SUPREME COURT OF QUEENSLAND

File No 11396 of 1997

BETWEEN:

JOHN THOMAS WRIGHT

Plaintiff

and

LIONGAIN PTY LTD

First Defendant

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION:	*John Thomas Wright v Liongain Pty Ltd* [2003] QSC 381
PARTIES:	**John Thomas Wright** (Plaintiff) **v** **Liongain Pty Ltd** (Defendant)
FILE NO/S:	SC11396 of 1997
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	District Court, Southport
DELIVERED ON:	7 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17.03.03 – 20.03.03
JUDGE:	Moynihan SJA
ORDER:	**Action dismissed**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE – As between an employer and employee -Whether the risk of injury to the plaintiff may have been reduced or avoided – Whether the security on the premises was adequate to avoid the risk of injury

TORTS – NEGLIGENCE – DUTY OF CARE – As between an employer and employee- Where the plaintiff alleged he was attacked during a robbery on the defendant's property – Where the plaintiff was an employee of the defendant – Where the defendant pleaded conspiracy on behalf of the plaintiff

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Where the action commenced before the *Uniform Civil Procedure Rules* came into force -Where the plaintiff contends that the as a consequence of r 166 (4) and (5) *Uniform Civil Procedure Rules* the defendant is taken to have admitted allegations contained in the statement of claim – Where the defendant amended its defence at the commencement of the trial – Where the plaintiff had previously been provided with the proposed defence and made a reply some months earlier – Where the defendant is not covered by r 371(1) – Where the plaintiff failed to address the issue prior to or during the trial.

Legislation Cited

Uniform Civil Procedure Rules 1999 (Qld)

Cases Cited

Briginshaw v Briginshaw (1938) 60 CLR 336

John Albert Dewar v R E & D M Pearce Pty Ltd (unreported SC625 of 96, 13 October 2000)

John Lysaght (Australia) Limited (1975) 132 CLR 201

Rejfek v McElroy (1965) 112 CLR 517

Theilemann v The Commonwealth [1982] VR 713, *Nelson v*

COUNSEL:	Mr TC Martin QC and Mr SJ Given for the Plaintiff
	Mr T O'Sullivan and Mr PL Feely for the Defendant
SOLICITORS:	Morton and Morton for the Plaintiff
	Hopgood Ganim for the Defendant

Introduction

[1] The Plaintiff was engaged by the Defendant from about 1991 to carry out security and other duties at the Gainsborough Greens Golf Course at Pimpama.

[2] Initially the Plaintiff's engagement was as an independent contractor. By 27 December 1994 he was employed under a contract as a security guard/caretaker. He

was paid a salary of approximately $30,000 a year with some overtime in addition. He paid $90 per week rent for the onsite residence he and his family lived in.

[3] As well as carrying out caretaker and security duties the Plaintiff did cleaning work two nights a week when the regular cleaner was not working. He also conducted an independent trucking business using a leased truck, apparently in partnership with his wife.

[4] In the early hours of the morning of 28 December 1994 the Plaintiff was found by police, who had been alerted by his wife, "hogtied" in the Gainsborough Greens clubhouse locker room. The clubhouse had been ransacked, three safes had been opened. Cash and goods, notably alcohol, had been stolen. It is convenient to refer to these events as "the robbery".

[5] The Plaintiff's case is that late on 27 December 1994 he was carrying out cleaning duties in the clubhouse. He was attacked from behind by an unknown assailant or assailants and knocked down. When he came to he was tied as the police had found him. The Plaintiff claims as a consequence of the attack he suffered debilitating spinal and psychiatric injuries.

[6] The Plaintiff pleaded a number of allegations to breach of duty by the Defendant, some general and some specific. His case at trial was, in essence, that the Defendant was in breach of pleaded obligations to:

a) equip the Plaintiff with a personal duress alarm;

b) equip the doors and windows of the clubhouse with a perimeter alarm system which could be activated while people were working inside the clubhouse;

c) heed the Plaintiff's warnings with respect to the inadequacies of the existing security system.

[7] It is convenient to dispose of (a) at this stage. On any view of the facts a duress alarm would not have prevented the Plaintiff's injuries. He would not have had an opportunity to operate it. I did not understand these considerations to be seriously in issue by the end of the trial.

[8] The Defendant, apart from not admitting or putting allegations in issue, alleges that the Plaintiff and David Mayne conspired to commit the robbery. The Plaintiff allegedly consented to the assault and binding in order to make it appear that the robbery was the work of others. I will refer to these allegations as "the conspiracy".

[9] The Defendant accepted that it carried the onus of proving the conspiracy on the balance of probability measured having regard to the seriousness of the allegations which are of course serious; they allege involvement in criminal acts; see *Briginshaw v Briginshaw (*1938) 60 CLR 336, *Rejfek v McElroy* (1965) 112 CLR 517.

[10] Gainsborough Greens Golf Course is situate off the main highway between Brisbane and the Gold Coast in an area of bushland with large acreage blocks. Its main facilities include a large two storey clubhouse, a driving range, buggy, machinery sheds together with associated improvements and a golf course.

[11] The Plaintiff and his family occupied a residence about 100 metres from the clubhouse. The general area was surrounded by a perimeter fence. Vehicle access to the clubhouse was by a circular driveway through lockable entry and exit gates separated by a gate house.

[12] The gates were in the vicinity of the Plaintiff's residence. The Plaintiff's German shepherd dog roamed freely in the area in the vicinity of the clubhouse and residence to discourage or detect intruders. The area was lit at night and the Plaintiff from time to time carried out security patrols.

[13] The Plaintiff worked split shifts from 6.00 p.m. to 11.00 p.m. and from 4.00 a.m. to 6.00 a.m. carrying out security patrols and other activity associated with the conduct of the business of the club and the golfing activities. A cleaner was employed from 11.00 p.m. to 7.00 a.m. five nights a week.

