in failing to provide the plaintiff with a safe place of work – where the alleged breach of duty was a failure by the employer to take the reasonable step of separating the two employees – where the defendant employer submits that separating the pair would have made no causal difference as they could still interact at other times – whether the injury was caused by the negligence of the employer TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – GENERALLY – where the plaintiff suffered personal injuries during a work place assault – where the assault is said to have been caused by the negligence of the defendant employer in failing to provide the plaintiff with a safe place of work –

where the plaintiff alleged the employer was on notice with respect to the assailant employee's violent propensity – where the assailant employee had a criminal history – where the plaintiff and the assailant employee had each asked to be separated – where tension had been building between the plaintiff and the assailant employee – whether the failure to separate the pair amounts to a breach of duty

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE - where the plaintiff suffered personal injuries during a work place assault – where the assault is said to have been caused by the negligence of the defendant employer in failing to provide the plaintiff with a safe place of work – where the assailant employee had a criminal history – where the plaintiff and the assailant employee had each asked to be separated – where tension had been building between the plaintiff and the assailant employee – whether the employer was on notice of the foreseeable risk of injury to the plaintiff

EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – PARTICULAR CASES – SAFE SYSTEM OF WORK – SAFE PLACE OF WORK – PARTICULAR CASES – where the plaintiff suffered personal injuries during a work place assault – where the injuries are said to be caused by the negligence of the defendant employer in failing to provide the plaintiff with a safe place of work - where it is alleged that the employer was on notice with respect to the violent propensity of the assailant employee – whether the employer is liable for the plaintiff's injury

EMPLOYMENT LAW – RIGHTS AND LIABILITIES AS BETWEEN EMPLOYER AND THIRD PARTIES – LIABILITIES OF EMPLOYER – FOR CRIMES, OFFENCES AND ILLEGAL ACTS OF EMPLOYEE – where the plaintiff suffered personal injuries during a work place assault – where the assailant employee had a criminal history – where the assailant employee had asked to be separated from the plaintiff – where the employer failed to separate the pair – whether the employer is liable for the unlawful assault on the plaintiff

Antoniak v The Commonwealth (1962) 4 FLR 454
Wyong Shire Council v Shirt (1980) 146 CLR 40
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355
McLean v Tedman (1984) 155 CLR 306
Hudson v Ridge Manufacturing Co [1957] 2 QB 348
Flounders v Millar [2007] NSWCA 238

Jovanovski v Billbergia Pty Ltd [2010] NSWSC 211
Serra v Couran Cove Management Pty Ltd [2012] QSC 130
Govier v The Uniting Church in Australia Property Trust [2017] QCA 12
Wolters v Sunshine Coast University (2014) 1 Qd R 571

COUNSEL: S. Andersen for the Plaintiff

G. O'Driscoll for the Defendant

SOLICITORS: Shine Lawyers for the Plaintiff

BT Lawyers for the Defendant

Introduction

[1] This is a claim for damages for personal injuries received in a workplace incident on 20 January 2014. The plaintiff was employed by the defendant as a knife hand/butcher at its food processing premises at Burleigh Heads. During the plaintiff's employment there had been some interaction with a co-worker, Mr Warren Parks. On the day of the incident the plaintiff was assaulted and significantly injured by Mr Parks, with serious consequences for him. That incident is said to have been caused by the negligence and/or breach of contract of employment of the defendant in failing to provide the plaintiff with a safe place of work in a number of particulars relating to its failure to address the threat which, so it is submitted by the plaintiff, was obviously presented by Mr Parks prior to the incident.

[2] The defence of the defendant places in issue the various particulars of negligence alleged against it, pleading in various ways that it was not negligent, nor was it in breach of any contractual obligation to the plaintiff. Further, the details of the ongoing effect of the plaintiff's injuries are also in issue between the parties.

[3] The evidence included an overall narrative of the events and history at the workplace. The defendant's state of knowledge as to the potential risk is obviously a central issue and there were four distinct events which arguably placed the defendant on notice of the relevant risk. These are set out in more detail below, but include:

(a) an earlier raising by the plaintiff of his concern about Mr Parks to his supervisor, Jamie Hall, pre-Christmas 2013 ("the first warning");
(b) a complaint by Mr Parks to the same supervisor about the plaintiff on the Tuesday prior to the assault ("the second warning");

(c) an angry exchange between Mr Parks and the plaintiff on the Friday before the assault ("the third warning", although it is not clear whether the supervisor, Mr Hall, heard this);

(d) the final event where again the same supervisor, Mr Hall, came upon Mr Parks loudly abusing the plaintiff on the 20 January, which led to the assault ("the fourth warning").

Overview of the evidence

The Plaintiff

[4] The plaintiff gave evidence broadly in line with the allegations in the statement of claim. He had been working for the defendant since October of 2013. He, Mr Parks and others worked in the "*lamb section*" of the defendant's facility. The physical features of the lamb section, together with the normal work stations of various employees, are set out in Exhibit 1, a diagram drawn by the plaintiff. In essence, the knife hands worked at various stations at benches supplied by conveyor belts. Lamb carcasses were brought in to the section on trolleys. The butchery activities were carried out at allocated stations. It is common ground that the plaintiff and Mr Parks worked back to back at adjoining stations, within two metres or so of each other. Immediately behind the plaintiff, and beside Mr Parks, was the supervisor, Mr Hall.

[5] The plaintiff's evidence was that Mr Parks was at all times a very intimidating person and was apparently at pains to present himself as such. He spoke of his violent past including the fact that he had previously killed someone, and that at previous work places he had always knocked someone out. He was also good friends with Jamie Hall and another co-worker, Joel Dennis. Mr Colwell had complained to Mr Hall that he was concerned about Mr Parks' behaviour before Christmas 2013 (the first warning).[1] He said that he was concerned about Mr Parks' emotional state, in terms of his own safety, and said to Mr Hall that the situation was like a ticking time bomb.[2]

[6] The plaintiff gave evidence that Mr Parks' conversation continually referred to his violent background with an undertone of intimidation. He suggested that Mr Hall liked this, to keep people working hard. Mr Parks would often comment critically on fellow workers taking toilet breaks or any other break in production.

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1 T1-19 l44 – T1-20 l24.

