DISTRICT COURT OF QUEENSLAND

CITATION:	*Mason v State of Queensland* [2023] QDC 80
PARTIES:	**JUSTIN MASON** (Plaintiff) **v** **STATE OF QUEENSLAND** (Defendant)
FILE NO:	D187/19
DIVISION:	Civil
PROCEEDING:	Originating Application
ORIGINATING COURT:	District Court, Maroochydore
DELIVERED ON:	12 May 2023
DELIVERED AT:	Maroochydore
HEARING DATE:	23 August 2021 – 26 August 2021
JUDGE:	Long SC DCJ
ORDER:	**Judgment for the plaintiff in the sum of $148,114.85, clear of the statutory refund**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the plaintiff claims damages for psychological injury suffered in the course of employment with the defendant – where the plaintiff's psychological injury arose from being physically assaulted by a supervisor and subsequent treatment of him in the workplace, including a lack of managerial support whilst employed by the defendant. TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – BREACH OF DUTY – REASONABLE FORESEEABILITY OF DAMAGE – whether the defendant is vicariously liable for the intentional unlawful assault committed by their employee – where wrongful acts can be regarded as being committed in the scope or course of employment and as a misuse or taking advantage of such a position such as to render the employer vicariously liable for it – whether the defendant is vicariously liable for the subsequent conduct of their employees following the reporting of the assault – whether the defendant failed to protect the plaintiff from any foreseeable risk of harm following

the reporting of the assault – where protection and support should be provided to a person who makes a public interest disclosure.

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – CAUSATION – whether each breach of duty was a necessary condition of the occurrence of the injury – where the plaintiff was vulnerable or susceptible to the development of a psychological injury – where the assault was a substantial contributing factor to the development of his adjustment disorder – where the subsequent conduct in the workplace provided substantial contribution to the condition and prolonged it.

LEGISLATION:

Public Interest Disclosure Act 2010 (Qld) ss 40, 41, 42, 43
Workers' Compensation and Rehabilitation Act 2003 ss 207B(2), 305, 305A, 305B, 305C, 305D, 305E, 306I, 306J, 306L, 306N, 306O, and 306P
Workers' Compensation and Rehabilitation Regulation 2014 (Qld) ss 129 and 130, Sch 8, 9, and 12

CASES:

Andar Transport Pty Ltd v Brambles Limited (2004) 317 CLR 424
Cincovic v Blenner Transport Pty Ltd (2017) QSC 320
Cook v Bowen [2007] QDC 108
Czatyrko v Edith Cowan University (2005) 214 ALR 349
Deatons Pty Ltd v Flew (1949) 79 CLR 370
Hayes v State of Queensland [2017] 1 Qd R 33
Inghams Enterprises Pty Ltd v Tat [2018] QCA 182
Keegan v Sussan Corporation (Aust) Pty Ltd (2014) QSC 64
Koehler v Cerebos (Aust) Ltd (2005) 222 CLR 44
Kondis v State Transport Authority (1984) 154 CLR 672
Lloyd v Grace Smith & Co
Malec v JC Hutton (1990) 169 CLR 638
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319
Nationwide News Limited v Naidu (2007) 71 NSWLR 471
New South Wales v Lepore 212 CLR 511
Peebles v WorkCover [2021] QCA 21
Prince Alfred College Incorporated v ADC (2016) 258 CLR 134
Robinson v State of Queensland [2017] QSC 165
Rosenberg v Percival (2001) 205 CLR 434
Shaw v Thomas [2010] NSWCA 169
Strong v Woolworths Ltd (2012) 246 CLR 182
The Corporation of the Synod of Diocese of Brisbane v Greenway [2017] QCA 103
Turner v State of South Australia (1982) 42 ALR 669
Vairy v Wyong Shire Council (2005) 223 CLR 442

Waters v Commissioner of Police for the Metropolis [2000] 1 WLR 1607
Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL: SD Anderson for the Plaintiff

BF Charrington for the Defendant

SOLICITORS: Slater and Gordon Lawyers for the Plaintiff

Crown Law for the Defendant

Introduction

[1] By Claim filed on 23 October 2019 and the Further Further Amended Statement of Claim ("*FFASOC"*) filed by leave of this Court on the first day of hearing on 23 August 2021, the plaintiff seeks damages for negligence and/or breach of contract, interest pursuant to section 58 of the *Civil Proceedings Act 2011* (Qld) and costs.[1]

[2] An essential part of the plaintiff's claim lies in contention of breach of an employer's duty of care to avoid the occasioning of foreseeable psychological injury of an employee.[2] The defendant acknowledges the statement in *Czatyrko v Edith Cowan University*,[3] that:

> "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work."

[3] In the evidence, there is agreement of the respectively relied upon psychiatrists that the plaintiff has suffered an adjustment disorder, which was not a condition which pre-existed the workplace-related conduct which is the subject of the claim.[4]

[4] His claim is that his injury was caused or contributed to by events which occurred in the workplace, due to the negligence and/or breach of contract of the defendant. As summarised in the plaintiff's written submissions, in particular reference to the *FFASOC* at [19], his claim is that the defendant:

> " a. failed to train, instruct and/or discipline the Supervisor that violence or threatening behaviour in the workplace would not be tolerated which would have prevented the incident and subsequent treatment;
>
> b. failed to take any or any appropriate steps to investigate the incident which would have prevented subsequent treatment;

---

1 Claim filed 23/10/2019.

2 The defendant concedes the coexistent nature of the duty under the law of negligence and contract; defendant's written submissions, filed 02/09/2016, at [47].

3 (2005) 214 ALR 349 at 353.

4 Although, there is evidence from Professor Whiteford as to a pre-existing vulnerability and some other differences of view as between these experts and as is discussed below at [23]-[28].

c. failed to take any or any appropriate steps to control or influence the behaviour of the Plaintiff's colleagues following the incident which would have controlled the subsequent treatment and would have provided the Plaintiff with support by enforcing the code of conduct and policies and procedures pleaded herein:

PARTICULARS

i. to remind (sic) Walker and other officers who were witnesses of their duty of confidentiality about the incident;

ii. to reinforce training of officers with respect to the Code of Conduct and anti-bullying and harassment policies of the Defendant;

iii. to ensure that management of the Centre provided training to officers on an ongoing basis with respect to the policies of the Defendant and in particular with respect to the Code of Conduct and anti-bullying and harassment policies;

iv. to create and maintain a supportive workplace culture in which individual employees were encouraged to report inappropriate behaviour and not encouraged to mock those who did report it.

d. failed to provide the Plaintiff with support after the incident which would have made him feel protected in the centre;

PARTICULARS

i. the matters in i to iv above and:

(1) someone from Centre management inquiring after his well-being;

(2) admonishing Walker that his behaviour toward the Plaintiff was inappropriate;

(3) someone from Centre management telling the Plaintiff that it is not acceptable for him to be touched and treated inappropriately by Walker.

e. failed to provide the Supervisor with any or any appropriate training and education on the issue of appropriate conduct within the workplace which would have prevented the incident and subsequent joking about the incident;

PARTICULARS

i. Anti-bullying and harassment;

ii. The Duty of Confidentially;

iii. The code of conduct;

iv. Appropriate Supervision of employees;

v. Respect for colleagues;

vi. Reporting of incidents; and

vii. Investigation of incidents.

f. failed to provide and implement any or any appropriate policies in relation to appropriate conduct of employees within the workplace which would have prevented the incident and the subsequent treatment."[5]

[5] Further and of some particular importance to how the plaintiff's case was ultimately put and engaged by the defendant, is the alternative pleading of reliance upon the principles of vicarious liability and particularly in respect of the act of a supervising officer in assaulting the plaintiff in the workplace.[6]

The Facts

[6] That workplace-related conduct is particularly identified as occurring between 22 January and 7 March 2017.[7] Further and as the following notation of relevant facts established by the evidence demonstrates, particularly in respect of the claim articulated at paragraph 19(d) of the *FFASOC,* the concern is with the plaintiff's experiences at his employment until 9 March 2017.

[7] The plaintiff was born on 28 September 1975[8] and was therefore aged 41 years in January and February 2017, when he was employed as a Custodial Corrections Officer ("CCO") by Queensland Corrective Services ("QCS") at the Woodford Correctional Centre. He was so employed from about mid-August 2014 to the end of March 2018 but in receipt of workers' compensation from 9 March 2017.[9]

[8] On 22 January 2017, and shortly after the plaintiff arrived at his post in the visits section of the prison, he was assaulted by his immediate supervisor. That occurred

---

5 Plaintiff's written submissions at [18].
6 *FFASOC* at [19A(c)].
7 *FFASOC* at [5] and [8]-[16].
8 T 1-18.36.
9 T 1-19.40-47 and Ex. 10.

in the context of a disagreement arising between the plaintiff and that supervisor ("Walker") as to whether a particular prisoner was to have a "contact" or "non-contact" visit.[10] The plaintiff described that during their discussion, he said to Walker "that [he] didn't like the idea, and [Walker] basically turned around and punched [him] in the guts".[11]

[9] The blow was just below the plaintiff's navel and on a hernia scar and hurt. The plaintiff was shocked, confused and embarrassed. He tried to laugh it off. He agreed that after he was punched, Walker said something like "I've just accosted Mr Mason. Best if you toe the line".[12] This was directed at the group of officers present and others laughed, as did the plaintiff.[13] One of the officers present, CCO Dedman, gave evidence of hearing a noise and hearing Walker say something like: "I've just had to accost Mr Mason. I don't want to have to do it to anyone else".[14]

[10] The plaintiff was uncertain as to what to do, he spoke to another guard and determined he would try to speak to Walker later in the shift, but was not able, to as Walker had, by then, left the visits area. The plaintiff then had several scheduled days off.

[11] Upon his return, he was approached by the section manager at the prison, Mr Mosley, who told him that he was aware that an event had occurred between the plaintiff and Walker and Mr Mosley requested the plaintiff make a report. The plaintiff did provide a report on 2 February 2017.[15]

[12] The plaintiff does not claim physical injury as a consequence of the assault by Walker. He described the blow as being of sufficient force to cause him to bend forward and double over as he felt a shooting pain down to his testicles.[16] What he does claim is that his psychological injury was initiated by the assault and caused, as well, by the events at work which followed. His claim is characterised as being that for about a month following his report of the assault, he was subjected to reprisals by staff, including Walker and not provided with support in this regard by his employer.

---

10 T 1-22.17-30.
11 T 1-22.32-35.
12 T 1-71.17-18.
13 T 1-71.20-24.
14 T 1-75. 41-47.
15 T 1-24.42-43.
16 T 1-23.1-2; T 1-69.19-33.

[13] Around 4 February 2017, the plaintiff was informed by a colleague and friend, CCO Dedman, that CCO Dedman had been requested to provide a report about the incident that he witnessed. He was also told that Walker had told CSO Dedman that he did not have to put in a report and that management could not make him do so but that he, CSO Dedman, had put in a report in any event.[17] CSO Dedman confirmed most of this conversation except for a recollection that he told the plaintiff of Walker's comment. Although, he conceded that he may have said so.[18]

[14] On 13 February 2017, on the plaintiff's return to work after some time off, he heard an unknown officer calling him a "dog cunt" as he was walking to his rostered post.[19] He was also asked by CSO David why he had a "punch up" with Walker and dobbed on Walker.[20] Upon arrival at his rostered post, he found Walker to be his supervisor, which made him uncomfortable. He decided to speak to Walker about the incident and explained that he was not happy about it. Walker joked about the incident and said that if the plaintiff was hurt in any way, he was sorry and, as the plaintiff described, passed the punch off as a slap.

[15] On both 14 and 15 February 2017, the plaintiff arrived at his rostered post to find that Walker was again his direct supervisor. On the latter occasion, the plaintiff contacted the acting operations supervisor, Ms Lancaster, to tell her of the incident and that he was uncomfortable having Walker as his direct supervisor. At around 9:30am he was redeployed to another part of the jail. At around 11:00am he was approached and spoken to by Mr Mosley about this redeployment and was offered the services of the Employee Assistance Program: "Optum".

[16] On 17 February 2017, the plaintiff was asked by colleagues, who were new and unknown to him, why he had "dobbed" on a supervisor.

[17] On 22 February 2017, the plaintiff was told by CSO Franklin that he had overheard Walker discussing the assault with other officers, stating that he "just gave the little fella a back hand" and that the plaintiff should be a bit careful around the place.

---

17 T 2-76.19-28; T 2-77.21-T2-78.19.
18 T 2-77.39-T2-78.19.
19 T 1-81.23.
20 T 1-16.39-41.

[18] Subsequently (on 2 March 2017),[21] the plaintiff spoke to Mr Mosley to tell him that he was not sure "what was happening and what was going on and what do I do from here".[22] He described that he was "completely lost as to what to do" and that he had told Mr Mosley:

> "… about me getting called different names on the walkway and basically being abused about the fact that an incident happened and no one was there to hear of, and to my knowledge, I still don't know who let him know in the first place, and that information never came back to me, so I was all up in the air and a bit lost about it all, because I done the report, and it just seemed like nothing was happening, no one was there to help you or do anything for you, so you just sort of get left to your own mind going, 'well, what the hell am I doing here, and why does everyone know about this and giving me grief when, you know, you should be at least be – have some avenue?' I – I thought, to be honest, that the manager would have called me into his office and sat us down…"[23]

He thought that Mr Mosley said, "something along the lines that he'd pass it on to management and that was for them to deal with".[24]

[19] On 9 March 2017, the plaintiff attended his general practitioner and was given a medical certificate for time off work.[25] He thereafter made a claim for workers' compensation,[26] and has not returned to his employment at the Correctional Centre.

[20] The credibility of the plaintiff's evidence was put in issue in only two respects:

(a) First, in relation to the allegations as to the subsequent treatment of him and particularly as it related to adverse comments or interactions with unspecified persons and the extent to which the plaintiff's evidence departed from what was then beyond what had been pleaded in that regard;[27] and

---

21 It should be noted that this and other dates referenced in preceding paragraphs are more particularly and for convenience drawn from the *FFASOC* and in at least some instances not necessarily or precisely confirmed in the evidence and that there would not appear to be any critical issue which turned upon the establishment of any precise date of occurrence.

22 T 1-42.36-37.

23 T 1-42.30-1-43.17.

24 T 1-43.15-16.

25 *FFASOC* at [17], admitted in the Further Amended Defence ("FAD") filed 24/08/2021 at [1].