[14] The clubhouse was fitted with an alarm system. This consisted of sensors which responded to movement inside the building. The external doors and windows were alarmed and there was a window break alarm.

[15] The system was turned on once the doors and windows were closed and locked and the clubhouse empty. If it was on while someone was inside or an external door or window was open the system would be activated. The system was a "back to base" system. Once activated, it alerted a security company watch room which initiated an appropriate response.

[16] There had not previously been a robbery at the club and there is little or no direct evidence from which the level of risk of robbery can be determined. It may be accepted however that it was foreseeable that the clubhouse might be robbed.

[17] The clubhouse was somewhat isolated and its operations obviously involved the exchange of money for goods and services. Goods including alcohol, golfing equipment and the like were on the premises as well as the proceeds of the club's operation.

[18] The risk of robbery, considerations of their adequacy aside, was recognised by the security arrangements in place. In addition to those I have already mentioned it is noteworthy that the Christmas/New Year period was a busy one with a number of functions. The club management sought to minimise the amount of money held on the premises by regular use of the club's bank safe deposit facilities. The evidence does not allow a conclusion as to whether the plaintiff knew of the arrangement.

[19] The Defendant was therefore, in my view, under a duty of care to take reasonable precaution to avert a robbery and the foreseeable consequent risk of injury to someone in the Plaintiff's position. I will postpone the question of whether the Defendant breached its obligation and whether as a consequence the Plaintiff suffered the injuries of which he complains.

[20] The case is one which turns on the credibility of oral testimony. The Plaintiff's case turns essentially on accepting him as creditable. The Defendant's conspiracy case turns essentially on the acceptance of the testimony of Yvonne Mary Sookee implicating the Defendant and David Mayne in the robbery. I will return to these considerations in more detail later.

The Defendant's duty, the Plaintiff's complaints and warnings, the subsequent upgrade of the clubhouse alarm system.

[21] I turn to the allegation that the Defendant failed to heed the Plaintiff's warning in respect of the inadequacies of the existing security system. This essentially involves a consideration of the evidence of the Plaintiff, Phillip Ryan Waterreus a security systems provider and the club manager at the time Shawn Gregory Mahoney

[22] Waterreus was a former civilian, military police and prison officer. Between 1994 and 1997 he conducted a security business under the business name Secureacam. Securacam provided the watch room support for the alarm system at the clubhouse on 27 December 1994. He and the Plaintiff came to know one another because each was involved in the security business.

[23] The Plaintiff gave evidence to the effect that he spoke to Mahoney on "numerous occasions" and made written reports about the inadequacy of the security system prior to the robbery. He raised the need for a system which could be activated although someone was inside the building on these occasions.

[24] Mahoney gave evidence that the Plaintiff did not raise such complaints about the system prior to the robbery. He did say there were discussions with the Plaintiff at some stage about security arrangements which concluded on the basis that the system was satisfactory. No written quotes were provided.

[25] Waterreus provided two written obligation free quotes to Mahoney and copies of them were tendered. Mahoney did not recall seeing the original quotes but accepted that he authorised and received them. One of the quotes was dated 27.9.94 and was for $10,986. The other, for $3,495.60, was dated 7.2.95. It is not clear whether this quote was accepted so as to lead to a post robbery upgrade of the system and although there was such an upgrade.

[26] Mahoney's evidence was that in his experience as club manager it was not unusual for security providers to solicit an invitation to quote in the hope of obtaining business. The Plaintiff introduced Waterreus to Mahoney, who thought the Plaintiff was acting

out of a sense of obligation to a mate by providing Waterreus with an opportunity to solicit business.

[27] From Mahoney's perspective, "it was a lot easier for me to say no to this guy" rather than for the Plaintiff to do it so he agreed to the quotes. I'm inclined to think that the probable explanation for the quotes being given was along these lines rather than generated by the concerns expressed by the Plaintiff.

[28] I do not accept the Plaintiff's account of the nature and extent of any conversations with Mahoney about the security system. In particular, I am not satisfied there was a conversation such as to put the Defendant (through Mahoney) on notice that the existing system was deficient so as to require rectification or augmentation prior to the robbery.

[29] I turn to the issues of whether the risk of injury to someone in the Plaintiff's position might have been reduced or avoided by installing a system which could be operated while people were inside the clubhouse and whether the Defendant should reasonably have done so; *Theilemann v The Commonwealth* [1982] VR 713, *Nelson v John Lysaght (Australia) Limited* (1975) 132 CLR 201.

[30] Again, as I have already said, security arrangements were in place. They were characterised by Mahoney who had experience as a club manager, as making the clubhouse "one of the more secure clubs" he had encountered.

[31] Some months after the robbery the Defendant installed an alarm system which could be on while people were inside the clubhouse. The evidence is unclear but it seems it may have activated sound and like alarms. It was put to Ms Cummins, the administration manager at the club that a siren would go off but her answer is equivocal.

[32] There was no evidence or issue at the trial directed to showing that adoption of the subsequently updated system prior to the robbery would have been inordinately expensive or otherwise disadvantageous. This is evidence that such a system was available but does not, of itself prove breach of duty in not adopting it c.f.; *Theilemann v The Commonwealth* [1982] VR 713.

[33] As I have already said the Defendant was under a duty to take reasonable precautions to avert a robbery and the foreseeable consequent risk of injury to the Plaintiff.

[34] The issues which therefore arise are whether the risk of injury to someone in the Plaintiff's position might have been reduced or avoided by the installation of such a system and whether the Defendant should reasonably have introduced it; *Theilemann* (ante), *Nelson v John Lysaght (Australia) Limited* (1975) 132 CLR 201.