2 T1-84 l27 – 45.

[7] The problem between the plaintiff and Mr Parks escalated in an incident on Friday, 17 January 2014 (the third warning). During the plaintiff's shift, Mr Parks was very agitated and aggressive. He was verbally threatening violence to an unspecified person. The plaintiff was concerned that the aggression might be directed at him and said to Mr Parks words to the effect of "*it isn't me, is it?*" Mr Parks replied to the plaintiff words to the effect of "*you're not a black cunt are you?*"

[8] This event resurfaced on Monday, 20 January 2014. During the plaintiff's shift, Mr Parks approached him and said words to the effect of "*I'm sorry for what happened on Friday*". The plaintiff responded "*I'm just not into that shit*". He gave evidence that he said this in a calm, moderate tone, meaning that he wasn't into intimidation[3] nor was he interested in arguing over nothing.[4] Mr Parks immediately became very agitated and shouted aggressively at the plaintiff, inviting him to the car park for a fight. Mr Hall intervened in the escalating argument (his coming upon this scene was the fourth warning) and told both of them to go to the office. This was an adjoining storeroom. Mr Hall walked in that direction, followed by the plaintiff and then Mr Parks. As they were getting near to the doorway to the storeroom, Mr Parks attacked the plaintiff, initially from behind, punching him numerous times in the back of the head and the face until he was physically restrained by two co-workers. The plaintiff's evidence was that Mr Parks was wearing his steel mesh glove at the time, although Mr Parks denied this[5].

[9] One of the intervening co-workers, Mr Larter, was also attacked. After being restrained, Mr Parks left the premises and was later dismissed. The plaintiff received first aid and also contacted the police. They did not respond and he went to the police station to report the matter.

[10] The plaintiff was away from work on worker's compensation for some time. Upon his return he continued working for the employer for a period, however was eventually given a formal warning for an incident where he was swearing at a superior. His employment was eventually terminated in May of 2014, apparently for leaving the workplace in his working clothes or "*whites*", which was not permitted.

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3 T1-58 l24.
4 T1-58 l41.
5 T2-65 l19.

Warren Parks

[11] Mr Parks gave evidence in the plaintiff's case. He frankly admitted his criminal history, which was that he was imprisoned in the United Kingdom for doing grievous bodily harm with intent to do grievous bodily harm, racially motivated and three counts of assault occasioning bodily harm. He was sentenced to 4.5 years imprisonment on a plea of guilty and released after 3.5 years. He had post release supervision, but then was released early from that to return to Australia because of his father's illness. His subsequent work history from 2010 included the Gold Coast Bakery where he had two violent, or at least argumentative events. He also worked as a cleaner for two years, which suited him to some extent because he was working alone. He worked for Australian Beef at Tweed Heads where again he got into trouble in relation to arguing with a workmate. He worked for the defendant from February to July 2013. He had worked there previously, having been dismissed because of a verbal argument, prior to his having visited the United Kingdom. When he was re-employed in 2013, a supervisor, Greg Blatch, who was aware of the previous incident, asked him if he had changed. Mr Parks said he had, and that he was more aware of his "*triggers*" and did not wish to be part of management. He said that it was a management position which had stressed him previously, leading to the previous altercation.

[12] When he worked in the lamb section, Mr Hall was his supervisor, with whom he got on well. He also got on well with Joel Dennis. However, he left that employment in July 2013, partly because he was having difficulties in his personal life including problems with his spouse and children. He returned in October because he needed employment to generate an income. Although his criminal history was not investigated when he was employed, he did later tell superiors, including Ann Marie Robinson, the human resources manager, and Mr Blatch, that he had been to prison.[6] He did not tell them about his post prison problems in previous work places.

[13] Mr Parks gave evidence that he had been annoyed by Mr Colwell on at least one occasion before the assault, and informed Mr Hall of this. Mr Parks was of the view that the plaintiff was influenced by a co-worker, Mr Larter, to have a poor attitude towards the employer, which he did not appreciate. He was placed in at least an

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6 T2-58, ll35-37 (Blatch); T2-59 ll10-16 (Robinson).

informal supervisory type capacity; he was second in charge for one week. He spoke to Mr Hall, saying that the plaintiff was doing the wrong thing and he was getting angry and frustrated. He asked Mr Hall if the plaintiff could be moved away from him. He described himself as being "*close to losing it*". Mr Hall calmed him down. This event was about the Tuesday before the assault. It happened in the absence of Mr Colwell who was not aware of it, however it amounts to another warning that Mr Parks' relationship with Mr Colwell required management, and chronologically was the second such warning.

[14] Mr Parks agreed that there was an aggressive interchange between he and the plaintiff on Friday, 17 January (the third warning). His recollection of the assault on 20 January is similar to that of the plaintiff. When he attempted to apologise for the exchange on 17 January, his version was that the plaintiff said "*shut up, I'm not into your shit*". This was regarded by Mr Parks as provocative and he became very aggressive to the plaintiff; Mr Hall came upon this scene (the fourth warning). The procession to the office and subsequent assault occurred more or less as the plaintiff recounted. Mr Parks denied wearing the mesh glove. He agreed he hit the plaintiff multiple times and others separated them. He also assaulted Mr Larter. He was dismissed and later pleaded guilty to the assaults and was sentenced to six months imprisonment wholly suspended, 150 hours community service and eighteen months of probation.[7]

[15] Mr Parks gave a frank account of his difficulties in various work places. He felt the plaintiff was rude and confrontational to him before the assault, but agreed that he assaulted the plaintiff first. In re-examination he said that he felt the employer had not done the right thing by he and the other workers in not moving him away from the plaintiff, in that he, at the time and place he was in his life, was a danger.[8]

[16] Conversely he also said that he felt he was **not** dangerous at the time but that he can often look angry and frustrated and did so at the time.[9]

Mr Larter

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7 T2-34, l30.
8 T2-67, ll 20-26.
9 T2-68 ll15-30, T2-69 l1-5.

[17] Mr Larter said that Mr Parks looked aggressive at work from his body language; he was, on this last period at the workplace, more purposeful; and was interested in moving up to make more money.[10]

Defendant's Witnesses

[18] The defendant contested much of the evidence in the plaintiff's case and called a number of witnesses who were employees; Greg Blatch, Glen Hunter, Justin Edwards, Jamie Hall and Ann-Marie Robinson. The thrust of most of this evidence was that Mr Parks did not present as any danger; everyone was surprised when the assault happened and it was not foreseen or foreseeable. This is dealt with in greater detail when the defence submissions are analysed below.