26 T 1-45.15.

27 Defendant's written submissions at [123]-[132]; T 1-81.1 – 1-84.40.

(b) Secondly, in respect of his evidence as to his interactions with Mr Mosley and disclosure to him of adverse contact with colleagues, as pleaded to have occurred on 2 March 2017.[28]

It is to be observed that as more particularly examined below,[29] there is no sufficient basis arising out of Mr Mosley's evidence to contradict the plaintiff, in the second respect. And that there is generally no other substantial contradiction of the plaintiff by other witnesses called in respect of what occurred in the workplace before the plaintiff left on workers' compensation.[30]

[21] Apart from reliance upon the extent of departure from the pleadings, the defendant particularly relied upon the establishment of the plaintiff's understatement, to Dr Bell in particular, of the extent and subsequent impact of his past traumatic experiences in being a correctional officer and what is described as his "inability to meaningfully explain his failure to obtain cleaning or similar employment, for which he was qualified and medically fit to do, over the 2 ½ year period between ceasing employment with the QCS and commencing with Estia".[31] Each of the latter specific issues are dealt with below in the context to which each directly relates.[32] Such valid criticisms of the plaintiff's presentation as a witness, however do not materially detract from the general impression created of an open and honest presentation, from a man who was attempting to explain himself in the context of circumstances which had led to a psychological decompensation, which he neither expected nor contemplated in the context of his prior expectations of his own capacity to manage stress and trauma. Neither was there any significant indication of false reporting in terms of exaggeration, as he was pressed for detail in giving his evidence. Moreover, the further criticism of the plaintiff's evidence as to being subjected to the harassment of colleagues, was improbable because of the inherent risk of such officers to "discipline for such conduct if caught", is not to be accepted. As will be further discussed, it is the very risk of such behaviour, particularly in a workplace such as this, which underlies the acknowledged policies of this employer requiring the

---

28 Ibid at [174], although here there is an incorrect reference to this occurring on 7/03/2017.
29 See paragraph [22] and [59]-[62], below.
30 See paragraph [63], below.
31 Defendant's written submissions at [124](e).
32 See paragraph [90] and [92], below.

support and protection of persons such as the plaintiff, as a public interest discloser, as further discussed below.

[22] In short, the plaintiff's evidence in respect of the treatment of him in the workplace, subsequently to his reporting of Walker's conduct, is to be accepted as, in essentially respects, honestly and reliably recounted. It was not and was not suggested to be, in any significant conflict with, or contradicted by, any other evidence. That includes the evidence of Mr Mosley and particularly as to their interaction on 2 March 2017. Mr Mosley expressly acknowledged an inability to remember details in the context of his own explanation of the impact of his own inability to work due to the development of PTSD.[33] However, Mr Mosley did have a recollection of reassuring the plaintiff when he first requested the plaintiff's report, in the context of the plaintiff's expressed concern as to how other staff would react to it.[34]

The Medical Evidence

[23] As has been noted, the psychiatrists called by the parties, Dr Bell by the plaintiff and Professor Whiteford by the defendant, agreed that the plaintiff suffers from an adjustment disorder.

(a) Dr Bell stated:[35]

> "(17) It seems there is no doubt that the physical assault took place; and, it seems to me that there is little doubt that it was the major contributor to Mr Mason's subsequent psychiatric injury.
>
> (18) The picture has been further confused, however, by suggestions that certain matters occurring subsequent to the assault were at least as important as the assault itself in the causation of Mr Mason's psychiatric condition. These matters include the threatening comments from some of his fellow workers, (to the effect that his work colleagues would not intervene if the inmates were to attack him physically); the verbal abuse and name-calling to which he was subjected ("narc", "dog", etc) and, the general lack of support from management.
>
> (19) In my opinion, the physical assault was the event which initiated the psychiatric injury. The other subsequent matters just described all contributed to the injury, but only after it had already been initiated.

---

33 T 4-6.35, 4-9.13-26 and 4-21.32-42.
34 See also, T 4-18-22.
35 Ex. 1 (report dated 12 August 2021).

Those subsequent matters contributed in the sense that they compounded the psychiatric injury; they brought it to a head; they made it more severe; they caused it to become more deeply entrenched; and, they helped to prolong it.

(20) The subsequent matters did not initiate the psychiatric injury. They contributed to it, but only after the psychiatric injury had already been set in train by the assault.

(21) Following the physical assault, I believe the psychiatric injury would have occurred regardless, (i.e. even if there had been no subsequent matters, such as abuse, threats, etc). The psychiatric injury would have occurred just because of the assault by itself. Without any of the subsequent matters, however, the severity and duration of the psychiatric injury would likely not have been as severe or prolonged as it has been."

(b) Prof. Whiteford stated:[36]

"8. The incident on 22 January 2017 itself did not cause the adjustment disorder. It was not a sufficient trauma; Mr Mason had experiencing (sic) much more significant trauma as a correctional officer than what occurred on 22 January 2017. The adjustment disorder was a result of the cumulative impact of the difficulties in the workplace since 2015 according to his clinical records from Optum Health & Technology (for which he was receiving treatment), the incident on 22 January 2017 and the harassment and threats made by other correctional officers in the days after 22 January 2017.

...

10. (a) There was a pre-existing psychiatric condition (or at minimum psychological vulnerability), as discussed in the body of my report.

(b) The assault on 22 January 2017 was one contributing factor, but insufficient to cause the adjustment disorder.

(c) Mr Mason reported being frustrated that he was rostered on with the supervisor but not fearful of the supervisor.

(d) He reports being referred to as a "dog" and a "nark" was distressing but he did not believe that this had caused psychological symptoms. I believe it was another contributing factor.

(e) He did not believe the threats from fellow officers that they would physically harm him and that they would not come to his aid when prisoners attacked him was a cause of his anxiety and adjustment disorder symptoms. I believe these were significant contributing factors to the development of the adjustment disorder,

---

36 Ex. 17, Tab 3, p. 32.

(f) The perceived lack of support from the workplace following the incident would be a contributing factor if this refers to the lack of action to prevent the threats from the other correctional officers.

(g) The criminal trial, including giving evidence, was a stressor and aggravated the adjustment disorder.

(h) The family situation was reported to me as being initially a stressor but this had resolved prior to 2017. However from the records of Optum Health & Technology it was clearly a stressor before 2017, increasing Mr Mason's vulnerability.

[24] In oral evidence, Professor Whiteford clarified that, in his view, the cumulative effect of the traumas related to the assault and what followed, acting upon "at least pre-existing vulnerability", was for an adjustment disorder persisting for longer than "would otherwise have been the case had it only been the incident on the 22nd of January 2017". [37] That is, that the subsequent events, including the involvement of the plaintiff in the criminal trial of Walker, "… more than exacerbated it. They prevented it from resolving since they perpetuated it."[38] He said:

> "I believe that that incident itself was significant in the setting of there being pre-existing vulnerabilities and all the subsequent events that he experienced. They – had it been only for that event, I believe that his adjustment disorder symptoms would have been much shorter in duration and have long since resolved prior to my assessment of him in 2018."[39]

He further explained that by definition, an adjustment disorder does not persist for more than six months after the trauma that occurred, "unless there are other consequences of that trauma such as a physical injury, or in this case ongoing threats, which cause it to persist".[40] And further that, in terms of it still being present when he saw the plaintiff in 2018:

> "… the reason for that wasn't the assault on - in January 2017 on its own. It was the things that happened after it that caused it not to go away.
>
> ….
>
> There were the issues he had when he attempted to go back to work. There were then the appearance in the court. There was the - the compensation came which caused him to recall and recount what happened, etcetera."[41]

---

37 T 4-72.1-5.
38 T 4-72.7-18. See also, T 4-80 L 44-48.
39 T 4-72.22-26.
40 T 4-80.19-22.
41 T 4-80.25-34.

There was also this exchange in re-examination:

> "Yes. So, for example, the events that occurred before he ceased work, they ceased in March of 2017 so they were no longer causally relevant, were they?---Had the – no, there would – needed to be other traumas after that - - -
>
> Yes?--- - - - which caused the adjustment disorder to still be present in 2018.
>
> Yes?---Yes."[42]

[25] For the defendant, there was some attention paid to past instances of the plaintiff's exposure to psychological trauma and indications of his past attention to mental health issues. The plaintiff attended a counsellor, Ms Turner, for two reasons in 2016. The first reason he raised with Ms Turner involved problems at work in the Woodford Correctional Centre associated with drug detection procedures. The second involved behavioural problems with one of his daughters.[43] The plaintiff reported to Ms Turner that the second problem had been largely resolved by his daughter's return to the family home at the time of the counselling.[44] Also identified is a series of previous exposures to traumatic incidents the plaintiff experienced in correctional work and public hospital security work in New Zealand, causing the plaintiff sleep problems and intrusive memories. These included the life-threatening incident with a prisoner armed with a makeshift knife, that resulted in the plaintiff suffering broken ribs.[45] The defendant also notes that the Optum records further detail the plaintiff's unhappiness with work in corrections and identify his intention to change employment, only a matter of months before the subject assault.

[26] Dr Bell conceded that his opinion was founded on a history that did not include the event involving the makeshift knife and the effect it and other incidents of exposure to violence, were having on the plaintiff's sleep and thought processes in mid-2016.[46] As noted for the defendant,[47] he further conceded that history would be relevant in providing an accurate opinion.[48] However, the context is that he had earlier been

---

42 T 4-80.36-42.
43 Ex. 17, Tab 5, p. 54.
44 T 3-8.1-9.
45 Ex. 17, Tab 5, pp. 51-57.
46 T 2-15.17 – 2-16.22.
47 Defendant's written submissions at [42].
48 T 2-18.17-18.

taken to an assertion in his report that he did not believe that any "vulnerabilities, if they existed at all, have played a significant role in Mr Mason's psychiatric injury".[49] His concession in respect of the additional information was that "the vulnerabilities are probably more relevant than what I had believed".[50] For instance, Dr Bell was earlier taken to an aspect of the plaintiff's history as provided to him in terms that "[t]here's never been much that has scared me. I've seen it all and I've been able to deal with it very well", and conceded that the recorded reporting by the plaintiff to the counsellor, some six years later, of sleep problems was associated with issues, including the event with the makeshift knife, would appear to belie the truth of the noted assertion of the plaintiff.[51] The further concession, to which attention is drawn by the defendant, is in the following further context:

> "And if you accept the description of the nice – the knife incident, and the account that I've given you of the assault at Woodford Correctional Centre, as a comparative exercise, Dr Bell, the knife incident of six years previously was a much more significant event than the event that I have described at Woodford, wasn't it?---It's – could rather have been, yes.
>
> And thus, it's more likely, isn't it, that that much more significant event from all those years earlier that was still creating problems in 2016 may well be the significant contributing factor to the development of the adjustment disorder?---I – I
>
> – I – no. I think that's not very likely, really. There – there is no – there was no diagnosis, no obvious psychiatric illness after that New Zealand incident, as far as I'm aware. He may – he may have had symptoms such as sleep problems, but that's – that's really all it was, as far as I'm aware.
>
> Well, Doctor, for there to be a psychiatric diagnosis, first of all there has to be a psychiatric assessment, doesn't there?---Well, yes.
>
> And if Mr Mason didn't obtain a psychiatric assessment, but simply endured with his problems for years, then there will be no diagnosis, will there?---Yes. No, there - - -
>
> And the – and the only way of obtaining a relevant diagnosis is to accurately explore all of the previous incidents that Mr Mason underwent, and the symptoms that he had as a result of those, and balance them as a causal exercise?---Well, yes. I suppose so, yes.
>
> And it would only be then that you could provide an accurate opinion as to what truly caused this man's adjustment disorder?---Yes."[52]

---

49 T 2-17.26-27.
50 T 2-17.29-37.
51 T 2-16.11-22.
52 T 2-17.39 – 2-18.18.

[27] In re-examination, Dr Bell was asked about the difference in respect of the plaintiff being subjected to assault by a supervising colleague, as opposed to a prisoner. He provided the following opinions:

> "Yes. As a central theme in Mr Mason's story, as I understood it – that he was always very worried about life and security of the staff – the prison officers, and not – not being protected sufficiently by management and – and supported by them. But when talking like, this incident, and [indistinct] and I think he was understandably confirmed in his opinion that no one was really there to look after him.[53]
>
> ….
>
> Mr Mason portrays an image of being a tough guy, able to handle anything, and that – that image is portrayed to his colleagues and management, and that whole image is put at risk when somebody punches him in the stomach [indistinct] the severity of the blow, and he's embarrassed, and – and he realises also that there's no assistance going to come to him. So all of that contributes to a feeling of frustration, disappointment, betrayal and eventually leads on to the – the adjustment disorder."[54]

He also explained his dislike for the word "vulnerabilities", because "it means different things to different people",[55] and continued:

> "Well, I – I don't use it, generally. So what I would rather say is factors which have contributed to a later development of a disorder. You look at things like personality. You look at the – the upbringing, for example, that he had, any – any other problems in his life, such as, well, marital problems, problems with his daughter. Things like that he – he has – he has always handled – as far as I understood it, he had always handled those things pretty well. As far as I understood it, he had not at any stage developed a psychiatric disorder prior to this adjustment disorder. So, in terms of contribution, if – if that is correct, that he has had much more severe trauma in the New Zealand incidents, for example - - -[56]
>
> ….
>
> You were saying if it is the case that Mr Mason suffered more 20 traumatic events in New Zealand - - -?---Well, yes. I mean, that – that really would have to be – that would have to say to me that he has more vulnerabilities, if I do have to use that word, to the development of an adjustment disorder later on in life. I – I wasn't aware of the New Zealand incidents, and, therefore, I did not think they – anything that had happened prior to the

---

53 T 2-19.36-41.
54 T 2-21.35-41.
55 T 2-23.27.
56 T 2-23.31-39.

> assault really played much of a role in the – in the development of the assault – the adjustment disorder."[57]

He also confirmed that he would not, in the light of the additional information, to which his attention had been drawn, change his opinion, except that "it gives more weight, I think, to the fact that he was vulnerable to the development of an adjustment disorder later on".[58]

[28] From the perspective of medical aetiology and subject to the application of relevant legal principles in respect of causation of damage,[59] this evidence supports the following findings:

(a) the plaintiff may have been pre-existently vulnerable or susceptible to development of psychological injury;

(b) the assault occasioned on him by Walker was the most substantial contributing factor to the development of his adjustment disorder; and

(c) the subsequent conduct in the workplace, which led to him feeling unsupported in respect of the investigation of this incident, provided substantial contribution to the condition and particularly the prolongation of it.