[35] In my view, the installation of an alarm system which could be on while someone was inside the building would probably have reduced the risk of injury to a person inside the building if a robbery took place while it was operating.

[36] As I have said, the evidence is sparse as to the level of risk of robbery and as to features of the system subsequently fitted. On the other hand, the system was changed after the robbery and there is no evidence if this was inordinately expensive or disadvantageous.

[37] I am satisfied, not without a degree of reservation that the Defendant ought to have fitted such a system prior to the robbery.

Pleading points

[38] The Plaintiff submits that as a consequence of *UCPR*, r166 (4) and (5) the Defendant is taken to have admitted the allegations contained in paragraph 6 of the statement of claim. It was submitted that in the event of the Defendant's failure to make out the conspiracy the Plaintiff was entitled to judgment on that admission. Since I am not prepared to find that the conspiracy is proven it is necessary to deal with the submission.

[39] The action was commenced on 28 June 1996 by a plaint and statement of claim filed in the District Court at Southport. The Defendant filed a defence and the matter was subsequently removed to this Court on the grounds that it was anticipated the Plaintiff's damages would be higher than the jurisdiction of the District Court. These events occurred before the Uniform Civil Procedure Rules 1999 came into force.

[40] The pleadings are notably sparse having regard to the issues litigated. Paragraph 4 of the statement of claim alleges the circumstances of the robbery and paragraph 5 that as a consequence the Plaintiff suffered injuries founding his damages claim.

[41] Paragraph 6 alleges that the injuries pleaded in paragraph 5 were the consequence of the robbery pleaded in paragraph 4 and caused by the Defendant's negligence and/or breach of duty in failing to provide a proper security system.

[42] The original defence filed, pleaded a bare "non admission" to paragraphs 4 and 5 of the statement of claim and a bare "a non admission and denial" of paragraph 6.

[43] At the commencement of the trial, the Defendant amended its defence. It appears that the Plaintiff had previously been provided with a copy of the proposed defence. In anticipation of the amendment ultimately made a reply had been filed some months earlier.

[44] The amended defence denied paragraphs 4 and 5 of the statement of claim. By new paragraphs 3(A) and (B) it provided a "direct explanation" (see r 116(4)) of its denial of paragraphs 4 and 5 by pleading the conspiracy.

[45] The anticipatory reply in fact had specifically pleaded that the Defendant's failure to provide a direct explanation of the non admission and denial of paragraph 6 in the amended defence constituted an admission of the allegation of breach of duty made by that paragraph because of the operation of R 166(4) and (5).

[46] Despite having been put on notice by the anticipatory reply the Defendant took no steps to deal with the issue either before or during the trial up to the stage of addresses. It responded to the Plaintiff's submissions in address.

[47] The point having been taken in address the Defendant submitted that it was unnecessary to amend the defence. This was on the basis that "the question arises whether in the light of the amendment to the defence it became necessary for the Defendant to recast all of the complete pleadings in conformity with the UCPR" citing *John Albert Dewar v R E & D M Pearce Pty Ltd* (unreported SC625 of 96, 13 October 2000).

[48] *Dewar* was an *ex temporae* decision consequent on an amendment at the commencement of the trial. It is difficult to identify the amendment or its effect. Holmes J ruled that on the basis of the philosophy of r 5 which is "to avoid delay, expense and technicality" and concluded, having regard to the "practical effect" of the amendment, it was "unnecessary to replead the action." It seems to me that *Dewar* is of no assistance to the Defendant. It is not a statement of general principle but a case which turns on its own particular facts.

[49] It seems, at best, misconceived for counsel for the Defendant to rely on *Dewar* and the proposition in support of which it is cited. That is because the issue in this case is not whether the *UCPR* required the Defendant to "recast the complete defence" but whether it was necessary to plead to para 6 of the statement of claim by pleading or direct explanation. .

[50] The amended defence was given the terms of paras 3(A) and (B), plainly designed to "recast" the pleading to comply with r 166(5) in respect of the allegations contained in paras 4 and 5 of the statement of claim. No explanation has been offered for the same obligation not extending to para 6.

[51] In my view, the Defendant's failure to provide a direct explanation of the denial or non admission in paragraph 6 of the statement of claim effects an admission of that paragraph in terms of the Rules. The Defendant's submission that it was not necessary to amend the defence in that respect should be rejected.

[52] The Defendant did not seek to withdraw the admission so the question of whether the effect of *R* 116(4) and (5) constituted "an admission in the pleading" in terms of r 188 was not canvassed.

[53] The Defendant submitted in the alternative to it being unnecessary to amend the defence that *R* 371(1) came to its aid. It then sought a declaration that the amended defence was "effectual for the purpose of putting in dispute all issues of viability including negligence in the action".

[54] Rule 371(1) provides that the failure to comply with the rule is an irregularity and does not render a proceeding, a document, or a step a nullity. Subrule (2) then provides that, subject to rules 372 and 373 the Court may declare a document or a step to be effectual or make another order that could have been made under the rules, including an order dealing with the proceedings generally as the court considers appropriate.

[55] The Defendant has, strictly speaking, not complied with r 372 or sought to be relieved from compliance. Be that as it may, in my view, the appropriate course would be for the Plaintiff to amend the defence in so far as it pleads to para 6 to comply with the Rules. If done, this would remove the basis for the operation of r 166 (5) rather than ignoring the non compliance but seeking to avoid its consequences.

[56] The conspiracy would provide "a direct explanation for the denial or non admission of paragraph 6" as it did in respect of the allegations in paras 4 and 5. The Plaintiff could not be said to have been taken by surprise by it being raised. I cannot, at present, see any other basis for concluding that the Plaintiff was otherwise disadvantaged by extending the amendments to paragraph 6 of the statement of claim.