Plaintiff's submissions

[19] The plaintiff submits that the main issue in the trial was the knowledge of the employer about the likelihood that Mr Parks would assault Mr Colwell. A number of background features are said to be relevant to such a conclusion, and these factual submissions are summarised as follows:

(a) Mr Parks was a large man, much larger than Mr Colwell (he was about 6ft 1inch tall and about 114kgs as compared to Mr Colwell's 76kgs);

(b) The defendant had significant previous experience with Mr Parks, who had worked there previously in the 1990's (including the previous verbal altercation), again in the first half of 2013 and finally commencing on the same day as Mr Colwell in October 2013 prior to the assault in January 2014;

(c) Mr Parks had previously been convicted in the United Kingdom on a plea of guilty to the offences outlined above.[11] He was sentenced to 4.5 years imprisonment.[12] He said that he told his supervisor, Mr Hall, about this, both the fact of imprisonment and what he was

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10 T2-88 ll 5-35.
11 T2-6, ll 1-2.
12 Supra at ll 32-37.

imprisoned for.[13] Mr Hall said that he may not have listened to this. Mr Hall's version was that he had heard Mr Parks had been to prison, but he did not know what for; had heard whispers and when Mr Parks spoke about his past, Mr Hall did not listen;[14]

(d) Mr Colwell had complained to Mr Hall about Mr Parks' behaviour in December 2013 (the first warning as set out at [5] above);

(e) Mr Parks' clear evidence that he told Mr Blatch he had been in prison.[15] This apparently informed Mr Blatch's repetitive jokes along the lines of "*have you killed anyone yet?*" or "*have you bashed up anyone yet?*"[16] This suggests either a knowledge or presumption, by a person in a management role, that the offences were of violence;

(f) Mr Parks' evidence that when he was made second in charge of the lamb room, it was a bad move because of his poor response to the pressure of a supervisory role.[17] He said that the situation was affecting him and he was "*building inside*" in anger and frustration, particularly with Mr Colwell, and he had told Mr Hall of this.[18] Accordingly, he asked that he or Mr Colwell be moved because he was close to losing it, but Mr Colwell was not moved;[19]

(g) He said that this conversation occurred about three days before the assault.[20] He described how Mr Colwell was *"really getting to me"* and he asked Mr Hall to move him away (the second warning);[21]

(h) He was really frustrated when this happened.[22]

[20] Thus, the plaintiff argues that both the communications with Mr Blatch and with Mr Hall put the defendant, as a corporate entity fixed with the knowledge of its employees, on notice of the potential danger presented by Mr Parks. Thirdly, the plaintiff points to the requirement on 20 January by Mr Hall for Mr Colwell and Mr

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13 T2-14, ll 31-46.
14 T3-118, ll 14-30.
15 T2-58, ll 35-37.
16 T2-58, ll 39-41.
17 T2-23, ll 36-47.
18 T2-24, ll 1-2 - T2-25, l 6.
19 T2-25, l 11 - T2-26, l 17.
20 T2-53, ll 1-5.
21 T2-53, l 28 - T2-54, l 5.
22 T2-54, l 38-40.

Parks to go with him to the office (the fourth warning).[23] This, the plaintiff argues, was an error of judgment as opposed to the more prudent course of immediately separating the two men. The plaintiff points to the evidence of Mr Hunter to the effect that separation is the appropriate first step with such a confrontation.[24]

[21] The plaintiff submits that this falls in the context of the first warning, that Mr Colwell had previously reported to Mr Hall that Mr Parks was crying over his bench and his hands were shaking[25] and further, that emotional instability is concerning when the workers are armed with knives.[26] He relayed this concern to Mr Hall.[27] He said words to the effect of "*he's killed somebody, he's crying over his cutting bench, he's shaking uncontrollably because of his carpel tunnel syndrome. I said it's only, you know, it's a ticking time bomb, just like everyone else said in the crew*".[28]

[22] Whatever complaints he said he received in relation to Mr Colwell, Mr Hall's version was that he made management aware of such a problem.[29]

[23] Thus, the plaintiff submits that Mr Parks clearly presented a problem and indeed, a danger; this was communicated to Mr Hall who took insufficient and inappropriate action, or possibly passed the problem on to management who took no action. The plaintiff points out that Mr Parks was forthright in the evidence outlined above and that on vital exchanges with Mr Hall, it was not put to Mr Parks that he was in error. The plaintiff submits that both Mr Colwell and Mr Parks conveyed the problem to Mr Hall who should have therefore known there was a foreseeable risk of injury to Colwell if he continued to work in close proximity to Mr Parks. Mr Colwell's evidence ought also to be accepted.

[24] The plaintiff presses for a number of findings of fact on the themes of factual circumstances placing the defendant on notice as to Mr Parks' dangerous proclivity giving rise to a duty of care, and the likelihood of reasonable remedial action removing the foreseeable risk of a violent event, such that the failure to remediate was a breach of duty causative of damage.

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23 T2-47, ll 20-21.
24 T3-40, ll 10-37.
25 T1-20, ll 1-13.
26 T1-84, ll 35-38.
27 T1-84, l 40.
28 T1-84, ll 41-45.
29 T3-115, l 9-16.

Application of the relevant law

[25] A number of legal principles touching on the relationship between employers and employees are non-controversial. The employer's obligation to take reasonable care to provide a safe working environment is a non-delegable duty and may extend to protecting them from criminal behaviour of third parties including fellow employees.[30] It is said that the duty arose in the context of the information given to Mr Hall, including Mr Parks' violent past, Mr Colwell's expressed concern, Mr Parks' request to be moved away from Mr Colwell and Mr Parks' demeanour of which he gave un-contradicted evidence.

[26] Avoidance of exposure to unnecessary risk is analysed according to the ordinary principles of negligence.[31] Thus, the enquiry is what would the reasonable employer have done in the circumstances having regard to the magnitude of the foreseeable risk, the probability of its occurrence and the expense, difficulty and convenience in taking alleviating action.

Foreseeability

[27] The plaintiff submits that the assault was foreseeable in the context of:

(a) Mr Parks' behaviour as described by the plaintiff and Mr Parks himself;

(b) the complaint made by the plaintiff about Mr Parks' behaviour (the first warning);

(c) the behaviour described by Mr Larter, Mr Parks and the plaintiff;

(d) Mr Parks' request to be moved away from the plaintiff (the second warning);

(e) Mr Parks' difficulties with controlling himself as reported to Mr Hall;

(f) the complaints made by others to Mr Hall about the behaviour of the plaintiff towards Mr Parks;

(g) Mr Parks' history of violence which was known to Mr Hall and Mr Blatch.

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30 *Antoniak v The Commonwealth* (1962) 4 FLR 454.