The Issues

[29] In the *FFASOC*, the plaintiff pleads:

> 4. It was the non-delegable duty of the Defendant, as the employer of the Plaintiff, to take all reasonable steps to avoid unnecessarily exposing employees such as the Plaintiff to a foreseeable risk of injury including psychiatric injury which duty was subject to ss 305 and 305A and 305E of the WCRA and required the Defendant to:
>
> (a) train, instruct and/or discipline the Supervisor that violence or threatening behaviour in the workplace would not be tolerated;
>
> (b) take steps to investigate the incident;
>
> (c) enforce the code of conduct;
>
> (d) provide the Plaintiff with support in his employment;
>
> (e) provide all employees with appropriate training and education on the issue of appropriate conduct within the workplace;

---

57 T 2-24.20-26.
58 T 2-26.8-12.
59 See paragraphs [33](d), [34] and [70]-[76], below.

(f) train its employees about acceptable and unacceptable conduct, and the foreseeable risks of psychiatric injury from unacceptable conduct and to enforce such training;

(g) avoid exposing the Plaintiff to employee behaviours and workplace circumstances which created a foreseeable risk of psychiatric injury;

(h) take all reasonable steps to ensure that supervisors responsible for supervising the Plaintiff follow policies and procedures in place with respect to his employment including investigating complaints.

4A. The Duty pleaded in paragraph 4 herein arose:

(a) immediately upon employing the Plaintiff as a CSO because of the nature of the employment and the policies and procedures;

(b) in the alternative, at the time, Mosley knew about the incident on or before 1 February 2017.

It may be noted that in *Inghams Enterprises Pty Ltd v Tat*[60] it was observed:

> "[27] The proper starting point for examination of liability issues in a case such as the present is a consideration of the relevant provisions of ss 305B–305E of the Workers' Compensation and Rehabilitation Act 2003 (Qld).
>
> [28] These provisions broadly correspond to ss 9–12 of the Civil Liability Act 2003 (Qld) and are provisions which are largely replicated in a number of statutes in *pari materia* throughout Australia. As the High Court observed in *Adeels Palace Pty Ltd v Moubarak* "[i]f attention is not directed first to [such provisions], there is a serious risk that the inquiries about duty, breach and causation will miscarry"

[30] The relevant provisions in the *Workers' Compensation and Rehabilitation Act 2003* ("*WCRA*")[61] are as follows:

> **Division 2 General standard of care**
>
> **305B General Principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless-
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
>
> (b) the risk was not insignificant; and

---

60 [2018] QCA 182 at [27]-[28].

61 The relevant reprint date was 8 September 2016.

(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 the 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.

Division 3 Causation

305D General Principles

(1) A decision that a breach of duty caused a 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 liability of the person in breach to extend to the injury so caused.

(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 purposes of deciding the scope if 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.

[31] The further pleadings of the plaintiff are:

17A. In the premises of the facts pleaded at paragraphs 5 to 7 herein, as at 1 February 2017 there existed a foreseeable risk of the Plaintiff sustaining a psychiatric injury, of which the Defendant was or ought to have been aware by its servant Mosely.

17B. In the alternative to paragraph 17A, in the premises of the facts pleaded in paragraphs 5 to 9 herein, as at 13 February 2017 there existed a foreseeable risk of the Plaintiff sustaining a psychiatric injury, of which the Defendant was or ought to have been aware, by its servants Mosely and Walker.

17C. In the further alternative to paragraph 17A, in the premises of the facts pleaded in paragraphs 5 to 11 herein, as at 15 February 2017 there existed a foreseeable risk of the Plaintiff sustaining a psychiatric injury, of which the Defendant was or ought to have been aware, by its servants Mosely, Lancaster and Walker.

And further and after pleading, in paragraph 19, the breaches of duty causative of the plaintiff's psychological injury,[62] it is pleaded that:

19A. The Defendant is liable for the loss and damage suffered by the Plaintiff as a consequence of the injury because:

(a) the breach of duty was a necessary condition of the occurrence of the Plaintiff's injury and it is appropriate for the scope of liability to extend to the injury pursuant to s 305D(1) of the WCRA;

(b) alternatively, the breach of duty materially contributed to the Plaintiff's injury irrespective of whether it was a necessary

62 As reflected in the extract of the plaintiff's submissions set out above at paragraph [4].

condition of the occurrence of the injury and it is appropriate for the scope of liability to extend to the injury pursuant to s 305D(2) of the WCRA;

(c) alternatively, the Defendant is vicariously liable for the acts and omissions of Mosely, Lancaster and Walker as set forth herein.

[32] The defendant's pleaded response to the allegation in paragraph 19 of the *FFASOC* is:

11. As to paragraph 19 of the further further amended statement of claim, the defendant denies the allegations contained therein as untrue, because of its belief that it was not negligent or in breach of any contract, and specifically as regards the subparagraphs thereof:

a) denies the allegations contained in subparagraph (a) thereof as untrue, because of its belief:

(i) any act of violence or threatening behaviour by Walker involved a criminal act that was not foreseeable within the meaning of section 305B of the Workers' Compensation and Rehabilitation Act 2003 (Qld);

(ii) a reasonable person in the position of the defendant was not required to take any precaution to train or instruct employees, including Walker, not to commit a criminal act or offence;

(iii) a reasonable person in the position of the defendant would not have taken any precautions to train or instruct someone in the position of Walker not to act in a violent or threatening way toward colleagues, including the plaintiff;

(iv) any act of discipline of Walker after the event would not have prevented such an event from occurring;

(v) it trained and instructed all employees, including Walker, in relation to its Code of Conduct for the Queensland Public Service and the Department of Justice and Attorney-General Workplace Policy;

b) denies the allegations contained in subparagraph (b) thereof as untrue, because of its belief that it took appropriate steps to investigate the incident by:

(i) requesting statements from the plaintiff, Walker and witnesses; and

(ii) referring the incident to the Corrective Services Investigation Unit and Ethical Standards Unit for investigation; and

(iii) Suspending Walker on 24 July 2017; and

(iv) otherwise the steps it is alleged ought to have been taken have not been sufficiently pleaded or particularised to enable any further response;

c) denies the allegations contained in subparagraph (c) as untrue because of its belief:

(i) it provided all employees, including the plaintiff, with training in respect of the Code of Conduct for the Queensland Public Service and the Department of Justice and Attorney-General Workplace Policy;

(ii) a reasonable person in the position of the defendant would not have taken any further precautions to control or influence the behaviour of other employees following the incident; and

(iii) it had no notice of any behaviour by any other employee following the incident which would have required a reasonable person in its position to address or regulate the same;

(iv) it provided the plaintiff with support by the offer of the Optum Health & Technology to the plaintiff by Ian Mosely and by regular contact from in or about March 2017 by Lou Cessford and Donna Hogan of the Occupational Health, Safety and Environment Co-ordinators at the WCC;

d) denies the allegations contained in subparagraph (d) as untrue because of its belief that it provided the plaintiff with appropriate support after the incident by:

(i) the offer of assistance by the Optum Health & Technology service; and

(ii) regular contact from in or about March 2017 by Lou Cessford and Donna Hogan of the Occupational Health, Safety and Environment Co-ordinators at the WCC; and

(iii) requiring a report and undertaking an investigation into the conduct of Walker;

e) denies subparagraph (e) thereof by reason of the matter contained in paragraph 11(a) above, which it repeats and relies upon;

f) denies the allegations contained in subparagraph (f) thereof as untrue, because of its belief that:

(i) the incident involved a criminal act that was not foreseeable within the meaning of section 305B of the Workers' Compensation and Rehabilitation Act 2003 (Qld); and

(ii) a reasonable person in the position of the defendant would not have provided or implemented any policies that would have prevented the random criminal act of Walker which occurred without any notice or warning; and

(iii) it had in place a proper policy in relation to post incident treatment by way of the offering the Optum service to any employee involved in an incident in the workplace and regular contact from in or about March 2017 by Lou Cessford and Donna Hogan of the Occupational Health, Safety and Environment Co-ordinators at the WCC; and

(iv) the policies it is alleged ought to have been provided and implemented have not been sufficiently pleaded or particularised to enable any further response.

And in response to the allegation in paragraphs 17A to 17C and 19A of the *FFASOC*, the defendant respectively pleads:

14. As to paragraphs 17A, 17B and 17C of the further further amended statement of claim, the defendant denies the allegations contained therein as untrue, because of its belief in the matters referred to in paragraph 11 above in this defence, which it repeat and relied upon.

15. As to paragraph 19A of the further further amended statement of claim, the defendant denies the allegations contained therein as untrue, because of its belief that:

a) it did not breach its duty of care to the plaintiff as alleged or at all;

b) Mosely and Lancaster did not commit any acts or omissions which were capable of giving rise to a breach of any duty owed to the plaintiff; and

c) any act of Walker in assaulting the plaintiff involved a criminal act of assault which did not form any part of his duties and for which the defendant is not vicariously liable as a matter of law.

[33] It is convenient to note some general propositions of principle in respect of the determination of the issues so raised:

(a) as to an employer's duty of care:

(i) it is a duty to take reasonable steps to provide a safe place and system of work,[63] with emphasis being upon an obligation to take "reasonable steps for the safety of its workers";[64]

(ii) as described in *Turner v State of South Australia,*[65] it is a duty to take reasonable care to avoid exposing employees to unnecessary risk of injury rather than to insure employees against danger:

> "The duty of an employer is to take reasonable care to avoid exposing his employees to unnecessary risk of injury: *Hamilton v Nuroof (Western Australia) Pty Ltd* (1956) 96 CLR 18 at 25. The employer is not an insurer of his employees against danger. "For a plaintiff to succeed it must appear, by direct evidence or by reasonable inference from the evidence, that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment": *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319. When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury would probably have been averted, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 416 – 417, 419."

(b) as to foreseeability:

(i) it does not matter that the precise manner in which the plaintiff received his injury was not foreseeable;[66]

(ii) the correct analysis is a prospective rather than hindsight one;[67] and

(iii) in terms of the statutory intervention by s 305B, the test is as to "not insignificant risk" which indicates a requirement of an increased degree of probability of harm for a finding that a risk was foreseeable than that previously applicable at common law as established in *Wyong Shire*

---

63 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687-688.
64 *Andar Transport Pty Ltd v Brambles Limited* (2004) 317 CLR 424 at 439.
65 (1982) 42 ALR 669 at 670.
66 *Inghams Enterprises Pty Ltd v Tat* at [31(a)], in reference to *Shaw v Thomas* [2010] NSWCA 169 at [43].
67 *Inghams Enterprises Pty Ltd v Tat* at at [31(d)]. See also *Rosenberg v Percival* (2001) 205 CLR 434 at 441-442 and *Vairy v Wyong Shire Council* (2005) 223 CLR 442 at [124]-[128].

Council v Shirt,[68] that a foreseeable risk is one that is not "far-fetched or fanciful".[69]

(c) in respect of the issues as to breach of duty and whilst the law to be applied is that stated in s 305B(2), the effect is the reflection of the following calculus, expressed in *Wyong Shire Council v Shirt*:[70]

> "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."

(d) the statutory provisions require an approach to causation which differs to that which applies at common law.[71] As explained in *Strong v Woolworths Ltd:*[72]

> "18 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. While the value of that test as a negative criterion of causation has long been recognised, two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Second, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm.
>
> 19 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 authors of the Ipp Report acknowledged their debt to Professor Stapleton's analysis in this respect. 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 a case such as the present, the scope of liability determination presents little difficulty. If the appellant can prove factual causation, it is not in contention that it is appropriate that the scope of Woolworths' liability extend to the harm that she suffered. In particular cases,

---

68 (1980) 146 CLR 40.

69 *Inghams Enterprises Pty Ltd v Tat* at [32] citing *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [26].

70 *Inghams Enterprises Pty Ltd v Tat* at [35].

71 *Inghams Enterprises Pty Ltd v Tat* at [50].

72 (2012) 246 CLR 182 at [18]-[27].

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. Whether the statutory determination may produce a different conclusion to the conclusion yielded by the common law is not a question which is raised by the facts of this appeal.

20 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 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 s 5D(1) is satisfied in any particular case." (Emphasis in original.)

21 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.

22 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 a case in which several factories had contributed to the pollution of a river, the defendant factory owner was held liable in nuisance for the discharge of pollutants from his factory which had "materially contributed" to the state of the river. Liability was not dependent upon proof that the pollutants discharged by the defendant's factory alone would have constituted a nuisance.

23 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.

24 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 [1956] AC 613 are taken up by s 5D(2) which, though referring to 'an exceptional case', is to be assessed 'in accordance with established principle'."

25 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.

26 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.

27 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."

[34] Further and in particular application to the circumstances of the onset of psychological injury from an assault of a support worker by a resident in a community

care facility and subsequent events, the following observations in *The Corporation of the Synod of Diocese of Brisbane v Greenway,*[73] may be noted:

> "[38] In *Strong v Woolworths Limited*, the majority said of the equivalent provision of s 5D(1) of the Civil Liability Act 2002 (NSW):
>
> > "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."
>
> Yet at no point did the trial judge apply the "but for" test: she did not consider whether, but for the acts and omissions which she found constituted the breaches of duty, the injury would not have occurred.
>
> [39] These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act, were enacted upon the recommendations in the Final Report of the Review of the Law of Negligence published in 2002, the so-called Ipp Report. As was discussed in Strong v Woolworths, the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington Castings Ltd v Wardlaw*. It was in the description of that category of case that the majority in Strong v Woolworths referred to cases which involve "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". The majority in Strong summarised that decision as follows:
>
> "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 quote of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease." (footnotes omitted)
>
> [40] Of that type of case, the majority in Strong also noted that Allsop P (as he then was) in *Zanner v Zanner*, like the authors of the Ipp Report, had assumed that a case such as *Bonnington Castings* would not pass the "but for" test. But the majority said:

---

73 [2017] QCA 103 at [38]-[41].

> "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." (footnotes omitted)

[41] Consequently, the trial judge's categorisation of the case, which used the description in *Strong* of the facts in *Bonnington Castings*, did not answer the question of factual causation under s 305D(1)(a). The trial judge had to decide whether the appellant's breaches of duty were "necessary to complete a set of conditions that [were] jointly sufficient to account for the occurrence of the harm"."