[57] The Plaintiff also submitted that rr 149, 150(4)(a) and (d) required the Defendant to plead particulars of the material facts relied on to support its denial of the Plaintiff's allegation of deficiencies in the existing system.

[58] The Plaintiff has left it too late to raise this issue. He bore the onus of proving the factual issues to which the submission refers. No steps were taken prior to or during the trial to pursue the point; it was raised in address. There was no objection to evidence referable to this alleged deficiency in the pleadings in the course of the trial. No argument of substance based on surprise or disadvantage referable to it has been advanced.

Background

[59] The Plaintiff was born on 15 November 1954. He married Lynelle Kay Wright in 1987. There was one child of the marriage born some months before the trial. The Plaintiff also had a daughter who, in 1994, was living with him and his wife in the caretaker's house and attending high school.

[60] The Wrights had separated in early 1997 but were reconciled.

[61] The Plaintiff left school at what was then called junior. He worked in jobs involving the operation of machinery in the cane industry and for earthworks. He became

involved in the "security industry" in early 1990 and had obtained a position with the Defendant some years prior to 1994. By the time of the robbery he was under contract.

[62] The Plaintiff and his wife met David Mayne (the alleged co-conspirator) and Mayne's partner Yvonne Mary Sookee through their daughters, Nahalia Wright and Rebecca Sookee. The two families lived near one another, the girls went to the same school travelling by the same bus. The acquaintanceship commenced around about August, September 1994 and the families quickly became friendly.

[63] The two men had a mutual interest in the "casino and fast cars". They went to the casino together on a regular basis where they talked, drank, played the poker machines and occasionally, at least, the gaming tables.

The events of the night of 27 December 1994

[64] The night of 27 December 1994 was one the of the cleaner's nights off. The Plaintiff started cleaning while there was still some patrons and the bar manager Kikkert in the clubhouse and completed the work after they had gone.

[65] The Plaintiff carried out a patrol in a golf buggy around the clubhouse, the driving range, the machinery shed and made a quick check when he came back to the clubhouse. He asked Kikkert when he (Kikkert) left to lock the front gate. This is a reference to the double entry and exit gates to which I have referred, the Plaintiff had already locked one.

[66] Kikkert says locking the gate was the Plaintiff's job and denies that the Plaintiff asked him to do it. A key was necessary and he (Kikkert) did not have one.

[67] It seems that the usual arrangement was for Kikkert to tell the Plaintiff or the cleaner that he was leaving and they would follow him out and lock the gate. There is no satisfactory explanation for departing from this arrangement on this particular occasion.

[68] The gates in question were substantial iron gates secured by chain and padlock. They gave vehicular access to the clubhouse by the circular driveway I mentioned earlier. Presumably, the gates were unlocked by the Plaintiff at the beginning of the day to allow access to the clubhouse area.

[69] It is not clear what were the arrangements with respect to the padlocks. If they were left in place but not locked then it is no doubt correct that a key was not necessary to lock them. On the other hand if they were locked, even if the gates were not secured by the chain, a key was necessary. In that circumstance, presumably it would be desirable, if not necessary, for the key to be returned to the clubhouse or the Plaintiff.

[70] The Plaintiff attacked Kikkert's credibility. It was suggested that he was in the clubhouse at an "inappropriate time" on a particular occasions and that he had watered down liquor consequently sold in the club. Kikkert explained the former and acknowledged and explained the latter by saying he did so to "increase margins" in liquor sales. The answer of course goes to Kikkert's credit.

[71] The Plaintiff says he was vacuuming the men's locker room using a backpack vacuum cleaner after Kikkert and the last patrons had left. Without any prior warning he felt a blow to his lower neck. He remembers falling forward and passing out after hearing a voice he did not recognise saying "stay down or I'll blow your guts out". He felt severe chest pain as he went down and passed out "for a short period".

[72] The Plaintiff's wife gave evidence that she arrived home around 10.30pm or 10.45pm on the 27th. She became concerned that her husband did not come home around 11.00p.m. and went to the clubhouse to find him. She saw, through a door or window, a broken internal door and rang the security company watch room. The police were alerted. The police came and found the Plaintiff "hogtied" with the vacuum cleaner cord. He was "not quite with it" when found. The Plaintiff had markings about his hands, his hands and feet were blue as if the circulation had been cut off. The Plaintiff appeared to have had a blow to the head and was "best probably described as semi-conscious".

[73] The Plaintiff was taken by ambulance to the Southport Hospital arriving there at about 3.00 a.m. on the 28th. He is recorded as having been conscious, his eyes opened spontaneously, he was oriented, obeyed commands, had normal power in his left arm and legs and a mild weakness in the right arm. He was complaining of angina but initially refused medication.

[74] At the hospital the Plaintiff gave an account of being hit on the head and falling back on the vacuum cleaner. He did not lose consciousness but "took a while to come to". He was tied up for "three or four hours" before the police found him.

[75] The Plaintiff was found to have a bruise to the mid lumbar spine and a lump behind his left ear, soft tissue injuries and abrasions. He accepted angina medication and was given Panadeine for back spasm pain at 3.15am. before being discharged at 4.00 a.m. on the 28th.

[76] It may be accepted that the Plaintiff was struck and bound. The issue is whether this was a genuine outcome of the robbery or contrived to make it look as though there was a genuine robbery.

[77] The club manager Shawn Gregory Mahoney arrived at the club house, he says, at about 5.00 a.m. The Plaintiff was being put in the ambulance when he arrived. Since the Plaintiff was discharged from hospital at 4.00 a.m. he must have arrived earlier.

[78] Mahoney found a glass door on the first floor leading from the outside of the building to a dining room was broken and there was broken glass on the floor inside the building.