31 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

[28] Thus, the plaintiff argues that the circumstances gave rise to the relevant duty of care to avoid a foreseeable risk of an assault on the plaintiff by Mr Parks. The breach thereof is said to be the failure to relocate either Mr Parks or the plaintiff to a different work station, or at least to separate them on the morning of 20 January. Here it is submitted that there was a breach of the duty in that there was not a reasonable response to the foreseeable risk. Reference is made to the statements of principle governing this analysis.[32]

Causation

[29] The plaintiff submits causation is proved in that that the defendant's breach of duty materially increased the risk of injury to the plaintiff and the risk materialised.[33]

[30] A comparative example is *Gittani Stone Pty Ltd v Pavkovic*[34] where an assault by shooting gave rise to tortious liability. The precise circumstances of the injury do not need to be foreseeable, rather that it was of a kind foreseeable as a possible result of the breach of duty. The background was such that the employer should have realised that the assailant was a serious danger to his co-workers.

[31] The plaintiff argues that the circumstances placed the employer on notice that the behaviour of Mr Parks needed to be properly managed. This could have been done with minimum difficulty and expense by moving either Mr Parks or Mr Colwell to another location (including within the lamb section), rendering it more probable than not that the assault would not have occurred. The extreme measure of sacking Mr Parks (mentioned in some other cases) was not necessary.

[32] The plaintiff emphasises that Mr Hall conceded that he could have moved people around if it made work go smoother.[35] This was confirmed by Ann-Marie Robinson.[36] The plaintiff argues that the failure to move Mr Parks or Colwell was consistent with a concern for production over safety.[37]

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32 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 per Mason J; *McLean v Tedman* (1984) 155 CLR 306 at 313 and *Hudson v Ridge Manufacturing Co* [1957] 2 QB 348.

33 *Flounders v Millar* [2007] NSWCA 238; *Jovanovski v Billbergia Pty Ltd* [2010] NSWSC 211 at [68].

34 [2007] NSWCA 355.

35 T3-115, ll 30-33.

36 T4-41, ll 1-2.

37 Colwell at T1-20, ll 21-23 and T1-46, ll 1-10; Parks at T2-25, ll 30-41.

[33] Thus overall the plaintiff submits that he has discharged the burden of proof and should succeed on liability.

The defendant's submissions

[34] The defendant points to the principle that although there is clearly a duty of care on an employer as regards employees, including protection from habitually dangerous conduct by fellow employees, this is a matter of degree; see *Serra v Couran Cove Management Pty Ltd*.[38] What is required is a significant history of misbehaviour by the fellow employee not dealt with appropriately by the employer. The trite enquiry in the particular factual scenario is whether the injury was foreseeable, whether there was a breach of duty and whether the breach caused the injuries complained of (this problem is simply stated, but subtle in analysis, in a case such as this).

[35] The defendant refers to the details of some of the plaintiff's pleadings and it is true to say that some of these are not made out. However, it may be, as the plaintiff submits, that the variances are not particularly significant. I shall return to this topic later.

[36] The defendant argues that the plaintiff's reports of violence and violent demeanour by Mr Parks are overstated and unacceptable.

The First Warning

[37] An example is the passage at T1-20, line 15 (discussed at [20] above) where the plaintiff described Mr Parks crying, hands shaking, leaning over a cutting board with a knife; persistently talking about how he's killed someone and how he has punched another person at every job he's ever been at. The defendant argues these latter assertions are demonstrably untrue. Mr Parks had not killed anyone, and had not punched people at every other job; thus the defendant submits he would be unlikely to say these things. Further, the report relayed to Mr Hall was less extreme, focussed on repetitive strain injury. I do not find the assertion of Mr Parks crying, leaning over with his hands shaking proven to the required standard. It is inconsistent with other evidence as to Mr Parks and his general nature, and curiously was not raised by either side in Mr Parks' evidence in chief or cross examination at all. However I do accept that Mr Colwell did observe Mr Parks'

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38 [2012] QSC 130 at [91] per Douglas J.

demeanour to be aggressive and that he complained to Mr Hall about this in late 2013, if not in the precise terms of a *"ticking time bomb"* as set out at [21] above, then at least in broad terms of a concern as to his moodiness and aggression. I accept that this was the first warning which Mr Hall had that the Parks/Colwell interaction required management. This is based not only on the plaintiff's evidence but also that of Mr Larter, who said Mr Parks had an aggressive appearance, and Mr Parks himself who said that was indeed his appearance.[39] The plaintiff has been apparently consistent on this issue; it is pleaded in essentially consistent terms in paragraph 4 of the Statement of Claim.

[38] The defendant also submits that the plaintiff overstated Mr Parks' criminal history, describing him as having said that he had killed someone when this was not Mr Parks' criminal history. The plaintiff conceded that he did not see Mr Parks strike anyone during the three months he worked with him (prior to the assault) nor did he physically approach anyone with a gesture or a threat, although he did hear him threatening on his own or getting angry at Mr Hall about other people.

[39] The defendant makes the point that when Mr Parks had been angry and aggressive on the Friday prior to the assault, it was not directed personally towards the plaintiff. It is submitted by the defendant that the plaintiff made allegations regarding Mr Parks which were simply not made out by the evidence including that he was convicted of manslaughter; had been in fight at Top Cut in the car park and that he was an intimidator for production. These matters were abandoned in the pleadings.

[40] Although it is not completely clear to me, these submissions presumably are directed at a conclusion that the plaintiff is not a particularly credit-worthy witness and where his evidence is not supported by other evidence care should be taken. Overall, however, with the exception of some details such as the crying and shaking outlined at [37] above, I do find the plaintiff's evidence to be generally acceptable.

Propensity

[41] The defendant argues that there was no particular factual basis for it to be on notice that Mr Parks had any particular violent propensity. The evidence showed that he

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39 See footnote 5 above.

had been in a single verbal altercation a number of years previously[40] when working for the employer.[41]

[42] The defendant points out that at the time of the re-employment of Mr Parks in 2013, it was not made aware of his criminal history; Mr Parks understandably said he was not proud of it and it would not assist his employment to reveal such details.[42]

[43] The defendant submits that there was little demonstration of any true propensity for violence on the part of Mr Parks. His disclosure as to his criminal history to Mr Hall was in the context of him explaining some of his background circumstances, possible changes in his life and his hopefulness for change; they did not have the flavour, so it is said, of disclosure of a violent propensity. Thus, the defendant questions whether there were in truth observable indications that Mr Parks presented a risk. The defendant points to the concession by the plaintiff that he did not see Mr Parks strike anyone or indeed act aggressively in the three months that they were employed together. However, as explained below, in my view the warning events collectively should have had a cumulative effect.