Breach of Duty

[35] Dealing first with the plaintiff's case, as it is premised upon the occurrence of the assault by Walker, there was, in the end, only reliance upon the alternative claim based upon the employer's vicarious liability for the acts of that employee. That is, in respect of such liability for the intentional tort in the nature of an unlawful assault, as was the finding of the prosecution brought as a consequence of the workplace investigation which ultimately occurred.[74] It is therefore unnecessary to rehearse the submissions of the defendant as to why, from its perspective, that assault was not foreseeable nor the consequence of any failure of training or failure of the defendant in terms of preventing its occurrence.[75] Nor to traverse the extensive evidence provided in support of the provision of appropriate training and supervision and absence of any failure on its part to prevent any foreseeable occurrence of that kind.

[36] As is noted for the plaintiff, it is only the defendant's vicarious liability for the act of Walker which is ultimately put in issue. Although the plaintiff's case is also couched in terms of vicarious liability for the subsequent acts or omissions of Mr Mosley and Ms Lancaster, it is essentially the plaintiff's case in that respect, that the relevant acts or omissions were those of the defendant, because it was through those managers that the employer's responsibilities and particularly as reflected in its own policies were to be implemented. Thus, it is pointed out that the issue raised in paragraph 15 of the

---

74 See Ex. 17, Tab 49, p. 645 and the defendant's written submissions filed 10/9/21 at [128].

75 Defendant's written submissions at [125] – [136].

further amended defence is denial that Mr Mosley or Ms Lancaster committed any acts or omissions which were capable of giving rise to a breach of duty owed by the defendant to the plaintiff.

Walker's assault

[37] As may be noted from the pleading, at paragraph 15(c) of the further amended defence, the issue is as to whether the defendant is vicariously liable for the unlawful assault committed by Walker.

[38] Each of the parties makes reference to *Prince Alfred College Incorporated v ADC*,[76] as a recent decision in respect of the vicarious liability of an employer for the intentional criminal acts of an employee, there the sexual abuse of a young boarding student by a housemaster. In that case, the primary judge considered but dismissed the claims as to the liability of the school and would also have refused the necessary extension of time to bring the action. The Full Court of South Australia held that the school was vicariously liable for the conduct of the housemaster and that an extension of time should have been granted. The High Court unanimously allowed the appeal and set aside the decision of the Full Court, on the basis that no extension of time should have been granted.

[39] However, and in the plurality judgment,[77] there are the following observations (made in the context of noting the reflection in the judgments below of "the divergent views about the approach to be taken to the question of vicarious liability both generally and in cases of the kind here in question"):[78]

> "*A general basis for vicarious liability?*
>
> 39 Vicarious liability is imposed despite the employer not itself being at fault. Common law courts have struggled to identify a coherent basis for identifying the circumstances in which an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional, criminal acts. There have been concerns about imposing an undue burden on employers who are not themselves at fault, and on their business enterprises. On the other hand, the circumstances of some cases have caused judges to exclaim that it would be "shocking" if the defendant employer were not held liable for the act of the employee. No doubt largely because of these tensions vicarious liability has been regarded as

---

76 (2016) 258 CLR 134.
77 French CJ, Kiefel, Bell, Keane and Nettle JJ.
78 (2016) 258 CLR 134 at [38].

an unstable principle, one for which a "fully satisfactory rationale for the imposition of vicarious liability" has been "slow to appear in the case law".

40 Vicarious liability has not to date been regarded as a form of absolute liability, although policy choices, and the questions posed for the determination of vicarious liability, can lead in that direction. The traditional method of the common law of confining liability, in order to reflect some balance between competing interests, is the requirement that the employee's wrongful act be committed in the course or scope of employment. At the least this provides an objective, rational basis for liability and for its parameters.

41 Difficulties, however, often attend an inquiry as to whether an act can be said to be in the course or scope of employment. It is to some extent conclusionary and offers little guidance as to how to approach novel cases. It has the added disadvantage that it may be confused with its use in statutes, where it has a different operation. In statutes providing compensation for injury suffered by employees it operates as a limit upon a right to compensation; in the common law it is an essential requirement for vicarious liability. But it has not yet been suggested that it should be rejected. It remains a touchstone for liability." (citations omitted)

Subsequently and after review of many decisions in respect of the attribution of vicarious liability (not limited to cases involving acts of sexual abuse) and the divergent judgments in the earlier decision of the High Court in *New South Wales v Lepore*,[79] the following was stated:

"*The relevant approach*

80 In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As *Lloyd v Grace, Smith & Co* shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As *Deatons Pty Ltd v Flew* demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in *New South Wales v Lepore* and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an

79 (2003) 212 CLR 511; Ibid at [42]-[79].

> employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.
>
> 81 Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.
>
> …
>
> 84 In the present case, the appropriate inquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children." (citations omitted)

[40] As is correctly noted for the plaintiff, the defendant's approach to the application of the *Prince Alfred College* decision is that the application of it is limited to cases involving sexual abuse of children.[80] For the defendant, some emphasis is placed upon the inclusion, in the particular features of the "occasion" and emphasis placed upon, "the ability to achieve intimacy with the victim".[81] However and as the plaintiff contends,[82] such limitation is not consistent with the approach taken in *Cincovic v Blenner Transport Pty Ltd*.[83]

[41] Moreover and whilst the statements in the *Prince Alfred College* decision, to which the defendant particularly draws attention, may be seen as being directly reflective of

---

80 Cf: plaintiff's written submissions, filed 10/9/21 at [33] and defendant's written submissions, filed 10/9/21, at [115].

81 (2016) 258 CLR 134 at [81].

82 Plaintiff's written submissions, filed 10/9/21, at [34]-[36].

83 (2017) QSC 320.

the circumstances of the case then before the court, the contention as to such limitation of what is described as "a new test… imposed in relation to vicarious liability for criminal acts of sexual abuse on children", is not consistent with the breadth of consideration of and statement of more generally applicable principle in that judgment. This includes in reference to other cases where the factual substratum did not include any acts of sexual abuse of children or otherwise. So much appears from the more general statement of principle in paragraph [84], notwithstanding the notation again of the factual context of "position of power and intimacy" and in the following interceding paragraphs:

> "82 That approach may be tested against the Canadian cases earlier referred to and against *Lister v Hesley Hall Ltd* and *Mohamud*. It is consistent with the process of reasoning in the more recent Canadian cases in emphasising that, although it is not enough to found vicarious liability that employment provides an opportunity for the commission of a wrongful act, in cases of this kind, factors such as authority, power, trust, control and intimacy may prove critical. It is consistent in result with *Lister v Hesley Hall Ltd*, although different in process of reasoning, for it is apparent that the role assigned to the warden in that case placed him in such a position of power, authority and control vis-à-vis the victims as to provide not just the opportunity but also the occasion for the wrongful acts which were committed.
>
> 83 *Mohamud* is not a case of this kind. However, it is apparent that the role assigned to the employee in that case did not provide the occasion for the wrongful acts which the employee committed outside the kiosk on the forecourt of the petrol station. What occurred after the victim left the kiosk was relevantly unconnected with the employee's employment. The approach of focusing on any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim, is also designedly different from the approach in *Mohamud*. This is because such a test of vicarious liability, requiring no more than sufficiency of connection – unconstrained by the outer limits of the course or scope of employment – is likely to result in the imposition of vicarious liability for wrongful acts for which employment provides no more than an opportunity. (citation omitted)

[42] Moreover, and in the antecedent examination of the necessity for finding that the role assigned to an employee provided the occasion for the relevant wrongful acts and more than opportunity for them, it is clear that the principle applies broadly in the sense that the wrongful acts can be regarded as being committed in the scope or course

of employment and as a misuse or taking advantage of such a position. As was specifically noted earlier in the judgment:

> "48 The decision of the House of Lords in *Lloyd v Grace, Smith & Co* has been referred to with approval on many occasions. It holds an important place in the development of the law relating to vicarious liability because it corrected the view, then current, that there should be no recovery for an employee's wrongful act unless it is undertaken in furtherance of the employer's interests. The case is no less important for the features it identifies in relation to the employee's role, and thus whether certain intentional acts of an employee warrant the imposition of liability on the employer. The question then is, what are these features?
>
> 49 The employee in *Lloyd v Grace, Smith & Co* was a managing clerk who conducted the conveyancing business of the defendant, a firm of solicitors, unsupervised. The plaintiff sought advice regarding two properties she owned. She was introduced to the managing clerk for that purpose and left to his attentions. The clerk induced the plaintiff to give him the deeds to the properties for the purpose of their sale and to sign two documents. The documents conveyed the properties to him. The firm was held liable for his conduct because it took place in the course of his employment.
>
> 50 Earl Loreburn spoke of the clerk having been entrusted with the client's business as a representative of the firm and Lord Shaw of Dunfermline of the apparent authority by which he was able to commit the fraud. Lord Macnaghten, with whom Lord Atkinson agreed, pointed out that the plaintiff thought the clerk was a member of the firm and implied that she was not to know the limits of his authority. His Lordship observed that the partner of the firm who had appointed the employee "put this rogue in his own place and clothed him with his own authority".
>
> 51 *Morris v C W Martin & Sons Ltd* has been described as a classic example of vicarious liability for intentional wrongdoing even though most of the judgments did not deal with that topic and decided the matter on the basis of bailment. The owner of a mink fur sent it to a furrier. With her permission the furrier delivered it to the defendants for cleaning. The employee who was given charge of it for that purpose stole it. The Court of Appeal held the employer liable. Diplock LJ applied "the principle laid down in *Lloyd v Grace, Smith & Co*" to the facts of that case and said:
>
> > 'They [the employer] put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he

was doing, albeit dishonestly, he was doing in the scope or course of his employment.'

52 Diplock LJ made it plain that, for an act to be said to be in the course of employment, something more was necessary than that the employment merely create an opportunity for the wrongful act to take place. This is a view which has been consistently applied. It could have been said of the facts of *Deatons Pty Ltd v Flew*, referred to below, that more was required than that the barmaid had access to glasses which could be thrown at customers. And, as will be seen, some Canadian cases concerning sexual abuse show that more is necessary for liability than that the employment puts an employee in place where children are present. These are cases where the employment provides an opportunity for the act to occur, but the act cannot be said to be in the course or scope of the employment.

53 *Lloyd v Grace, Smith & Co* was referred to with approval by Dixon J in *Deatons Pty Ltd v Flew*, a case in which it was sought to render the employer liable for an assault by an employee. On the plaintiff's version of events, which had been accepted by a jury, he was the victim of an inexplicable and unprovoked attack by a barmaid when he asked to speak to the licensee. She responded by throwing a glass at him and he suffered the loss of the sight of an eye.

54 Dixon J held that the barmaid could not be said to have acted in the course of her employment in taking that action. Her actions were entirely unconnected with her employment. His Honour described the barmaid's act as one of personal "passion and resentment" not done in furtherance of the employer's interests, under his express or implied authority or as an incident to, or in consequence of, anything she was employed to do. She did not throw the beer or glass in the course of maintaining discipline or order, for which she was not in any event authorised.

55 More relevantly, for present purposes, his Honour said, by reference to *Lloyd v Grace, Smith & Co*, that it was not one of those acts for which an employer may be liable because they were acts 'to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master'.

56 Although the term "authority" is used in *Lloyd v Grace, Smith & Co* and *Morris v C W Martin & Sons Ltd,* it was not just ostensible authority which was decisive of those cases. Fundamentally, those cases were decided by reference to the position in which the employer had placed the employee vis-à-vis the victim of the wrongful act, as the passage from

> Diplock LJ set out above makes plain. In the words of Dixon J, the position is one to which the apparent performance of the employment "gives occasion" for the wrongful act. In *Lloyd v Grace, Smith & Co* the position of the clerk, from the client's perspective, was indistinguishable from that of a partner of the firm. Because of what the clerk's position conveyed to the client, the clerk was able to secure the client's trust and confidence so that she unhesitatingly complied with his requests with respect to the deeds and the documents. In *Morris v C W Martin & Sons* the position of the employee was again one of trust, but is perhaps more simply explained by reference to the level of control he was given over the property.
>
> 57 As will be seen, in cases involving the sexual abuse of children at educational, residential or care facilities, Canadian courts have taken an approach to vicarious liability which, although expressed in terms of an "enterprise risk theory", emphasises features analogous to the considerations which proved determinative in *Lloyd v Grace, Smith & Co.*

[43] Other than also in acknowledging the particular factual context then before the court, there is also no indication of any perception of limitation of the expressed principles, to instances of sexual abuse of children, in the other judgment in the *Prince Alfred College* case. After observation that:

> "128 In this case, because of the refusal to grant the respondent an extension of time, there cannot be any resolution of contestable and contested questions. That consideration is important. The course of decisions in this Court and the courts of final appeal in the United Kingdom and in Canada reveals that decisions concerning vicarious responsibility for intentional wrongdoing are particularly fact specific. Decisions in the United Kingdom and Canada recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions. The overseas decisions also expose a difficulty in undertaking any analysis by reference to generalised "kinds" of case. Why? Because the "[s]exual abuse of children may be facilitated in a number of different circumstances." (citations omitted);

it was further stated:

> "130 We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for

> intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.
>
> 131 The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case."

[44] In particular, the influence of the reasoning drawn from *Deatons Pty Ltd v Flew*, in reference to *Lloyd v Grace Smith & Co*, is to be noted. For the defendant, reference was made to *Deatons Pty Ltd v Flew* as "the seminal decision involving an assault by an employee".[84] Although, the facts there involved the assault of a patron or customer by an employee. It is also to be noted that the *Prince Alfred College* decision involves particular review of the differently expressed views in *New South Wales v Lepore*,[85] and notation of the degree of consistency of the approaches there to the essential principle underlying the approach taken in *Deatons Pty Ltd v Flew*.[86]

[45] The appropriate application of principle to the circumstances of this case requires that it be established that the employment of Walker went beyond providing opportunity and provided the occasion for his assault of the plaintiff, in the sense that there was advantage taken of Walker's position of authority in respect of the plaintiff, so that his wrongful act should be regarded as committed within the course or scope of employment and therefore such as to render the employer vicariously liable for it.

[46] It should be concluded, as is contended for the plaintiff, that the appropriate basis for so finding, is to be found in understanding that the wrongful act here was not in essence any manifestation of some animus or emotional outburst as between employees or in respect of an employee, but rather a wrongful form of management of a subordinate by a superior or supervisor and in the exercise of the authority vested

---

84 Defendant's written submissions, filed 10/9/21, at [108].

85 (2003) 212 CLR 511 as was also noted in the defendant's written submissions filed 10/9/21, at [109]-[114], in the context of what has been noted as the defendant's attempt to limit the application of the *Prince Alfred College* decision to the precise factual circumstances of sexual abuse of children.