[79] A glass door on the ground floor from the foyer into the pro shop was also broken and there was broken glass both inside and outside the door. Various items were missing from the pro shop. Keys kept on hooks at the rear of one of the cupboard doors under the serving counter had been disturbed. A storage area containing a safe appeared to be undisturbed. It was later realised that the key to that safe was missing, a locksmith was called and the safe was opened. It was found that the money which was in it had been taken.

[80] A large safe located in the administration office had been torn away and transported some 50 metres to the loading dock area. Mahoney estimates it weighed between 80 to 100 kilograms and said it had been dyna bolted to the floor. It had been forced open and the contents stolen.

[81] Moving the safe to the loading bay would probably have required more than one person. There was a trolley available but the evidence does not otherwise provide a basis for concluding how it was moved.

[82] Cash totalling of the order of $12,314.55 was missing from various places as was alcohol to the value of $2,621.35 and various other items from the pro shop such as sunglasses, sunscreen and cigarette lighters.

[83] The probability is that more than one person was involved in the robbery and that a vehicle, or vehicles, was used to remove the stolen property. The evidence does not admit of any more detailed findings on these issues.

[84] It is probable that whoever robbed the club had access to inside information, for example, as to the position of safes, keys and the working of the alarm system. The Plaintiff obviously had access to such information. He gave me the impression in the course of his evidence that he was seeking to downplay his interest or knowledge of such matters. That said, others were in the same position as he was to acquire and use that information.

The conspiracy

[85] As I have previously said the success of the conspiracy claim depends on the acceptance of the evidence of Yvonne Mary Sookee.

[86] Ms Sookee and Mayne formed a defacto relationship in about 1984 first in Sydney and then moved on to the Gold Coast in 1989 where they lived until 1997. The relationship broke up in that year. As I have said they became acquainted with the Wrights around about August, September 1994 and the families soon became friendly.

[87] Ms Sookee's account of events came to light in 1999, after the Plaintiff made a workers' compensation claim for the injuries he suffered in the robbery. It seems Ms Sookee had made mention of the robbery and the surrounding events to a third party who brought her to the attention of Workers' Compensation Commission investigators. They sought her out and she agreed to meet with them and ultimately provided a statement.

[88] Ms Sookee was interviewed by the Workcover investigators on 10 March 1999 and on 31 May 1999 she gave a statement to police. The Plaintiff and his wife were subsequently arrested and charged in respect of the robbery. The proceedings went to committal hearing but did not go to trial.

[89] Mayne and Ms Sookee had separated in 1997. There is a history of animosity of the kind not uncommon in such cases. Each took out apprehended violence orders against the other before the separation. They do not speak. Family Court proceedings continued through 1999/2000 before being resolved.

[90] The Plaintiff submitted that Ms Sookee was motivated by animosity to facilitate a story of the Plaintiff and Mayne's involvement in the robbery. It is suggested that another factor which may have motivated Mrs Sookee was the close relationship which developed between the Wrights, particularly Mrs Wright and Ms Sookee's daughter Rebecca. This occurred in the context of the break-up of the relationship between Mayne and Ms Sookee.

[91] Rebecca had been injured in an accident. Ms Sookee asked the Wrights to take her in and look after her because her relationship with Mayne was breaking up and it was not a good environment for the injured girl. It seems a strong affection developed between Mrs Wright and Rebecca and continues. The suggestion is that Ms Sookee may have resented this.

[92] As a matter of observation Ms Sookee was, for whatever reason, notably not at ease while giving evidence. That said, she did not manifest animosity to Mayne or the Wrights in the style of her giving evidence and handled the allegations of ill will towards Mayne and the Wrights in a balanced way. The complete fabrication of the story of the conspiracy an opportunity disproportionate to any apparent animosity or its cause.

[93] These things said, there was a basis of animosity which may have motivated Ms Sookee to fabricate a story of Wright and Mayne's involvement in the robbery, That she did so cannot be dismissed from consideration.

[94] Ms Sookee stated that she had overheard a conversation between Wright and Mayne "some months" before the robbery to the effect that they intended to monitor staff going from the club to the bank with a view to intercepting and robbing them. Wright and Mayne deny this. It will be recalled that they became acquainted in August or September of 1994.

[95] Turning to the events of 27 December 1994 Ms Sookee's evidence was that on that evening she was at home with Mayne and the children. Mrs Wright arrived by herself at about 9.00 p.m. and stayed for a cup of tea. Shortly afterwards Mayne left in his vehicle returning some time later. He drove round behind the house where there was a large shed.

[96] Ms Sookee put her head out of the door and inquired as to what he was doing and was told to mind her own business. She went back inside but before she did she saw Mayne carrying goods into the shed. It is to be inferred that this was the stolen alcohol.

[97] Ms Sookee gave evidence that some time after the 27th she looked in the shed when Mayne was not at home. She saw cartons of beer and bottles of spirits, she nominated Bacardi, Vodka, Bourbon and Gin. She said that some of the liquor was subsequently brought into the house for consumption.

[98] According to Ms Sookee's evidence after he finished at the shed Mayne returned to the house. Mrs Wright was still there and remained for some time before leaving. Some time later Mayne answered the phone, and then informed Ms Sookee to the effect that the Plaintiff had been held up and that he was going to see what had happened.

[99] Ms Sookee's account of these events is contraverted by Mayne and Mrs Wright. Mrs Wright gave evidence that on the night of the robbery she went to Mayne and Sookee's residence. Then, together with the two girls, she went to an evening movie session. They returned at about 10 o'clock. I am inclined to accept Mrs Wright's evidence about these events.