[44] It is submitted that a finding should be made rejecting the evidence of Mr Parks when he says that he informed Mr Blatch of his imprisonment and that Mr Blatch subsequently made jokes showing his awareness of convictions for violence, and that conversely the evidence of Mr Blatch should be accepted on this point. In this context, no motive was suggested for Mr Parks to give such evidence if it had not in fact occurred. Mr Parks presented generally as an impressive witness who was not an advocate for the plaintiff, but rather was attempting to give a truthful account in a balanced way. There is no apparent reason for him to falsely ascribe such statements to Mr Blatch, although of course mistakes are always possible and witnesses sometimes wrongfully reconstruct events. Further on this issue, however, it was clearly stated by Mr Parks that Mr Blatch did make remarks about Mr Parks on a number of occasions about whether Mr Parks had killed anyone yet (supra at paragraph [19](e), footnote 16). If this evidence is accepted, it begs the question of what reason Mr Blatch would have to make these jokes if he was not aware of what Mr Parks said he had told him. I accept the evidence of Mr Parks on this issue, i.e.

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40 T1-61, l 40.
41 T2-4, ll 40-46; T2-5, ll 9-25.
42 T2-57, l 15.

that he told Mr Blatch of his imprisonment and that Mr Blatch either knew or believed (and the two are equivalent) that it involved violence.

[45] The defendant submits that there are various aspects of the evidence supporting the conclusion that, at the time when he commenced re-employment with the defendant, Mr Parks was going through a difficult time and thus was determined to do well at his work and behave accordingly. Thus he would not have presented as a potential danger.

[46] The defendant notes that although Mr Parks gave evidence that he had told Ms Robinson about going to prison, her evidence contradicts this, saying that she only learned about it after the event. Whatever the truth of this, her state of knowledge is not a central issue.

[47] The defendant accepts that Mr Parks gave evidence describing his complaints to Mr Hall about his frustration which was building (the second warning).[43] However it resists the idea that such an exchange put the employer on notice that Mr Parks could not handle the supervisory position. Again, however, it is a step in a cumulative process.

[48] The defendant acknowledges that evidence was given as to the previous employment of Mr Parks in the 1990's and a dispute concerning a driver, however this is explained as no more than a verbal exchange not leading to any physical violence.

The Second Warning - details

[49] The defendant referred to Mr Parks being upset with the plaintiff, on Mr Parks' evidence on the Tuesday prior to the event. The passage appears at T2-24, line 30-46 and 2-25 lines 1-30 where he was upset about Mr Colwell doing something wrong in relation to forequarters and told Mr Hall of this; he was building inside with anger and frustration and asked for he or Mr Colwell to be moved. He was close to losing it and something had to be done, as he reported to Mr Hall; T2-26, lines 1-15. What the defendant argues is that the exchange in question did **not** indicate mounting tension between Mr Parks and Mr Colwell or any imminent explosion by Mr Parks. However, this is a very difficult proposition to accept. Mr

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43 T2-24, l 30.

Parks said in cross-examination that the plaintiff was "*getting to me*"[44] and this was the context of the discussion where he said to Mr Hall that Mr Hall needed to get Mr Colwell away from him – "*you need to move me*".[45] He explained that he told Mr Hall "*You've got to shift him*".[46] Mr Parks seemed to adopt counsel's proposition to this effect at T2-54, lines 40-45.

[50] Mr Parks also agreed that he had an exchange with Mr Colwell before the assault which was the catalyst for the incident on the Monday following.[47] However he seemed to think it happened on the previous Tuesday, whereas Mr Colwell says the previous Friday, i.e. one working day prior to the incident.

[51] The defendant refers to the following passage of evidence in the re-examination of Mr Parks:

> "*I've turned around to Jamie and said, 'what's he doing? Just get him away'. I warned him – and I said 'he's really getting to me'.*
> *Q: Did you say that to Mr Hall? – I did, yes*
> *Q: Yes and he said you got really frustrated. Did you tell Mr Hall that you are frustrated; … Yeah, it was – it was a 'calm down, calm down' from Jamie, having my welfare in –*
> *Q: Yeah? – he was 'calm down, calm – we'll sort it', but it's one of those environments where it's – you're on the go and it can be easily settle it down for the moment and hopefully it just disappears, that – but I don't think Jamie – well, I – even me, at that time, I didn't realise what was going to eventuate. I'm just thinking 'yeah it will just disappear'.*"[48]

[52] The defendant argues that this is the only exchange between Mr Parks and Mr Hall where Mr Parks complains about Mr Colwell and asks to be removed. It is further submitted that it does not amount to something sufficient to put the employer on notice that the two needed to be separated. I do not accept this; rather, it was a further warning to Mr Hall to manage the problem between Mr Parks and Mr Colwell.

[53] It is also argued that the exchange was more focussed on work production issues than real conflict and that care should be taken not to apply the wisdom of hindsight to over-emphasise the significance of the exchange. The submission is that there

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44 T2-53, l 31.
45 T2-54, l 5.
46 T2-54, l 41.
47 T2-26, ll 26-36.
48 T2-66, ll 25-39.

was no requirement as a result of that exchange to separate the two workers, and that would not have been a reasonable response.

[54] The defendant emphasises a concession by Mr Parks that he had not reported difficulties with Mr Colwell further up the management chain, saying "*I thought I could deal with it on my own*". The passage, which is at T2-64, arose in the course of a cross-examination concerning the post event interview which Mr Parks had with Mr Blatch and Ms Robinson, with counsel putting questions from a document, possibly contemporaneous notes. The passage begins with the question at T2-60, line 34:

> "*Do you remember sitting down with Greg Blatch and being asked the question 'tell me what happened?' or words to that effect? – [Indistinct] on the incident – on the occasion where we met offsite?*
> *Q: Offsite? – yes*"

[55] At T2-62, line 11, he was asked:

> "*Do you remember saying that to Blatch and Anne-Marie in course of that? – I do remember. I wouldn't be able to remember that of my own on that – but you saying it, it is true what I have written there.*"

[56] Later the cross-examination continued:

> "*And do you recollect saying that Anne-Marie asked you, 'why didn't you report what was going on to someone?' and you replied, 'I thought I could deal with it on my own'? – If it's written there I must have said it and I don't – I'm – I should – I was aware that I had made Jamie* [Hall] *aware of a situation between me and Jamie* [Colwell] *previously. I probably did say that I could deal with it on my own.*
> *Q: And that's what you thought? – Pardon?*
> *Q: And that's what you thought at the time, you thought that you could deal with it on your own? – I could have dealt with it on my own, yeah.*"

[57] This is said to amount to a confirmation that Mr Parks had not made any complaints about issues he had with Mr Colwell and in particular, the exchange between them on the Friday before the assault. However its true value to the defendant is doubtful. The witness was adopting a proposition which apparently came from a document and agreed with some of the propositions on the basis of a probability. There seems to be little recourse to his own memory of events. He also agreed with the proposition that he could have dealt with the situation on his own, but was doing so rather in the abstract, in my view, rather than adopting a proposition that this was the result of his specific thought process at the time of the incident. Moreover, he

clearly adhered to the proposition that he had told Mr Hall of the tension he was feeling in relation to Mr Colwell.