86 (1949) 79 CLR 370 at [75]-[79].

in that supervisor by the employer.[87] So much is made clear in the evidence that immediately after he assaulted the plaintiff, Walker said to all of his subordinates who were present, words to the effect that he had just accosted Mr Mason and did not want to have to do it to anyone else.

The subsequent conduct

[47] In the context of the defendant's concession as to the general applicability of the duty of care articulated in *Czatyrko*, as to the risk of some foreseeable psychological harm where a defendant was on notice as to that,[88] the question becomes what the defendant failed to do in order to protect against the incidence of any such harm.

[48] For the plaintiff, it is accepted, in reference to the adoption of the principles discussed in *Koehler v Cerebos (Aust) Ltd,* [89] in *Keegan v Sussan Corporation (Aust) Pty Ltd*,[90] including the reference to *Nationwide News Limited v Naidu*,[91] that the plaintiff must establish that it was reasonably foreseeable that he would suffer a psychological injury and in order to establish breach of duty to protect against any such risk and it is necessary to have regard to the degree of probability of that risk being effected.[92] As further noted in *Keegan v Sussan Corporation (Aust) Pty Ltd*,[93] such considerations are encompassed within the requirements of s 305B of the *WCRA*, in that a breach of duty "to take reasonable precautions" is not established unless the risk of injury "was not insignificant" and "in the circumstances a reasonable person in the position of the person would have taken the precautions".

[49] Although, as has been noted, the plaintiff's case was pleaded as premised more broadly, it was, in this respect, ultimately pursued only upon what is contended to be failures of his employer to provide support for him, in consequence of his public interest disclosure (by his report of Walker's assault) and in the context of the conduct of other employees in respect of that occurrence.

---

87 And therefore to be distinguished from the circumstances of other "analogist decisions" to which the defendant refers in the written submissions filed 12/9/21, at [92]-[107].
88 See paragraph [2], above and defendant's written submissions, filed 12/9/21, at [116].
89 (2005) 222 CLR 44 at [53].
90 (2014) QSC 64 at [20]-[23].
91 (2007) 71 NSWLR 471 at [25]-[27].
92 Plaintiff's written submissions 12/9/21 at [42].
93 (2014) QSC 64 at [24]-[26].

[50] Accordingly, it is unnecessary to dwell upon the contentions for the defendant or the evidence upon which such contentions are made, as to any broader basis upon which the plaintiff's case was pleaded. The effect is that those contentions are effectively not contested as adequate responses to those broader bases of the plaintiff's pleaded case. And it is to be concluded that there is no established basis for finding any breach of duty of the defendant, subject to dealing the basis upon which the plaintiff's case was ultimately pursued, in focus entirely upon what is identified in the evidence of the psychiatrists as an integral component of the plaintiff's adjustment disorder, in terms of his perception of lack of support in the workplace.

[51] Particular emphasis is placed upon the explicit policy of the defendant as to the protection and support to be provided to a person who makes a public interest disclosure, expressed in reference to (amongst other legislative enactments) the *Public Interest Disclosure Act 2010* ("*PIDA*").[94] The necessary context to this policy is to be found in the *PIDA* and in understanding that it was not in issue in this case that the report provided by the plaintiff as to Walker's assault of him, was a "public interest disclosure" within the meaning of that term in the *PIDA*. That is because, at least by then, the plaintiff was a person who had made a public interest disclosure and attracted the protections afforded by the *PIDA* ("public interest discloser").[95] In particular, s 41 created an offence of taking reprisal in respect of the involvement of any person in making or being involved in a public interest disclosure. It suffices to note that the concept of detriment, which is a part of the concept of reprisal,[96] is itself defined so as to include: "intimidation or harassment".

[52] Further the expressed policy, including in terms of steps to be taken to protect and support the public interest discloser, is informed by understanding that a reprisal is made a statutory tort,[97] with a public sector entity (like the defendant) made vicariously liable for such acts.[98] That is not a basis upon which the plaintiff's case proceeds, as that case is not pressed merely or even directly upon any contention of reprisal, but rather proceeds upon the contention as to the defendant's failure to take action to support him as a public interest discloser.

---

94 Ex. 17, Tab 20 at pp 484-486.
95 As set out in Ch 4 of the *PIDA*.
96 Reprisal is defined in s 40.
97 *PIDA*, s 42.
98 Ibid, s 43.

[53] In any event and in that context, the plaintiff draws attention to *Hayes v State of Queensland*,[99] in particular the recognition, quite apart from any context there of any public interest disclosure, of a duty of care which may arise when there is known "unhappiness" in a workplace.[100] In *Hayes*, particular reference is made to the statement of the House of Lords in *Waters v Commissioner of Police for the Metropolis,* that:[101]

> "… a person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence."

[54] The question as to whether any such duty of care arose in the circumstances, is necessarily a question of fact and evidence of notice to the employer of any risk of the employee suffering psychological injury as opposed to being under stress or pressure, will be important.[102] It is not a matter of judging the defendant as if it had psychiatric expertise but the approach taken in *Hayes*, in reference to the sophistication of a government department, [103] is particularly apposite in the context of the expressed policy of the defendant in respect of a public interest discloser. That is a policy which itself tends to confirm the appropriateness of recognising the risk of psychological decompensation in the absence of the provision of reasonable support of the plaintiff, in the context of the investigatory process which was engaged as early as the report which came to Mr Mosley's attention as to the assault committed by Walker and particularly from the point when Mr Mosley sought to engage with the plaintiff upon his return to work and sought his cooperation in providing the plaintiff's report. Indeed, it was the evidence of Mr Mosley that when he first approached the plaintiff for the report, the plaintiff's reaction was to raise "deep-concern" about "the fallout of being called names and being ostracized because he was effectively dobbing on someone".[104]

---

99 [2017] 1 Qd R 33.
100 Ibid at [110]-[118] and [97]-[104].
101 [2000] 1 WLR 1607 at 1615. See *Hayes* at [111].
102 See *Hayes* [2017] 1 Qd R 337 at [25]-[26].
103 Ibid at [173].
104 T 4-8.5-7 and 4-9.18-21.

[55] Accordingly and from that point when the plaintiff provided that indication of his concern about his vulnerability to recriminations in the workplace, the defendant was under a duty to take reasonable care to protect the plaintiff from such recriminations and to reasonably support him, so that his vulnerability did not lead to his perception that he was isolated and unsupported in the workplace and particularly a workplace where the support of colleagues may have been perceived as a critical aspect of the functioning of it.[105] That is, in terms of both the implication in the policy as to foresight of risk, otherwise, of psychological as much as physical harm and the particular notice given to Mr Mosley of the need to consider such risk, as implicit in the plaintiff's own expression of concern and obvious perception of his vulnerability to such repercussions.

[56] As the plaintiff contends, the matters relied upon by the defendant, in terms of support of the plaintiff,[106] are indicative only of proper steps to investigate and deal with the allegation made against Walker. Like the position noted in *Hayes*,[107] something more was required by way of positive support of the plaintiff, than the offer of a free counselling service. The difficulty is in the identification of anything done by the defendant to earlier implement its own stated policy, that "we will support employees who report genuine concerns of wrongdoing" and that such persons "should not be treated adversely because of their involvement in this process".[108]

[57] As to the omissions in that regard, contrary to the defendant's own policy in respect of providing that support, it is necessary to note the evidence of Mr Verall, who was employed as a principal investigator in the Ethical Standards Unit which became responsible for the internal investigation of the disclosure, assessed it as a public interest disclosure and acknowledged specific omissions in respect of providing support for Mr Mason in such circumstances. In particular he acknowledged:

(a) That, in respect of a matter received on 2 February 2017 and on 8 February 2017, he assessed the complaint as a public interest disclosure and it was approved to be the subject of his investigation,[109] confirming his awareness of

---

105 As the plaintiff described himself, as to the effect his experiences had on him: T 1-38.34-38 and 1-45.43-1-26.17.

106 See defendant's written submissions at [141] – [163], with reference to the evidential basis at [20] – [35].

107 [2017] 1 Qd R 337 at [177].

108 Ex. 17, Tab 20 at p. 485.

109 T 4-42.39-40.

obligations to provide support to the plaintiff and protection against any reprisal action.[110] And he confirmed that in accordance with established policies, that was how it should have been treated by the plaintiff's managers, from the outset.[111]

(b) In the context of his identification of only his email dated 6 March 2017 to the plaintiff, prior to the plaintiff ceasing work on 9 March 2017,[112] he conceded that there was an absence of contact by administrative staff in respect of the required support of the plaintiff as a public interest disclosure.[113]

(c) He was unaware of any steps taken in accordance with an acknowledged obligation to protect and support the plaintiff as a public interest discloser.[114]

(d) He was not aware of any risk assessment being done as required, in respect of the plaintiff's situation.[115] He was not aware that any of the plaintiff's managers had discussed with the plaintiff his position as a public interest discloser.[116] He was unaware of the plaintiff's expressed concern to Mr Mosley about the prospect of repercussions, when a report was requested to be made by him. And in his assessment made on 8 February 2017, the single item checked against the categories of "risk assessment" and "reprisal risk mitigation strategies" was "monitoring close management of staff who may engage in reprisal".[117] And neither did he become aware of anything subsequently being raised by the plaintiff with Mr Mosley as to the plaintiff being intimidated by being called a "dog" or the like, as something which would have enlivened the employer's obligation to seek to protect the plaintiff from such conduct.[118]

[58] It is also necessary to understand that the matters addressed in Mr Verrall's evidence, as to the involvement of the Ethical Standards Unit, were necessarily engaged

---

110 T 4-40.1-4.
111 T 4-43.8-4-44.30.
112 T 4-34.25-30 and Ex. 17, Tab 58.
113 T 4-42.1-30.
114 T 4-42.30-47.
115 T 4-46.25-45. See Ex 17, Tab 20 at 486, where there is expressly stated requirement of a risk assessment at the outset, "to determine the likelihood of confidentiality and risk of reprisal" and any requirement for a plan to be "established to monitor and address any problems that may arise".
116 T 4-48.4-6.
117 T 4-43.35-45 and Ex. 17, Tab 53.
118 T 4-50.20-40.

pursuant to employer's policy,[119] separately to the investigation conducted by the Corrective Services Investigation Unit and which led to Walker being charged with a criminal offence of common assault, of which he was convicted in the Magistrates Court at Caboolture on 13 February 2018.[120] It is further necessary to understand the broader import of both this specific evidence and the policy to which it was addressed, to the position of the mangers responsible for the position of the plaintiff, in the discharge of the defendant's responsibilities as his employer.

[59] In the first instance and as has been noted as some particular notice, giving rise to the relevant duty of care, is the plaintiff's expression of concern as to the potential repercussions of his providing the report, which Mr Mosley saw as important for an investigation of Walker's conduct and which he sought to persuade the plaintiff to provide.[121] However and until he raised a particular concern about no such action being taken his managers, Mr Mosley and by inference Ms Lancaster, who was not called as a witness, simply allowed the plaintiff to continue to be rostered to be supervised by Walker. The relevant course of events is that:

(a) Mr Mosley, upon learning of the incident, approached Walker, who admitted "a gentle pat" and was told that "on no account do you touch anyone ever";[122]

(b) Mr Mosley approached the plaintiff for his report when he was next rostered to work, a few days later;[123]

(c) The plaintiff described that he was still trying to figure out what happened and what to do.[124] He also said that when he was approached by Mr Mosley, on his return to work after some days off, he was a "little scared" to furnish the report but agreed to do so because he was asked to by Mr Mosley.[125] Mr Mosley's evidence was that when he approached the plaintiff on his first day back at work, after Mr Mosley had learned of the incident with Walker, the plaintiff did not want to progress it "because of … the fallout of being called names or being ostracised because he was effectively dobbin on someone", but Mr

---

119 Ex 17, Tab 20 at 486, T 4-52.32-43 and cf: T 4-32.5-12.
120 Ex 17, Tab 49.
121 T 4-8.5-20.
122 T 4-7.27-35.
123 T 1-24.5-8; T 4-7.40.
124 T 1-24.24-28.
125 T 1-24.30-32.

Mosley reassured him that to progress the matter beyond the warning he had given Walker, he needed the plaintiff to commit to his report as "first-hand evidence to support it",[126] and later declared that the plaintiff had been "deeply concerned how other staff would react" to the report, with Mr Mosley's recollection being that he reassured the plaintiff that "its just names – name calling" and that "most staff are not like that and if there is someone dong that you have to tell me";[127]

(d) The plaintiff prepared his report dated 2 February 2017,[128] when he returned to his home that evening and emailed it to Mr Mosley;

(e) The plaintiff gave evidence about being concerned to return to work to be supervised by Walker and decided to "try and clear the air". He approached him in his office to tell him that he was concerned about being hit and did not like it and did not like being called names on the walkway, but that Walker, although he said "I'm a bit sorry about it", just made "a bit of a joke of it" by putting his hands on the table and saying "well I'm not going to hit you now" and "it was just a slap". This made the plaintiff feel even worse.[129]

(f) The plaintiff said that he ultimately contacted Ms Lancaster when, after his return from some leave, he was for three consecutive days, from 13 to 15 February 2017, rostered to work with Walker as his supervisor.[130] He described attempting to make some earlier contact, without success, and identified the email he then sent to Ms Lancaster on 15 February 2017 (Ex 6). It is redolent of his underlying concern in respect of lack of managerial support:

> "Fee for your information I have spoken to you regarding an incident with a staff member on the 22/1/2017 and was requested to furnish a report the following week since then I have been off on leave upon my return to work on the 13/2/2017 I have hade no contact with any one regarding the matter and have made attempts to contact management. Furthermore I have had a number of staff approach me regarding the matter that I would have hoped was a private and confidential."

---

126 T 4-8.5-15.
127 T 4-0.13-21.
128 Ex. 4. He later basically furnished the same report in a different format to the CSIU: T 1-26.15 – 1-27.15 and Ex. 5.
129 T 1-37.25 – 1-38.2.
130 T 1-39.15 – 1-40.30.