[100] Mayne was present when they returned and did not leave prior to Mrs Wright leaving. The group had coffee and talked for something of the order of three-quarters of an hour before Mrs Wright left. Mrs Wright thought that her daughter may have stayed the night at her friend's house.

[101] Mrs Wright did not see any of the activities that Ms Sookee described as Mayne being involved in and Mayne denies any such involvement. He gave evidence that he had a back injury which would have precluded him doing the lifting Ms Sookee said she saw him do or involved in putting the goods in the shed.

[102] After she had coffee, Mrs Wright returned to her own residence, and as I have said, became concerned about her husband's failure to come home and alerted the security company.

[103] Mrs Sookee's evidence was that some days after the robbery Wright came to the house. The robbery, it may be noted, received considerable media attention. While the two men were together she asked them whether they had been involved in it. At first, they told her to shut up, then told her that they had done it and that "David had hit John over the head and tied him up with the vacuum cleaner cord". Wright and Mayne deny any such conversation.

[104] Ms Sookee further gave evidence that, about a month after the robbery, Wright came to the house. He and Mayne retrieved two calico bank money bags out of a dam on the property and brought them into the house. The bags contained currency, predominantly coinage, which was washed and counted on a billiard table in the house and split between the two men. She and Mrs Wright were present and assisted in this being done

[105] I am not prepared to accept Ms Sookee as a credible witness so as to found a finding that the conspiracy has been proven to the requisite standard.

[106] The statements that Ms Sookee gave to those responsible for investigating her claims are inconsistent in a number of respects with her evidence at committal and in the trial. Moreover, she identified goods she said she saw in the shed which are not on the list of goods stolen from the clubhouse. It is unlikely that the stolen money contained the amount of coinage she claims was counted. Her story about the retrieval and counting of the money is, in any event, somewhat implausible. It is also unlikely that Mayne could have unloaded the stolen goods as she has described without assistance.

The Plaintiff's financial circumstances

[107] The Plaintiff stoutly maintained in giving evidence that he was not in financial difficulties in December 1994. He said he had access to money if he needed it to get out of trouble and his financial situation was not causing him any stress. His financial difficulties started when his employment was terminated in July 1995, although he acknowledged that prior to that there were "a few problems".

[108] On each of 3 and 25 February 1995 a payment of $3,151.70 was made to Concorde Leasing in respect of the truck used in the trucking business conducted by the Plaintiff apparently in partnership with his wife. The money came from an account of which Mayne was the signatory and which was presumably in his name. The Plaintiff says he arranged the first payment with Sookee and the second with Mayne and that he paid the money back. Mayne said that the Wright's approached Sookee, who then approached him, and that he signed the cheques.

[109] Apparently Sookee was not a signatory to the accounts upon which the cheques were drawn. She said that she had nothing to do with the drawing of the cheques but when she asked Mayne what the cheque of 25 February was for, he told her that it was for the Plaintiff to make a payment on the truck. She said that she did not have control over the business side of matters and that was Mayne's responsibility.

[110] Each of Mayne and Sookee stated that they did not receive any money from the Plaintiff in repayment of the loans.

[111] On 31 March 1995 the Plaintiff and his wife signed an affidavit verifying their statement of affairs pursuant to the *Bankruptcy Act 1966* (Commonwealth). The statement disclosed unsecured creditors who were owed a total of $90,000. The amount owed to secured creditors totalled $244,800. The shortfall after the realisation

of the securities at the values estimated in the financial statement totalled $21,800. The statement disclosed property owned by the Wrights to the value of $8,100.

[112] One of the secured creditors was Concorde Leasing. The Plaintiff leased an Atkinson truck from that company which was used to conduct the trucking business to which I have previously referred. The statement of affairs valued it at $15,000. It sold for $11,500 in circumstances which led to the Plaintiff being convicted of fraud.

[113] The Wrights offered creditors $16,000 payable by 36 equal monthly instalments of $444.44. The funds were to be applied to meeting trustee expenses and then distributed among creditors in full satisfaction of their debts.

[114] The Plaintiff was constrained to acknowledge that the liabilities reflected in the list of creditors in the statement of affairs dated back "well prior to" 27 December 1994.

[115] The Plaintiff's conviction for fraud occurred in these circumstances. On 14 December 2001 he pleaded guilty in the District Court at Southport of having dishonestly obtained $11,500 from Robert Allan Oar between 15 November and 3 December 1997. The Plaintiff was represented by a solicitor and counsel. The offence arose out of his having sworn a statutory declaration to the effect that the truck leased from Concorde leasing he was selling to Oar for $11,500 was unencumbered.

[116] In cross-examination the Plaintiff asserted that he had done nothing wrong but had pleaded guilty because he did not have the money to fight the charge. He sought to suggest he had been told it was in order to sell the truck. I do not accept his evidence on this and the following matters. The Plaintiff said that he could not recollect anything of the sentencing remarks or the sentence which was imposed. He said that this incident did not cause him ay distress "because there was no malice in it, there was no fraud in it, so far as I was concerned. I wouldn't do it to someone (Oar) that I'd known all my life".

[117] In addition to his salary of $30,000 the Plaintiff conducted the trucking business in partnership with his wife, who was also in employment, at least from time to time. The Plaintiff's and the partnership tax returns for the financial years ending 30 June 1993, 1994 and 1995 disclose the following situation.

Year	Party	Income Position	Comment
1993	The Plaintiff	$34,978 (Deficiency)	
1994	The Plaintiff JK & L Wright	$46,646 (Deficiency) $25,448 (Deficiency)	$7,460 distributed to LK Wright

1995	JT Wright Partnership	$16,284 (Deficiency) $19,395 (Deficiency)	$9,697 distributed to LK Wright.

[118] The Plaintiff enjoyed gambling. He and his wife enjoyed playing the pokies. As I have said, he and Mayne went to the casino to talk, to drink, to play the pokies and occasionally the gambling tables.