[58] The defendant submits that without the benefit of hindsight, these various events are insufficient to put the employer on notice that Mr Parks had a propensity for violence.

Knowledge of Propensity

[59] The defendant made a number of submissions dealing with the individual witnesses and their knowledge of any alleged propensity.

Glen Hunter

[60] Glen Hunter was the production manager. He confirmed that there was not normally a criminal history check for potential employees, nor was there in this case. Further, Mr Parks appeared to have a good attitude and he had received no complaint about misbehaviour such as bullying, which would have been dealt with. He said that he was surprised to hear about the assault and there were no alarm bells ringing as to any trouble brewing.[49] He was unaware of any potential problems with the plaintiff and also confirmed that, had there been any problems, production concerns would give way to worker safety.

Justin Edwards

[61] Mr Edwards was a co-worker who was also surprised at the occurrence of the assault. He did not consider Mr Parks to be violent or aggressive and describes him as being a "*big teddy bear*". I note that this seems somewhat incongruous with other evidence concerning Mr Parks, particularly the descriptions by Mr Colwell and Mr Larter, (as well as Mr Parks' criminal history), however it is also true that people can give different impressions in different interactions.

Jamie Hall

[62] I have mentioned Mr Hall in the summary above. I did not find him to be a persuasive witness. He was combative, somewhat insolent, and at times professed either not to have heard, or to be able to recall, conversation addressed directly to

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49 T3-29, l 20.

him.[50] He was the supervisor at the time. He was friendly with Mr Parks at work, but not outside work.[51] In his observations, Mr Parks was not aggressive or different to anyone else and aggression was not reported to him.[52]

[63] Mr Hall conceded that he was aware that Mr Parks had been to jail, but he personally was not concerned about it, being inclined to give people a second chance[53].

[64] The defendant acknowledges that Mr Hall did not expressly deny knowledge of Mr Parks' complaints about Colwell, however he was adamant that he was not aware of animosity between them prior to the incident. For the reasons outlined above, I accept the evidence of Mr Parks on this topic. Mr Hall also said that he had not received complaints about Mr Parks and denied that the plaintiff consulted him about Mr Parks leaning over the table and crying in pain.[54] Again, as outlined above, I accept the plaintiff's evidence generally as to the first complaint.

[65] Mr Hall also said that he suffered from industrial deafness and had difficulty hearing conversations in the workplace.

Ann-Marie Robinson

[66] Ms Robinson was the HR manager. On her evidence, she was not aware of Mr Parks' criminal history. She did not consider him aggressive but rather respectful and polite and there were no complaints made to her by other workers.[55] There is a tension between her evidence and that of Mr Parks, who says he did inform her of the criminal history prior to the assault.[56] Again, this is not a central issue.

Greg Blatch

[67] As noted at para [44] above, the defendant argues for a finding rejecting the evidence that Mr Parks had informed Mr Blatch of his convictions. However Mr Parks presented as an impressive, balanced witness; there is no apparent reason for him to falsely or mistakenly swear that he had informed Mr Blatch of the

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50 e.g. T3-81 ll35-38.
51 T3-71, ll 35-45.
52 T3-72, ll 15-25.
53 T3-72, ll42-43.
54 T3-77, ll10-15.
55 T4-4 l 15-25.
56 T2-59 l 10-16, l 26-29.

imprisonment and that Mr Blatch later made jokes on the topic. I accept Mr Parks' version on this point.

[68] The defendant also argues that Mr Blatch's surprise at the assault is a circumstance supporting the conclusion that the employer was reasonably not on notice as to Mr Parks' propensity. I shall return to this topic.

Arguments as to knowledge generally

[69] Thus, the submission of the defendant is that the employer's knowledge of Mr Parks' criminal history alone did not put them on notice of actual danger, in the absence of knowledge of the details or any misbehaviour at work. However the knowledge was somewhat broader than the criminal history; Mr Parks had, to the defendant's knowledge, misbehaved at work previously. Admittedly, the verbal argument had been some years previously, but there had also been his recent abrupt departure in 2013 which put Mr Blatch somewhat on guard. Mr Parks said that when Mr Blatch interviewed him for his re-employment on that third occasion, Mr Blatch asked him if he had changed – suggestive of a perception that there had been a necessity for change – and Mr Parks said that he was more aware of his "triggers" and thus said that he did not want to be part of management, instead preferring to put his head down and be left alone.[57] Mr Blatch largely accepted this version.[58] It amounts to knowledge of previous behavioural problems, significant enough for Mr Blatch to find it necessary to ask if he had changed.

[70] The defendant submits that there is some guidance on the topic of the employer's knowledge in *Govier v The Uniting Church in Australia Property Trust*.[59] It is submitted that at para [19] of the judgment, the court analysed the degree to which a letter written by the plaintiff in that case and handed to a representative of the employer had the tendency to place the employer on notice of the danger presented by the assailant. The Court of Appeal embraced the primary Judge's description of the letter as making accusations almost exclusively of emotional (rather than physical) aggression. Fraser JA said:

> "*I accept the respondent's submission that the respondent was not fixed with liability merely upon proof that the respondent should have appreciated that the appellant was annoyed or distressed by*

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57 T2-13, ll5-15.
58 T4-58, ll20-32.
59 [2017] QCA 12.

> *MD's conduct towards her, or even that the appellant was in fear of MD: Tame v New South Wales [2002] 211 CLR 317 at 329. [my emphasis]*

That would be a relevant, but not determinative finding, which would need to be considered in the context of the other relevant findings.