The response was that he was immediately moved and Mr Mosley came to speak to him as to whether he was happy with the move and offered him the counselling services of Optum, because he expressed concern that he was being called a dog;[131] and

(g) The plaintiff said that he later spoke to Mr Mosley about his ongoing concerns including the intimidation and abuse he was experiencing. He said that he told him:

> "About me getting called different names on the walkway and basically being abused about the fact that an incident happened and no one was there to hear of, and to my knowledge, I still don't know who let him know in the first place, and that information never came back to me, so I was all up in the air and a bit lost about it all, because I done the report, and it just seemed like nothing was happening, no one was there to help you or do anything for you, so you just sort of get left to your own mind going, "Well, what the hell am I doing here, and why does everyone know about this and giving me grief when, you know, you should at least be – have some avenue?"[132]

And Mr Mosley said he would pass it on to management to deal with.[133] It was pleaded that this interaction occurred on 2 March 2017.[134]

[60] As has been noted, the difficulty with Mr Mosley's evidence is his own indications as to his own mental health having affected his recall of events and detail.[135] When he was being asked about his lack of recollection as to what the plaintiff raised with him on the later occasion, he said:

> "Now, you just can't remember what Justin said to you on the 2nd of March?---No. I get glimmers of it, but because I've been unwell, my life's taken – I've had a big nosedive. I was a Freeman once, but not any more. I can't remember. And that's the situation I find myself in."[136]

[61] There was little in Mr Mosley's evidence to contradict or conflict with the evidence of the plaintiff. He did reject the direct suggestion put to him that the plaintiff had informed him of being called derogatory names and that "he had dobbed on

---

131 T 1-40.30-40 – 1-75.22-31. The plaintiff said that he had spoken to Ms Lancaster in her office about being called names: T1-105.45 – 1-106.11.
132 T 1-42.39 – 1-43.1.
133 T 1-43.14-24.
134 FFASOC at [14], being the subject of non-admission in the Amended Defence at [8].
135 T 4-22.8-11. See also T 4-8.19-42 and 4-9.23-26.
136 T 4-22.8-11.

people",[137] but he went on to describe the reasons he noted for only having "glimmers" of memory. He also confirmed that the plaintiff was shifted immediately upon Ms Lancaster coming to him.[138] Some reliance is placed upon Mr Mosley's evidence in confirming that there were ways of separating a supervisor and a correctional officer with the prison:

> "Yeah, you just – you could relocate the supervisor – well, the deputy general could relocate him if he wanted, if the incident was of such a nature, or I could move the staff member if I was able to. I mean, I asked – I did ask him if he wanted to be moved and he didn't think he – he should be moved. So that was a – you know, that was a – a lot of a – some block. I said well … --- So he stayed with he was."[139]

However, this appeared to conflate separate aspects of his earlier evidence. First and after he had confirmed that the plaintiff had written a report, which went to the General Manager, and he was asked what action he took, at that stage, to separate Walker and the plaintiff, his response appeared to be as much directed at his interaction with the plaintiff in requesting the report:

> "Now, at that stage did you take any action to separate Mr Walker from Mr Mason?---At the time I went back up – that was when I saw Walker – I went back up and – back up when Mason was on duty and spoke with Walker, and I said, "Look, I put him down the back. He can manage the" – because there's two ways in to Visits, the prisoners' side and the visitors' side – "He can work down there." And he said he won't have any contact with him. And I saw Mason, and he seemed comfortable with that."[140]

Secondly when asked if he recalled it ever being indicated that the plaintiff was not comfortable in working under Walker, he said:

> "I've thought on this since I got the subpoena. Alls I can recollect is one of my supervisors, I think it was Fiona Lancaster, came to me and said [indistinct] and I just said, "Shift him," which we could do within our internals if requested. And I think he was moved down to the front into – directly into my area."[141]

And he also then described that upon his redeployment, he approached the plaintiff and that:

> "What did you say to him?---Yeah, my memory is not clear, but his view was that Mr Walker should be moved and not him, and I said that, "At the moment

137 T 4-21.35-37
138 T 4-8.30-37.
139 T 4-15.28-34.
140 T 4-8.21-27.
141 T 4-8.30-34.

you've made the request and I've moved you, and you will be in good company down here and supported," and that's about as much as I can remember."[142]

[62] None of this is inconsistent with the plaintiff's evidence that upon his initial return to work, he was content to seek to speak with Walker about the incident only to be rebuffed in the way he described or that he would, at any earlier stage than when he actually sought intervention, have resisted being shifted away from Walker. It is notable that Mr Mosley's evidence was also confirmatory of Walker's "bombastic"[143] nature and his attempt to laugh off the matter of the assault when Mr Mosley approached him about it, and his protestation that it was just a slap.[144]

[63] Although, as has been noted, there is some criticism of the detail of it, as it emerged in the plaintiff's evidence, neither was there any reason to not accept the plaintiff's evidence as to the interactions with other correctional officers. True it is that the most egregious and intimidatory conduct was attributed to unidentified officers calling out as he moved within the prison and therefore not capable of being investigated or contradicted, but in the other respects, there was, as earlier noted,[145] no effective contradiction from witnesses involved in other identified interactions:

(a) The plaintiff identified Mr Dedman as a correctional officer present when he was assaulted by Walker.[146] Mr Mosley identified him as possibly being the person who first brought that incident to his attention.[147] Mr Dedman was not asked about that, but he did describe being subsequently approached by Mr Mosley with the request that he provide an incident report and that he was ultimately a witness in the prosecution of Walker in the Magistrate's Court.[148] The plaintiff gave evidence as to a conversation he had with Mr Dedman, in which Mr Dedman confirmed that he had done a report, despite being told by Walker that he did not have to and that this angered and concerned the plaintiff.[149] Mr Dedman gave evidence as to a discussion with the plaintiff in which he confirmed that he had made such a report,[150] but was evasive and

142 T 4-8.42-45.
143 T 4-22.16-20.
144 T 4-21.5.
145 See paragraphs [20] and [22], above.
146 T1-27.23-26.
147 T4-7.25.
148 T2-76.19-2-77.10.
149 T1-34.29-1-35.30.
150 T2-77.39-43.

non-committal when asked if he had told the plaintiff that Walker had said that he did not have to make the report and ultimately conceded that "maybe" he did.

(b) The plaintiff gave evidence of being approached by correctional officer Sahic, who asked if he had:

> "… dobbed or why [he] had dobbed on Walker and that I wasn't going to take it further. I wasn't going to be a narc and go to report …"[151]

Mr Sahic said that he would have spoken to the plaintiff in passing about the incident with Walker, of which he had heard,[152] but he could not recall what had been said, except that he would not have used the word "dobbed".[153] In cross-examination, he confirmed hearing the incident in the "rumour mill" in the prison,[154] and otherwise sought to maintain a position, consistent with his understanding of the unacceptability of any other behaviour, that he "probably would have told him to report it, if that's what happened",[155] in the context of explaining that he had a lack of recall of "the specifics of the conversation" due to the lapse of time involved.[156]

(c) The plaintiff gave evidence of being approached by correctional officer Franklin, who told him that:

> "… he'd overheard some of the boys in – in his unit … I'm not sure if it was Mr Walker or Mr Boise stated that Maxi had given the little fellow a back hander and then told me that I should be worried – concerned about who I speak to … and then he said, 'stay safe man' and we got on with our day and I left."[157]

Mr Franklin was not called as a witness.

[64] The issue here is neither limited to nor determined by reference to the exposure of the plaintiff to any actual reprisal or harassment but rather and as was a critical concern expressed by the plaintiff,[158] and reflected in the assessment of both psychiatrists as

---

151 T1-36.10-14.
152 T3-15.38-43.
153 T3-15.45-3-16.6.
154 T3-16.43 and 3-17.40.
155 T3-19.38 and CF: T3-18.39-3-19.35.
156 T3-15.41-46.
157 T1-41.44-1-42.4.
158 T 1-38.32 – 1-39.4, T 1-42.35 -1-43.3 and T 1-45.43 – 1-46.17.

to the development of his injury,[159] that this course of events, including and commencing with the assault occasioned by Walker, left him with the perception of lack of support and vulnerable as unsupported in a potentially dangerous workplace and where the support of other correctional officers was reasonably viewed by him as an important consideration to his own wellbeing and ability to cope. That is, in understanding the effect on the plaintiff of the things that were said to him, including in terms of his evidence as to what was conveyed to him, as to things said by other persons, that communication rather than any question as to proof of the truth of the assertion.

[65] It is appropriate to conclude, in the circumstances, that the defendant's own policy evinced an understanding of the need to support a public interest discloser, such as the plaintiff, to protect against the risk of psychological as well as any prospective physical harm and therefore appreciation of such risk, as a matter which is not insignificant. As well, such risk was sufficiently identified by the plaintiff, when he was prevailed upon by Mr Mosley to make his public interest disclosure.

[66] It is difficult to comprehend, in circumstances where immediately upon the plaintiff raising specific concern about it, action was taken, that earlier proactive remedial action was not taken so that he was not rostered so as to have ongoing contact with Walker as a supervisor. To do so, would have been entirely consistent with the defendant's policy, which set out steps to be taken to guard against the risks implicitly recognised and here there were the specific failures to implement that policy, as were identified in Mr Verrall's evidence. The failure in respect of any required plan serves to confirm why there was a failure to earlier separate the plaintiff from ongoing contact with and supervision by Walker and the absence of any follow up contact with the plaintiff as to his position, before he suffered his injury and left work on workers' compensation. And also serves to demonstrate how the plaintiff was not provided with a direct mechanism of support in terms of seeking to protect him from the risk of reprisal and in turn, his perception of the lack of managerial support which was

---

159 See Ex. 1, at p. 9/(18), where Dr Bell refers to the subsequent occurrences as including "the general lack of support from management". Professor Whiteford also noted that "[t]he perceived lack of support from the workplace following the incident would be a contributing factor if this refers to the lack of action to prevent the threats from the other correctional officers.": Ex. 17/Tab 3, at p. 33/(f).

critical to the development of that injury.[160] Moreover, it is appropriate to conclude that those failings relevantly engage the general principles discussed in *Hayes*.

[67] Accordingly, it is appropriate to find, in accordance with s 305B of the *WCRA*, that in respect of those failures that a reasonable person in the position of the defendant would have taken those precautions to avoid the foreseeable and not insignificant risk of occasioning some psychological harm to the plaintiff.

[68] In that respect, any necessary sense of requirement of responsiveness to any perceived risk of psychological harm is established and the circumstances here are to be particularly factually distinguished, in this respect, from the cases directly referenced in the defendant's supplementary written submissions,[161] and more practically apt for the application of the principles discussed in *Hayes.*

[69] Therefore and in overall summary, it is found that there is breach of duty of care in both respects and for which the defendant is responsible. In the first instance, vicariously liable for such breach by Walker of his duty not to unlawfully assault the plaintiff.[162] Secondly, for the subsequent conduct and notwithstanding the concession as to vicarious liability for any breach of duty by the plaintiff's managers in respect of the subsequent treatment of him, an alternative and perhaps better view is that those acts or omissions are those of the defendant, because it is through those managers that the defendant as employer acted in dealing with the defendant and in implementation of its policies.[163]

---

160 See paragraph [58](g), in particular, above.

161 Defendant's supplementary written submissions, filed 10/09/21, in particular reference to *Hegarty v Queensland Ambulance Service* [2007] QCA 366, and *James v State of Queensland* [2018] QSC 188, with further reference to *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 and *Govier v The Uniting Church in Australia Property Trust (Q)* [2017] QCA 12.

162 It may be noted that for the purpose of application of Part 8 of the *WCRA* in s 305, "duty" is defined broadly as meaning "any duty giving rise to a claim for damages" including vicariously identified duties of care, including a "duty of care in tort", with "duty of care" defined separately as meaning "a duty to take reasonable care or to exercise reasonable skill (or both duties)."

163 As explained in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [39], vicarious liability whether relating to intentional criminal acts or negligent acts of an employee "is imposed despite the employer not itself being at fault."

Causation

[70] It follows, upon the basis that the defendant is liable for these breaches and the effect of the evidence of the psychiatrists to which reference has been made, that it was the cumulative effect of these breaches, in combination, that caused his injury as a matter of medical aetiology,[164] that the plaintiff has established that his injury for which he ceased work on 9 March 2017 was factually caused by those breaches. That is and pursuant to s 305D(1)(a) of the *WCRA* that each breach of duty "was a necessary condition of the occurrence of the injury", even if there was pre-existent vulnerability or susceptibility to it. More particularly, this is in the sense that but for the breaches, the psychological injury for which the plaintiff claims, would not have been occasioned to him. Whilst there is some particular focus in the evidence and particularly that of Professor Whiteford, on the occurrence of the reprisals of other correctional officers and for which there has been no pleading of the defendant's vicariously liability, the evidence does not allow for any contribution of them to be separated out and particularly where the failings of the defendant were in terms of not taking the steps required under its policy to support and protect the plaintiff in that respect, including by completing the necessary risk assessment and communicating with him so that an appropriate implementation was in place in order to provide a necessary sense of support.

[71] And it is not understood that there was any contention that if such a conclusion was reached, that there was any basis under s 305D(1)(b) to find otherwise than that it is appropriate for the scope of liability of the defendant to extent to the injury so caused.[165]

[72] Further and on the basis that the ongoing issues which were particularly identified by Professor Whiteford as perpetuating that injury and particularly in the nature of the plaintiff's involvement as a witness in the proceeding against Walker and in the workers' compensation claim, were the direct consequences of the assault and the injury so caused, there is no different view to be taken as to that perpetuation of the injury.

---

164 This was effectively conceded by the defendant, as clear: see defendant's written submissions at [179] and [181].

165 In addition to the conceded general application of the broad duty of care of an employer, as discussed in *Czatyrko,* there are also the noted policy consideration recognised in the attribution of vicarious liability.

[73] It is only necessary to deal with some further submissions of the parties directed at alternative prospects, including that the plaintiff might fail to establish either of the breaches of duty.

[74] Whilst the plaintiff's case was ultimately only pressed, as it was effectively litigated, on the basis that it was the plaintiff's condition which led to his leaving work, on workers' compensation, on 9 March 2017, which was to be compensated, it was also pointed out that,[166] in the *FFASOC,* there was an alternative pleading that:

> "…The breach of duty materially contributed to the Plaintiff's injury irrespective of whether it was a necessary condition of the occurrence of the injury and it is appropriate for the scope of liability to extend to the injury pursuant to s 305D(2) of the WCRA".[167]

In this regard, it is in my view correctly contended for the defendant that there is difficulty in discerning such a case as would warrant the application of s 305D(2) from the medical evidence and that the bare pleading to which reference was made did not include any material facts upon which such resort might be premised.[168] In short, this is a case where it is solely a question as to the application of s 305D(1).