[119] Bank records in evidence show on 9 September 1994 a $400 cash advance at an ATM at Jupiter's Casino on the Gold Coast and on 18 and 22 September advances of $500 and $200 from an ATM at the Breakwater Casino in Townsville. These are not large sums but the Plaintiff could ill afford them. In any event it is probably that he gambled more than these amounts.

[120] The Plaintiff told Dr Nothling that in 1996 and 1997 he had attended the casino in an attempt to make money. He had no job and he'd never gambled before. The Plaintiff said that he lost thousands of dollars and then, realising what he was doing he stopped gambling.

The nature and extent of the Plaintiff's injuries and disabilities

[121] The Plaintiff claims that as a result of the assault of 27 December 1994 he suffered the following injuries:-

(a) a soft tissue injury to the neck and shoulder girdle;
(b) a soft tissue injury to the spine;
(c) a head injury;
(d) aggravation of an asomatic spondylosis at L-5;
(e) psychological trauma;
(f) chest pain.

[122] It may be accepted, whatever reservations I may have about the Plaintiff's credibility, that he had been assaulted and bound. This is founded on the observations made by the police and at the Southport hospital. In that context it may therefore be accepted that he suffered soft tissue injury to the neck, shoulder girdle and lumbar spine and that he received a blow on the head. There is, in my view, no basis for concluding that these injuries had any long term effect or would have interfered with his earning capacity to any significant extent.

[123] The Plaintiff had a history of angina. The robbery may have triggered an episode however the evidence on the point is sparse. There is no basis for concluding the robbery had any long term effect on his angina or its causes.

[124] The Plaintiff has a history of back problems. In late 1972 he injured his lower back and was off work and received workers' compensation into 1973. During the period from 1980 to 1995 he sought and received chiropractic treatment for back ache apparently attributable to a slipped disc. In 1989 he consulted his general practitioner complaining of back ache for which he was prescribed painkillers and referred for a CT scan of his lower back.

[125] In evidence-in-chief the Plaintiff said his main area of pain following the robbery was to his lower back and neck and that he had not previously experienced any problems in that area. He categorically denied to Dr Morgan, an orthopaedic specialist, that he had any previous problems to his cervical or lumbar spine prior to the robbery.

[126] When pressed in cross-examination the Plaintiff said he didn't recall, or didn't know, if he'd had any medical treatment for any back condition prior to the robbery. It is true that his back problems predated the robbery and the trial. In my view, however, his protestations are not convincing given considerations such as the nature of his occupation, the longevity of his condition and the episodes referred to above.

[127] Dr Morgan, an orthopaedic specialist whose evidence I accept, could not detect any specific neurological dysfunction to explain the Plaintiff's complaints about his back. He was of the opinion that radiographic features referred to in his report were long standing and not specifically related to the robbery. The doctor was uncertain as to the exact nature of any injury which may have been sustained in the region of the Plaintiff's lumbar spine or cervical spine but thought it was possible that he may have sustained some form of minor muscular ligamentous strain injury.

[128] On examination on 26 May 1997 Dr Morgan found a 5 per cent restriction of the Plaintiff's normal bodily function referable to the cervical and lumbar segments of the vertebral column. When given the Plaintiff's back history before the robbery he thought it suggested not all the disability was due to the robbery. The extent to which the robbery contributed to the disability has diminished over time and that any continuing effect has negligible consequences for his disability.

[129] In Dr Morgan's view, "from a purely orthopaedic perspective", the Plaintiff remained capable of the duties required of him as a security guard and as a caretaker.

[130] Dr Yaksich was a neurosurgeon specialising in pain management and a consultative position in rehabilitation medicine who saw the Plaintiff on a referral from his general practitioner in February 1995. CT head scan and X-rays of the dorsal and cervical spine did not show any significant abnormality. Dr Yaksich later obtained X-rays of the lumbar spine which showed a spondylosis effect at L-5 but no slip.

[131] On his first examination Dr Yaksich found tenderness in the neck and shoulder girdle in the lumbar spine and lower thoracic area. The range of cervical and lumbar spine movement was reduced but there was no neurological deficit. He recommended a course of therapy at the Belmont Private Hospital which the Plaintiff undertook.

[132] On 13 September 1995 Dr Yaksich reported to the Workers' Compensation Board that the Plaintiff continued to suffer quite severe backache and limitation of movement and had responded, to some extent, to a course of physiotherapy. He thought it would be unlikely he would be able to return to full-time work but that his condition was not yet stable.

[133] Dr Yaksich last reported on the Plaintiff on 27 January 1996 where he continued to complain of back ache. Dr Yaksich thought the Plaintiff had sustained an injury to his lumbar spine and that he was disabled for the purpose of returning to his former work or heavy work activity.

[134] Dr Yaksich is not very specific as to the nature of this injury but thought the Plaintiff was genuine. He stated that he appeared to suffer from post traumatic stress or psychological changes and recommended that a report be obtained from a psychiatrist Dr Chittendon, who was treating the Plaintiff.

[135] The Plaintiff had not disclosed his history of back difficulties to Dr Yaksich but he thought the Plaintiff's symptoms after 1994 were related to the robbery. When the Plaintiff's back history was put to Dr Yaksich he concluded nevertheless that the symptoms the Plaintiff complains of should be related to the robbery.

[136] Dr Dickenson, an orthopaedic specialist, reported on 12 October 1998 that there was nothing the Plaintiff's history or examination to indicate that he had any orthopaedic impairment but he had somatic symptoms "due to mechanisms which are not of orthopaedic origin" and which were probably addressed in psychiatric or psychological reports. He concluded that the Plaintiff had no objective orthopaedic impairment as a result of the robbery.