[71] That analysis, I accept, can be transposed to the present case, in the sense that mere proof that there should have been an appreciation that Mr Colwell was annoyed or distressed by Mr Parks' conduct, or even in fear, is not, of itself, sufficient to establish liability. It would be, as in *Govier*, a relevant, but not determinative finding. In this case, of course, the plaintiff goes further and emphasises not only the reports of annoyance, but requests by both parties to be further separated from each other.

Causation – should Colwell have been moved away from Mr Parks?

[72] As outlined above, the defendant argues that an important exchange (the second warning) between Mr Parks and Mr Hall was really about work production, rather than any real conflict – *supra* at paras [49]-[53]. However, as outlined, Mr Parks said that the plaintiff was "*getting to me*" and told Mr Hall that he needed to separate the two; "*you've got to shift him*". In relation to the earlier incident concerning the forequarters, he said "*look, mate, you've got to move him away from me. I'm trying to do my job the best I can or put me on the other saw, get me away from him*".[60] The defendant points to the evidence that Mr Parks did not intend to attend work and assault the plaintiff on the day of the incident, thus, it is said that the circumstances did not necessitate the two being separated; further, had it been done, this may not have made any causal difference because the two could still interact at smoko or at lunch.

[73] This cannot be accepted. On the clear evidence of the two protagonists, the direct precipitating factor for the assault was the plaintiff's response on the day to the apology made by Mr Parks as to his previous behaviour (the response may have been intended by Mr Colwell to be polite, but misinterpreted by Mr Parks). Without the discussion on the previous Friday[61] (the third warning event; by which time, on the plaintiff's case, the two should already have been separated), then

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60 T2-53 l 33.

61 T1-19, ll 30-35; T2-26, ll 27-32, T2-27, l 33.

there would not have been a need for an apology and the assault would not have taken place. Moreover, had the two been separated, there would not have been the earlier tension and back to back bumping described by Mr Parks leading up to the incident, which had escalated the problems between the two.[62]

[74] The defendant again refers to the passage referred to from *Govier* for the proposition that the circumstances did not establish a risk of assault.

Conclusion in relation to liability

[75] In my view the evidence of the plaintiff, and particularly Mr Parks, should be accepted with respect to the various features referred to above, thus putting the defendant on notice that Mr Parks was a danger to the plaintiff. As set out above, some of the denials by Mr Blatch, and the evidence of Mr Hall, is not convincing on these topics such that the plaintiff and Mr Parks should generally be accepted. Thus, the evidence as outlined above supports the making of the following findings of fact on the balance of probabilities, firstly as to the existence of a duty of care:

(a) that Mr Colwell did raise concern to Mr Hall about Mr Parks' behaviour in December 2013 (the first warning);

(b) that Mr Parks did report to Mr Hall that he was having difficulty with Mr Colwell and wished to be moved away from him in the week prior to the assault (the second warning);

(c) that, similarly, several people including Joel Dennis complained to Mr Hall about not wanting to work around Mr Colwell;[63]

(d) that Mr Dennis and Mr Parks worked next to each other and were good friends (such that appropriate management action might have been to move Mr Colwell, rather than Mr Parks);

(e) that at relevant times prior to the assault (from the time of the first warning onwards), Mr Hall was aware that Mr Parks had been in prison; and he knew or should have known the broad details of Mr Parks' offences, at least that violence was involved. Similarly, that Mr Parks told Mr Blatch that he had been imprisoned and this prompted Mr Blatch's jokes on five or six occasions to the effect of

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62 T2-27, l 35 to T2-28, l 36.
63 T3-113, ll 24-26.

"*you haven't killed anyone yet*" indicating awareness of violent offences;

(f) that the employer did not provide training to Mr Hall in personnel management or de-escalating conflicts between employees;

(g) that Mr Hall's knowledge ought to have, but did not, prompt him to properly assess the risk that Mr Parks posed to Mr Colwell;

(h) thus, that the employer was on notice by virtue of the information it had, or that was available to Mr Hall and Mr Blatch, that Mr Colwell faced a foreseeable risk of injury by assault by Mr Parks.

These circumstances gave rise to a duty of care to take reasonable steps to avoid the foreseeable risk of violence by Mr Parks towards the plaintiff. The reasonable steps under consideration are as pleaded at paragraph 8 of the Statement of Claim, particularly a failure to act on the plaintiff's November (pre-Christmas, in evidence at trial[64]) 2013 concerns (8(c)); failure to otherwise address the tension between the two, for example by separating them in the workplace (8(d)); and failure to separate them on the 20 January when they were arguing (8(e)).

This being a case of alleged negligence by omission, it is necessary to embark on the hypothetical inquiry as to whether the incident would likely have been avoided had the duty been discharged.[65] As to this aspect, the following findings are made:

(i) that it would have been feasible to move either Mr Colwell or Mr Parks to separate them at any point prior to 20 January 2014 without significant difficulty or expense for the defendant's business. This could have been at the direction of Mr Hall, or if he referred the matter higher, a superior such as Mr Blatch or Ms Robinson;

(j) that had Mr Parks and Mr Colwell been separated by 17 January, the assault would likely not have occurred, because the interplay of the 17th and then consequently 20 January would, more likely than not, not have happened;

(k) further, that on 20 January when Mr Hall encountered Mr Parks and Mr Colwell arguing (the fourth warning), he should have separated

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64 T1-20, l10.

65 See *Wolters v Sunshine Coast University* (2014) 1 Qd R 571 at [40] to [42].

them rather than sought to remove them together, and had they been separated, the assault would likely not have occurred.

[76] This leads to the conclusion that on the information available to the employer via the state of knowledge of Mr Hall the supervisor, the assault was foreseeable; further, the separation of the two was a relatively simple and inexpensive step to avoid it. The failure to relocate either Mr Parks or the plaintiff, thereby separating them, by 17 January was therefore a breach of the duty of care which arose. The failure to immediately separate them on 20 January was a further breach, particularly in light of the evidence of Mr Hunter as to the appropriateness of this as a first step.

[77] The breaches of duty were causative of the injury to the plaintiff in that they materially increased the risk of injury and the risk materialised. Like *Gittani Stone (supra)*, the circumstances, although not as extreme as that case, called for the employer to do more than it did (which in this case was nothing), to avoid the risk of violence. It is true that this is a question of degree, but I do not accept, having regard to the above findings, that the assault in this case can be characterised as an isolated incident occurring for the first time such as to absolve the employer of responsibility (compare the observations of Dunphy J in *Antoniak v The Commonwealth*,[66] referred to in *Serra v Couran Cove Management Pty Ltd*, *supra,* at [91]). Perhaps the other employees were, as they professed, surprised that the assault occurred; in the circumstances as I have found them to be, at least Mr Hall and probably Mr Blatch were not entitled to be so surprised.