[75] For the defendant and in particular reliance upon an expectation that it would not be found liable for Walker's assault, even on the basis of vicarious liability, it was contended that the situation would be analogous to that analysed in *The Corporation of the Synod of the Diocese of Brisbane v Greenway ("Greenway"),*[169] rather than *Robinson v State of Queensland.*[170] This contention is particularly premised on an understanding of the weight attributed by both psychiatrists and more particularly Dr. Bell, to the assault in terms of it being sufficient to have caused an adjustment disorder.[171] In the first instance, it is unequivocally conceded that an adjustment disorder was a consequence of the assault and on the medical evidence caused by it. In this respect and as was noted to be the case in *Greenway,*[172] there was no articulation here, in the pleadings or in the conduct of the case, of any contention of an aggravation or exacerbation of any existing injury, having regard to the subsequent

---

166 Plaintiff's written submissions at [40].
167 *FFASOC* at [19A(b)].
168 Defendant's written submissions at [183]-[185]. See *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 at [50].
169 [2017] QCA 103.
170 [2017] QSC 165.
171 Defendant's written submissions at [180]-[182].
172 [2017] QCA 103 at [48].

conduct. Accordingly, the reasoning in *Greenway* does serve to exemplify that in the absence of the finding of breach of duty for which the defendant is responsible, in respect of Walker's assault, it would not be possible to find that the test of causation prescribed in s 305D(1) has been proven.

[76] A further alternative not addressed in any particular detail in submissions, would be only a finding of liability in respect of Walker's assault. Given the emphasis put upon this as a causative factor in the medical evidence and the obvious implication that all of what followed was precipitated by it, it would remain appropriate to find that s 305D(1) was satisfied in respect of that as a matter being factually causative of the plaintiff's injury and moreover to the extent that he was, from 9 March 2017, rendered incapacitated for work and as satisfying the "but for" test, in the sense noted in *Strong v Woolworths,*[173] and *Greenway,*[174] as making "material contribution" such as to be "necessary to complete a set of conditions that [were] jointly sufficient to account for the occurrence of the harm", for which the plaintiff claims as occasioned to him from 9 March 2017.

Assessment of damages

[77] Accordingly, it is only necessary to assess the plaintiff's damages on the basis of his development of an adjustment disorder which resulted in him ceasing work with QCS on 9 March 2017. The principal areas of disputation as to that assessment are in respect of:

(a) The calculation of general damages pursuant to Schedule 12 of the *Workers' Compensation and Rehabilitation Regulation 2014* ("WCRR");

(b) The extent of the plaintiff's incapacity for employment after his medical retirement from the QCS in April 2018; and

(c) The appropriate allowances for future considerations in terms of:

(i) Reduction in earning capacity; and

(ii) Treatment needs.

---

173 (2012) 246 CLR 182 at [20]-[25].
174 [2017] QCA 103 at [40]-[41].

[78] The plaintiff's approach to assessment of damages proceeds upon the basis of acceptance of the unchallenged evidence of the plaintiff's wife and brother as to their objective observations of the impact of the plaintiff's injury upon his life, his withdrawal from activities he had previously and regularly enjoyed, change in his personality and ongoing diminution in the man they knew, even after he returned to some employment.[175] It is also contended that the plaintiff's tendency was to understate the impact it had on him and had specifically sought a mental health care plan in June 2021, as preparations were occurring for the trial and he became aware of what his wife and brother were reporting and he met with his psychologist.[176] His evidence was that he still did not feel himself and that he hoped to go back to full-time work in the future.[177]

General Damages

[79] Pursuant to s 306P of the *WCRA*, the plaintiff's general damages must be calculated by reference to the "general damages calculations provisions" (as they are relevantly prescribed by regulation) and applying to the period within which the injury was sustained.[178]

[80] In the first instance, there is a question as to the proper categorisation of the plaintiff's condition having regard to Schedule 9 of the *WCRR* and is explained in Schedule 8, which in turn involves the assessment by the medial experts of a Psychiatric Impairment Rating Scale, ("PIRS"), as required by Schedule 11 and explained in Schedule 10.[179] That is for the purpose of the appropriate attribution of an ISV by the Court,[180] and calculation of an appropriate award pursuant to Schedule 12.[181]

[81] As is correctly pointed out for the defendant, a significant difference in the approaches of Professor Whiteford and Dr Bell was that Professor Whiteford opined that by definition, an adjustment disorder has a limited duration, typically six months or less, with the continuance of the plaintiff's condition being explicable by other related events such as his giving evidence in Walker's trial in the Magistrates Court and the

---

175 See evidence of the plaintiff's wife at T 1-107 – 1-115 and the plaintiff's brother at T 2-34 – 2-38.
176 T 1-59.30 – 1.60.27 and Ex 12.
177 T 1-60.29-32.
178 The relevant reprint is that dated 8/9/2016.
179 Section 129 of the *WCRR*.
180 Section 306O of the *WCRA*.
181 Section 130 of the *WCRR*.

processes of the present claim.[182] Whereas, Dr Bell did not recognise such limitation but did note an effect of entrenchment or prolongation in respect of the subsequent matters.[183] It is also appropriately noted that:

(a) Dr Bell's assessment of a PIRS of 7% is in his report dated 19 October 2018,[184] and that in his second examination of the plaintiff, on 11 August 2021, Dr Bell noted improvement in his condition; and

(b) Professor Whiteford's assessment of a PIRS of 5%, came later and consistently with Dr Bell's notation of improvement in the plaintiff's condition.[185]

[82] In this context, the common submission of the parties, which should be accepted, is for categorisation within Item 12 of Schedule 9, which applies to "(moderate mental disorder)" for ISV range of 2-10. The further submissions of the parties are then only at variance in that:

(a) For the defendant, attention is drawn to the example given for injuries falling within Item 12, being those with PIRS rating between 4 % and 10 %. It is then contended that having regard to the available range of ISV, from 2-10 and the PIRS of 5% assessed by Professor Whiteford, the appropriate assessment is of an ISV of 4, which by application to the sum of $1,390, results in a calculation of $5,560.[186]

(b) On the other hand, for the plaintiff and in the context of Dr Bell's assessment of a PIRS of 7%, emphasis is placed upon the unchallenged evidence of the plaintiff's wife and brother as to their objective observations of the impact of the plaintiff's injury upon his life, his withdrawal from activities he had previously and regularly enjoyed, change in his personality and ongoing diminution in the man they knew even after he returned to some employment. Accordingly, the plaintiff seeks a higher calculation, upon assessment of an ISV of 8.[187]

---

182 See paragraph [24] above.
183 See paragraph [23](a) above.
184 Ex. 1, p. 11.
185 Ex. 17, Tab 3, p. 35.
186 Defendant's written submissions at [204].
187 Plaintiff's written submissions at [54].

[83] There is some merit in each contention, as reflection of the competing considerations. As is provided at Item 8(3) of Schedule 8:

> "The fact that schedule 9 provides examples of factors affecting an ISV assessment is not intended to discourage a court from having regard to other factors it considers are relevant in a particular case."

Accordingly and in this instance, some weight should be placed on the evidence as to the extent of impact the injury had upon the plaintiff in terms of his general loss of amenity and enjoyment of life.

[84] There should be assessment of an ISV of 6 and accordingly an assessment of general damages of $8,630 ($6950 + $1680).[188]

[85] Section 306N of the *WCRA* precludes any award of interest on general damages.

Past Special Damages

[86] There is agreement that the appropriate award for Past Special Damages is $8,392.68.[189] And it is also conceded that interest is appropriately allowed on $400.52, at 0.745% for 4.63 years, in the sum of $13.80.[190]

Past Economic Loss

[87] Given that the submissions of the parties were completed on 10 September 2021, in respect of evidence given prior to that date, it is appropriate in respect of all economic loss issues, to first consider the assessment of the components with reference to those contentions, before adjusting to the date of judgment and so that there are appropriate allowances for any interest component.

[88] In respect of the assessment of Past Economic Loss, the agreed applicable net average earnings figure for the plaintiff was $870 per week.[191] And there is no contention that

---

188 Pursuant to the *WCRR* Schedule 12, Table 6 for injuries sustained after 1 July 2015.

189 As calculated in Ex. 10; Plaintiff's written submissions at [62] and Defendant's written submissions at [264].

190 That is, at half the 10 year treasury bond rate on 1 July 2021, of 1.49%, on the amount included for out of pocket travel expenses; Plaintiff's written submissions at [62]-[63] and Defendant's written submissions at [257]-[258].

191 Ex. 17, Tab 1-6, p 1187; Plaintiffs written submissions at [58] and defendant's written submissions at [209].

the adoption of this figure would in any way in which the plaintiff seeks to apply it to past or future economic loss, lead to infringement of s 306I of the *WCRA*.

[89] For the plaintiff, the amount claimed is calculated at $200,954.95, on the basis of that net amount applied over the period from 9 March 2017 to 20 August 2021, but with allowances for the plaintiff's earnings for his return to remunerative employment from 16 October 2020 and with further allowances for some identified periods thereafter when he was unable to work due to unrelated health issues.[192]

[90] This approach is the subject of a number of criticisms for the defendant. It is contended to be based on the erroneous assumptions that the plaintiff established an incapacity for employment from the time he ceased working with QCS on 9 March 2017,[193] including after the commenced work with Estia Health on 16 October 2020, performing work in a laundry at an aged care facility on a casual basis.[194] The submission for the defendant is that this is not an appropriate case to proceed to measure past economic loss by a simple reference to the difference between pre-injury remuneration and actual earnings after that. Particular reference is made to the evidence of the psychiatrists as to the plaintiff's capacity for work, other than in a correctional role:

(a) In his report dated 19 October 2018, Dr Bell observed:

> "Apart from employment as a correctional officer in Australia and New Zealand, Mr Mason has worked in the security industry and in pest control. I understand that he has also recently attained a Certificate qualification in Aged Care.
>
> From the psychiatric point of view, he is now totally unable to return to the correctional services work; but, he would probably manage quite well in the security industry and/or in the aged care environment.
>
> …
>
> In my opinion, Mr Mason would be suited to work in the security industry and aged care. He could also manage pest control, if he chose to return to that.
>
> In addition, I note the vocational assessment Mr Mason undertook in September 2017, in which he was considered suitable for work as a domestic cleaner and an electrical trades worker. From the psychiatric

---

192 As calculated in Ex. 9.
193 T 1-85.25.
194 T1-51.27-41 and Ex. 7.

point of view, there would be nothing to prevent him from working in these types of employment either.";[195]

(b) Professor Whiteford, in his report dated 27 November 2018 observed:

"14. I do not believe Mr Mason would sustain a return to work as a correctional officer but he could work in alternative employment, initially part-time, and once the current stresses are over, full-time with no restriction on the number of hours he could work."[196]

[91] It is notable that Professor Whiteford's prognosis was as to initially part-time employment. The vocational assessment referred to by Dr Bell, is that of Ms Neil. In her report dated 19 September 2017, that rehabilitation consultant identified cleaning work (in an industry also identified as a large and growing one) as a short-term employment option.

[92] In this context, the defendant contends that the plaintiff's evidence falls short of establishing any incapacity for cleaning work or aged care work, in particular, from April 2018 to October 2020.[197] It is further contended that any reduction in the plaintiff's earnings from approximately 16 October 2020, when he commenced working on a casual basis with Estia Health,[198] performing duties in a laundry at an aged care facility, was not related to his psychological condition, but rather, the plaintiff's evidence that:

(a) He preferred to work as a casual because of the higher hourly rate, enabling him to work less hours; and

(b) He could work in a full-time role and more shifts if they were available to him.[199]

Otherwise, the defendant points to the long period between April 2018 and October 2020 and what is contended as the absence of demonstration of any meaningful effort of the plaintiff to obtain work in that period.

[93] The defendant is also critical of an implication or assumption in the plaintiff's approach, that he would have remained a correctional officer in the intervening period

---

195 Ex. 1 at pp 12-13.
196 Ex. 17, Tab 3, pp 33-34.
197 Defendant's written submissions at [291].
198 T 1-51.27-41.
199 T 1-53.11-20.

and in the absence of his injury. That is in recourse to the particular recognition in cases such as *Peebles v WorkCover*,[200] of the applicability of the reasoning noted in *Malec v JC Hutton*,[201] of appropriate adjustment of awards for both past and future economic loss, for relevant contingencies, where they exist.[202] In the defendant's submission, such consideration arises from the disclosures made by the plaintiff to the psychologist with whom he was engaged at the service made available by the defendant and to which he was directed by Mr Mosley: Optum Health and Technology. However, this evidence is directed to the plaintiff's earlier engagement of that service, in 2016 and in the course of which there was discussion as to some impacts of the plaintiff's prior exposure to traumatic events in his past employment in a correctional centre and which served to inform what has been noted as the ultimate identification, by each psychiatrist, of the plaintiff's underlying susceptibility or pre-disposition or vulnerability, to his injury. In particular, it is noted that the plaintiff made the following assertions to the psychologist:

> "(a) On 31 May 2016, that he had a Skipper's ticket, was ok with working away from home and had applied for four jobs, by then;
>
> (b) On 8 June 2016, that his job seeking was going well including in relation to a youth worker position at Boystown that nothing had changed in the corrections role, with a co-worker retiring for similar reasons and that although he would love to stay he felt he could not and wanted to look for other work;
>
> (c) On 10 June 2016, he asserted that he had 'just about' decided to leave and was looking at other jobs including that he may have a six-month job on trawlers; and
>
> (d) On 16 June 2016, that he had told the general manager at the Woodford Correctional Centre that he would be resigning and that he couldn't stay now even if prison management indicated they would fix up everything he had been upset about."