[78] These findings support the plaintiff's pleaded case; the factual allegations and particulars of negligence relied upon encompass the matters outlined above, particularly subparagraphs 8(c), (d) and (e) of the Statement of Claim.

[79] Thus, the plaintiff succeeds on the issue of liability. In my conclusion these are not findings made with the benefit of hindsight, rather the circumstances and events prior to the assault were sufficient to put the employer on notice of the risk that Mr Parks presented. This arose through the state of knowledge in particular of Mr Hall, given the warning events which had occurred. The remedial action to avoid the risk

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66 (1962) 4 FLR 454, 458-459.

was simple and inexpensive, thus failure to act was a breach of duty and damage followed.

Quantum

General damages

[80] It is common ground that Mr Colwell, apart from some physical injuries, suffered a serious psychiatric injury as a result of the assault. Dr Dwyer assessed Mr Colwell as suffering from Post-Traumatic Stress Disorder with a 22% impairment.[67] Professor Whiteford, called on behalf of the defendant, was not in significant disagreement. The parties agree that an Injury Scale Value ("ISV") of 30 is appropriate resulting in an award of $60,700 for general damages.

Past economic loss

[81] The plaintiff claims damages on the basis of a loss of $840 for two weeks and $890 thereafter, based on the promise which he had been given of an $80 increase in his wage. The total claim is $188,149 together with interest thereon.

[82] The defendant submits that prior to the plaintiff's employment with the defendant his employment had been less consistent and at lower rates. In 2011/2012 he was earning income averaging $537 net per week. This increased slightly the next year but reduced again in 2013 prior to his employment with the defendant. The defendant submits that these features should be taken into account, together with the casual nature of the employment with the defendant and the past economic loss should be discounted for these contingencies.

[83] I am inclined to accept that a discount is appropriate, however at a lesser level than that contended for by the defendant. In the result the damages will be calculated as follows:

(a)	$840 for two weeks	=	$ 1,680.00
(b)	WorkCover weekly benefits	=	$ 4,909.00
(c)	$890 for 207 weeks	=	$184,230.00
	Total lost wages	=	$185,910.00
	Less WorkCover weekly benefits	–	$ 4,909.00

[67] Dr Dwyer's report of 13 April 2015 is Exhibit 7 and the second report of 20 February 2018 is Exhibit 8.

Total	=	$181,001.00
Less 15% for contingencies	–	$ 27,150.15
Total	=	$153,850.85
Past loss of superannuation at 9.5%	=	$ 14,615.83

[84] Interest on past economic loss of $153,850.85 should be calculated on the basis, as claimed by the plaintiff, of 1.54% per annum, being one half of the average of the Treasury bond rate in January each year 2014 to 2018. This amount on past economic loss of $153, 850.85 for 4.1 years amounts to $9,714.12.

Past Special Damages

[85] In relation to past special damages, there seems to have been a disagreement between the parties, at least by the stage of written submissions, although there did not appear to be any particular dispute at the time of the trial. I accept the plaintiff's figures in accordance with Exhibits 4 and 5, the Medicare refund and the WorkCover figures, totalling $31,282.29.

Future Special Damages

[86] In relation to future out of pocket expenses, these are claimed by the plaintiff in the sum of $19,080. Dr Dwyer, the specialist psychiatrist called on behalf of the plaintiff, quantified the required psychiatric and psychological treatment as a total cost of $11,080. The plaintiff also seeks global amounts for attendances upon his general practitioner, travel expenses, pharmaceutical expenses and an exercise program. I assess the total of these amounts globally in the sum of $3,000. Thus, the total for future out of pocket expenses would be $14,080.

Fox v Wood

[87] The plaintiff also claims damages in accordance with the principle in *Fox v Wood* in the sum of $947.

Future Economic Loss

[88] In relation to future economic loss, the plaintiff was born on 21 August 1974 and is now 43 years of age. The plaintiff claims, in accordance with the medical evidence, the full loss of $890 per week for 23 years until the age of 67, discounted on the 5% tables, but then further discounted by 35% to take account of the vicissitudes of life

and his potential residual earning capacity. These calculations give a figure of $417,098.50. The defendant, conversely, argues for an allowance of a complete loss for 2 years and a reduced figure for the following 5 years by which time the plaintiff will be able to fully engage his pre-existing employment skills. These general calculations would lead to an award of $200,000.

[89] The plaintiff points out that the prognosis by Dr Dwyer is poor. Further, the plaintiff has completely unable to do paid work since Dr Dwyer had last seen him in 2015. He has been unable to do much work around the home and had not engaged in recreational activities. Dr Dwyer's opinion was that it would be difficult for the plaintiff to engage in work involving contact with others, any degree of concentration, or strict timetables. It would be unlikely, in his view, that Mr Colwell would be able to work more than 20 hours per week. He might have some limited work from home at his own pace.

[90] Professor Whiteford said that the plaintiff could not have held down a job when he saw him recently and would not have been able to manage a job interview.[68] He said that because Mr Colwell has been out of work for so long now that he would be significantly de-skilled and is very socially isolated.

[91] In my view, the appropriate allowance is the total loss of $890 for 2 years, which on the 5% tables amounts to $88,466. Given the evidence of his ongoing significant problems I am prepared to allow a further loss of approximately half of his previous earning capacity at $450 per week for the ensuing 20 years, amounting to $299,880. These amounts give a total of $388,346, which in my view, should be discounted for the contingencies of life by 25% giving an award of $291,260. Loss of future superannuation at 11.3% amounts to $32,912.

[92] Accordingly, damages should be quantified as follows:

1.	General damages at	$ 60,700.00
2.	Past economic loss at	$ 153,850.85
3.	Interest thereon	$ 9,714.12
4.	Past superannuation at	$ 14,615.83
5.	Past special damages at	$ 31,282.29
6.	Future special damages at	$ 14,080.00

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68 As noted in the conference note of Ms Evans of 15 March 2018, Exhibit 11, p 2.

7.	*Fox v Wood* at	$ 947.00
8.	Future economic loss at	$ 291,260.00
9.	Future superannuation at	$ 32,912.00
	Total	$ 609,362.09
	Less WorkCover refund of	$ 24,367.00
	Total	$ 584,995.09

[93] There will be judgment for the plaintiff against the defendant in this amount. I will hear the parties as to costs.