[94] Accordingly and for the defendant, it is contended that there is no evidence that the plaintiff has been rendered incapacitated, by his injury, from pursuing his interest in trawler work or in respect of other employment for which he is regarded as suited or had past experience, or as a youth worker, or particularly such as cleaning or aged

---

200 [2021] QCA 21.
201 (1990) 169 CLR 638 at 642-643.
202 Defendant's written submissions at [207]-[208] and [224]-[229].

care related work. The defendant's submission is that the assessment of the plaintiff's loss "must reflect the prospect he would have left correctional work in any event; his unexercised or under-exercised capacity for work other than in corrections via lack of effort or choice; and his other (unrelated) incapacitating conditions."[203]

[95] From those premises, the defendant contends for an assessment which allows only:

(a) the amount of the weekly benefits received from WorkCover Queensland, as the plaintiff's full entitlements, in the period from 9 March 2017 to 23 March 2018 and which is repayable as a first charge on his damages;[204] and

(b) in addition, only a small global award, suggested in the sum of $20,000, as a measure of the plaintiff's loss "had he properly endeavoured to exercise his residual capacity over the following three years".[205] The defendant further submits that the suggested global award is supported by analyses in respect of the award rates applicable to aged care workers, in laundry and also personal care duties,[206] being demonstrable of a net diminution in earnings of approximately $100 per week,[207] and on that basis, commensurate with a loss in the order of $20,000 in the period involved from April 2018 to 10 September 2021.[208]

[96] Otherwise, for the defendant, it is accepted that:

(a) interest should be allowed on the component of past economic loss which exceeds the amount of refundable payments of workers' compensation, at the uncontested rate of 0.745% (being half the 10 year treasury bond rate on 1 July 2021, of 1.49%) for 4.47 years;[209] and

(b) the defendant's damages should include an amount for past loss of superannuation, at 9.5%, but only on the amount "over and above the

---

203 Defendant's written submissions at [232].
204 Ibid at [233].
205 Ibid at [234].
206 See Ex. 17, Tab 133.
207 Defendant's written submissions at [235]-[239].
208 That is from the point of the plaintiff's separation from QCS and the date of oral submissions, when this decision was reserved, which was contended to be a period of 181 weeks.
209 Defendant's written submissions at [240].

WorkCover weekly benefits, as correctional officers are paid their normal remuneration and entitlements when on benefits".[210]

[97] In respect of the assertions made to the psychologist in 2016 and before his injury, it is necessary to understand that whilst there was reference to some reaction to past trauma in correctional work, the precipitant for the counselling was a difficulty which had been encountered in the plaintiff's relationship with a daughter.[211] Moreover and as noted, the evidence of the psychiatrists ultimately only supported vulnerability or susceptibility to the injury subsequently suffered. More particularly, the assertions as to looking for other avenues of employment are understandable only to the extent that the plaintiff may have been seeking alternative employment opportunities, but there is nothing to support a conclusion that this would be to effect any diminution in his earnings. Accordingly, there is an insufficient basis for recognising any such contingency, as far the assessment of past economic loss is concerned, and as noted, the now known periods of the plaintiff's inability to fulfill his earning capacity, for any other reason, may be taken into account.

[98] However, there is more merit in the defendant's contention as to the plaintiff's failure to prove that his underutilised past earning capacity has been caused by his injury, at least throughout the period involved. The plaintiff's contention, otherwise, cannot sensibly withstand the attention which the defendant draws to the assessments of both psychiatrists and the rehabilitation consultant and particularly that:

(a) In September 2017, the plaintiff reported to the rehabilitation consultant, a daily routine of domestic duties, cleaning, gardening, shopping and driving;[212]

(b) He accepted when cross-examined, his own expectation that various suggested vocations, including in cleaning work, would have been achievable from a psychological perspective;[213]

(c) The plaintiff's evidence was, variously, that he may or may not have been able to do cleaning work throughout the period from April 2018 to October 2020 and that he "was probably unable to work for most of that" and "for a

---

210 Ibid at [241]. This contention was not put in issue.
211 T1-76.1-31; T1-88.13 – 1-92.44. Mr Mosley confirmed his knowledge of this: T 4-10.4-9.
212 Ex 17, Tab 1 at p 9.
213 T 1-96.1-27.

considerable time of that I was a basket case".[214] For the defendant, particular reference is made to the following passage**:**

> "And exaggerating whatever you can to try to portray yourself as more disabled than you were?---If I wanted to exaggerate, I'd exaggerate a lot more than you. I've got a pretty good vocabulary. I ain't exaggerating. Most of the time, I'm trying to tell everyone I'm okay. And 90 per cent of the time, you're going, "I'm great. I can do that".
>
> You were okay 90 per cent of the time?---You'd like to think so. Yes."[215]

However and whilst it is also not supportive of the maintenance of total incapacity for employment, at least over the entire period, I am not satisfied that it should be regarded, as contended, to be a concession of capacity to do so for 90% of that period.[216] Although, the plaintiff did unequivocally concede that he had told Dr Bell that he could do more shifts in his then current employment and that he "would like to think" that he could do that work full time. And the position was not improved by the following re-examination of the plaintiff:

> "Now, it was suggested to you that from April 2018 you were perfectly capable of working as a cleaner, that essentially you sat at home because you wanted to make your claim better instead of getting a job in April of 2018; is that right?---No. Look, I am not really interested in the claim to be honest, that's sort of where we have ended up. I just wanted to get my life back together and normal. I was, yeah, just sick of being not right and not being able to do bugger all. You know, one minute you're fine, the next minute you're sitting in the car waiting for your wife to come out of the supermarket because you have no idea why you don't want to go in there. So I couldn't tell you t be honest whether I could or couldn't have been a cleaner through that time, whether I couldn't or could have been – I don't know – anything. I would have loved to have gone to work straight after it all and pretended everything was okay but it wasn't. There were plenty of times I would have just gone, "Yeah, I'm fine, I can do that", and there were times where I have said that, "I'm great, I'm brilliant, I'll go and do that".
>
> And were you?---Probably not.
>
> Would you have gone to work if you could?---Yeah, probably. I would have loved it. As I've done now, I've gone in and done it. And look, a couple of times, even in the laundry I've sat there and gone, "I just can't do this". And then I've gone on and said, "Well, why not", and you just get on with it. But generally, being back at work and doing work, when I

---

214 T 1-98.1-25.
215 T 1-98.33-39.
216 Defendant's written submissions at [218].

> get home, I feel so much better, you know, and it's – you've achieved something. So maybe I could have; maybe I couldn't. I have no idea."[217]

(d) The plaintiff's evidence was that he was offered and completed a Certificate III course in aged care, prior to the cessation of his workers' compensation entitlements and that although when he later sought to utilise this from October 2020, he had some difficulties in adjusting to caring work, he did enjoy the work to which he was allocated in the laundry.[218] The plaintiff's wife described the completion of this course as being good for him in terms of finding the motivation to participate and that her influence in his return to work was "lots of nagging".[219] The plaintiff described it as "pretty much necessity" in the context of the inadequacy of his income protection insurance and making "ends meet" in reliance upon his wife "working 24/7 for us".[220]

[99] In these circumstances and as the defendant contends, the plaintiff has not established that it is more probable than not that he remained totally incapacitated for work throughout the period from April 2018 to October 2020 due to the injury for which the defendant is liable, nor that from the time that he did return to work with Estia Health that he was any less than fully capable of full-time employment there or elsewhere, for the same reason.[221]

[100] Therefore, the approach to the assessment of past economic loss proposed for the plaintiff must be regarded as inappropriate. The difficulty then lies in the indeterminacy of any particular points, before that return to work, when the plaintiff may have been regarded as fit to return to some employment and subsequently full-time work. Except as to the amount of the global assessment for the period after his separation from the employment with QCS, the approach of the defendant should be adopted as appropriate.

[101] Therefore and in the first instance, there should be allowance of the amount of that part of the statutory refund, received as weekly benefits to the end of March 2018, a

---

217 T 1-107.1-23.
218 T 1-50.34 – 1-51.25.
219 T 1-114.9-17.
220 T 1-50.20-32.
221 That is, leaving aside any other health implications which may have affected that capacity.

sum of $53,334.77.[222] Secondly and in respect of the remaining period which was approximately 180 weeks from April 2018 to 10 September 2021 and is now approximately 267 weeks, extrapolated to 12 May 2023, and in accordance with the requirements of s 306J of the *WCRA*, it is to be noted that whilst the underlying premise in the defendant's analysis of a diminution in earnings of at least $100/week is a useful touchstone, weight is to be given to both the evidence as to extent of impact of the plaintiff's injury and the acknowledgement of Professor Whiteford of the need for separation from the issues related to the plaintiff's injury and particularly as to some expected gradation in return to full working capacity, in concluding that an appropriate global assessment would be $71,255, by assessing:

(a) the loss to 16 October 2020, in the amount of $57,855, by halving the extrapolation of loss of $870 per week to allow for a graduation of return to full working capacity in that period of approximately 133 weeks; and

(b) the loss thereafter to 12 May 2023, in the amount of $13,400, at the rate of $100 per week for approximately 134 weeks.

[102] Accordingly, the appropriate awards are:

(a) $124,589.77 for past economic loss;

(b) $2,728.57 in interest ($71,255 x 0.745% x 5.14 years), and

(c) $6,769.23 for past loss of superannuation entitlements ($71,255 x 9.5%).

Future Economic Loss

[103] The plaintiff was born on 28 September 1975 and therefore would have turned 46 years of age, less than a month after 10 September 2021. Accordingly, there remained a period of approximately 21 years to a normal retirement age of 67.

[104] For the plaintiff, the contention is that it would remain uncertain as to when the plaintiff would be able to return to full-time work. And in the context of notation of the plaintiff's evidence that he still did not feel himself,[223] it was contended that he

---

222 Ex. 10, WorkCover Queensland – Payments/Recoveries History Report.
223 T 1-60.25-36.

should be allowed four years at a loss of $870 per week, or $165,300.[224] It is further simply contended that "[n]o discount for the vicissitudes of life is applied due to the conservative figure.[225] However and quite apart from the absence of any identified touchstone for the period of four years or apparent allowance for the fact of the plaintiff's return to casual work, in the context of the finding that the plaintiff has not proven that he had any remaining incapacity for full-time work by the point at which this assessment is to commence,[226] the approach is not appropriate.

[105] For the defendant, it is also pointed out that the assumption in the plaintiff's approach is that he would have remained in his job in corrections until retirement age.[227] The challenge to that assumption, at least as far as there being any reduction in earnings, has been dealt with above,[228] and a similar approach remains apposite to the future component. However, the defendant concedes that the plaintiff has an incapacity for corrections work and that "he is entitled to an award to reflect the loss of the chance that for whatever reason he may have endured for some future period in corrections work".[229] It is then contended that a global assessment is appropriate, with reference to the review undertaken in *Cook v Bowen*[230] being informative in revealing a range of $40,000 to $60,000.[231]

[106] Presumably with an eye to both ss 306J and 306L of the *WCRA,* the defendant sought to support its contention for an award within that range by an analysis which before allowance for contingencies which allowed for the identified diminution in earnings of $100 per week in full-time aged care related employment, extrapolated to age 67 and applying the 5% tables to a present value in the sum of $68,600. Such an approach is, in the circumstances, appropriate to adopt, subject to allowance for contingencies. However, that will be adjusted to truly effect a future assessment as from the date of judgment. That is in terms of the same extrapolation to age 67, from 12 May 2023, which produces a figure of $64,600.

---

224 Plaintiff's written submissions at [65]. There is no further explanation of how that sum is actually determined.
225 Ibid at [69].
226 That is the date of judgment; cf: paragraph [87] above.
227 Defendant's written submissions at [243].
228 See paragraph [97], above.
229 Defendant's written submissions at [249].
230 [2007] QDC 108 at [30].
231 Defendant's written submissions at [250].

[107] For the defendant, it was correctly pointed out that the discounting of that figure for contingencies would be in proper recognition of the prospects or risks of the plaintiff leaving correctional work irrespective of incapacity and diminution in remuneration, being otherwise injured and incapacitated in the course of correctional work or the activities of daily life or bodily health leading even to death.[232] It is contended that the "normal" discounting is by 15%,[233] but with what would be an inappropriate inflation of the rate to 50%, having regard to the contended weight to be given to a finding that is not appropriate: that the plaintiff's past demonstration of efforts to obtain alternative work would lead to a conclusion that it was at least as likely as not that the plaintiff would leave correctional work. That reasoning, at least as far as it relates to the prospect of the plaintiff doing so to diminish his income is not to be accepted, to that extent. However, this assessment is in respect of a longer period and as has been noted, the prospect or risk of such an occurrence in the future should be recognised. It is also in this particular context of future prognostication, appropriate to give some more particular weight to the plaintiff's clearly demonstrated desire to leave corrections work and make some additional allowance for that contingency. Accordingly, the assessment on this basis will be reduced by 25% and in the sum of $48,450.

[108] It is otherwise not in issue that allowance of future superannuation should be made and the calculation is $5,814.00 (at the rate of 12%).[234]

Future special damages

[109] For the plaintiff, refence is made to the plaintiff's evidence that he will return to treatment when he can afford it,[235] and that he had, shortly prior to trial, obtained a mental health care plan.[236] The only dispute is as to the amount to be allowed. [237] The plaintiff seeks $26,587.00 as estimated by Dr Bell. However, that occurred prior to Dr Bell's subsequent consultation and acknowledgement of significant improvement in the plaintiff's condition and was not revisited in evidence. The estimation of

---

232 Ibid at [253].
233 Ibid at [254], with reference to Luntz, *Assessment of Damages for Personal Injury & Death*, 5th ed., LexisNexis, [7.4.8] p. 711.
234 Plaintiff's written submissions at [70] and Defendant's written submissions at [256].
235 T 1-59.16-19.
236 Ex. 12.
237 Plaintiff's written submissions at [71] and Defendant's written submissions at [259]-[263].

Professor Whiteford does not come with such an impediment and is as the defendant contends to be preferred. Accordingly, the allowance will be for 10 sessions of therapy with a psychologist, at $245 per session and in a sum of $2,450.00.

Conclusion

[110] A summary of the appropriate assessment of the plaintiff's damages is:

Head of Damage	**Amount**
General Damages	$8,630.00
Past Economic Loss	$124,589.77
Interest on Past Economic Loss	$2,728.57
Past Superannuation	$6,769.23
Future Economic Loss	$48,450.00
Future Superannuation	$5,814.00
Past Special Damages	$8,392.68
Interest on Past Special Damages	$13.80
Future Special Damages	$2,450.00
Sub-total	*$207,838.05*
Less WorkCover Refund[238]	*$59,723.20*
TOTAL	**$148,114.85**

[111] Accordingly, there will be judgment for the plaintiff in the sum of $148,114.85, clear of the statutory refund. The parties will have a further opportunity to be heard as to the orders to be made, including any as to costs.

---

238 As required pursuant to s 207B(2) of the *WCRA*, which provides that this is a first charge on any ordered damages sum.