[137] I accept the evidence of Drs Morgan and Dickenson in preference to that of Dr Yaksich.

[138] The Plaintiff's general practitioner referred him to Dr Judith Chittendon, a specialist psychiatrist, some time before 23 May 1996. Dr Chittendon continued as the Plaintiff's treating psychiatrist up to trial. The weight to be given to her evidence depends on the reliability of the accounts given to her by the Plaintiff.

[139] In a report of 23 May 1996 Dr Chittendon diagnosed the Plaintiff as suffering from post traumatic distress disorder and in a report of 3 August 1998 as suffering from major depressive disorder considering him to have largely recovered from his post traumatic stress disorder which was the sequelae of his assault.

[140] The major depressive disorder diagnosis was largely as a result of the Plaintiff's pain and physical disability and his "very real psychological distress" as a result of the robbery. She reported on 25 July 2002 that she still considered the Plaintiff to be suffering a major depressive disorder.

[141] Dr Chittendon's assessments reflect a largely uncritical acceptance of the Plaintiff's accounts and in evidence she was supportive of him. Her attitude is explicable from the perspective that she was the Plaintiff's treating psychiatrist but bears on the objective weight to be given to her opinions in this case.

[142] Dr Chittendon downplayed stressors other than the robbery. She did not know, or take into account, the Plaintiff's financial situation. It seems that the Plaintiff did not tell her of his fraud conviction and it seems that she was unaware of or downplayed the extent of his amphetamine abuse.

[143] In my view, her evidence is outweighed by the evidence of Dr Nothling who did not treat the Plaintiff but reported from a psychiatric/medico legal perspective.

[144] Dr Nothling had obtained psychological assessments from Dr Lucielle Douglas who conducted a series of tests and reported a profile of scores reflecting an individual who was acknowledging experiencing elevated levels of emotional distress and disturbance which appeared to be both depressive and anger based in nature.

[145] The profile disclosed indications that there may have been an exaggeration of the level of psychological symptomology. It did not fit the profile of either chronic pain or post traumatic stress disorder patients in terms of the test criteria.

[146] Dr Nothling was of the opinion that the Plaintiff had suffered from an adjustment disorder with mixed anxiety and depressed mood secondary to ongoing complaints of pain and disability following the assault of 27 December 1994.

[147] In Dr Nothling's opinion, the Plaintiff's psychiatric morbidity had been attenuated and exacerbated by his heavy use of intravenous amphetamine from late 1998 to 17 August 2001. There were other stressors operating, some of which related to his being charged with the robbery but others being, for example, his conviction for fraud.

[148] Dr Nothling thought that persecutory traits the Plaintiff described over the previous three and a half to four years would have been significantly contributed to by amphetamine usage.

[149] Dr Nothling had difficulty in accepting Dr Chittendon's diagnosis of major depressive disorder given the Plaintiff's use of amphetamines prior to 25 July 2002 (the report date). The relevant diagnostic criteria excluded the diagnosis of major depressive disorder in a patient using such dosages of amphetamines.

[150] In his report of 16 October 1998 Dr Nothling thought that the Plaintiff had described some features of an Adjustment Disorder with Depressive Mood secondary to his ongoing pain and disability. Dr Nothling considered that the Plaintiff's symptoms as described were not consistent with his appearance at interview and thought that more aggressive therapeutic doses of the antidepressant the Plaintiff was taking would give

better results. He did not regard the Plaintiff's adjustment disorder symptoms as preventing him from working.

[151] Observations of the Plaintiff made after the accident by the club manager Mahoney and the administration manager Cummins suggest that the Plaintiff may have been exaggerating his symptoms after the robbery. On the other hand, the Plaintiff's evidence of the nature and extent of his disability is supported by the evidence of his wife.

[152] I am satisfied that the Plaintiff has exaggerated his symptoms. There is, in any event, a curious circularity about the evidence as to the nature and extent of the Plaintiff's orthopaedic and psychological disability consequent on the robbery in so far as it is said to be die to the robbery.

[153] No doubt the robbery and its aftermath was, in any event, a traumatic experience. The psychiatric assessments are however, in part at least, based on the Plaintiff being in pain consequent on what was done to him in the robbery. The orthopaedic evidence which I have accepted does not support the conclusion that the pain of which the Plaintiff complained is orthopaedic in origin.

[154] On the other hand, the psychiatric reports do not identify any other mechanism. From a psychological point of view the Plaintiff was subjected to stressors unrelated to the robbery both before and after it occurred. These include, for example his financial situation, the circumstances leading to his conviction for fraud, his and his wife's being arrested and charged with the robbery. After the robbery he was, for a time, a heavy amphetamine user and gambler. He borrowed heavily from his family.

[155] On the view I take of the evidence the effect of the robbery was short term. The Plaintiff has not established that his ongoing orthopaedic and psychologically based complaints are a consequence of the robbery. It is impossible to disentangle the effects of the robbery from the other psychological stressors.

[156] Because of the view I take of the Plaintiff's credibility I am not able to take these findings further.

The Plaintiff's credibility

[157] As I have indicated I do not accept the Plaintiff as a credible witness.

[158] He was not truthful about his financial difficulties before and after the accident. The Plaintiff was in financial difficulties before the robbery. It contributed little to the bankruptcy reflected in the affidavit of 31 March 1995 verifying the statement of affairs.

[159] The payments made to Concorde Leasing on 3 and 25 February 1995 by Mayne support that view. Although the question of a relationship between the conspiracy and those payments is a matter of speculation rather than inference the evidence about the payments give rise to more questions than answers. The Plaintiff must know the answers. He did not repay the money.

[160] The Plaintiff's conviction for fraud on 14 December 2001 casts a significant shadow over his credibility. He was prepared to resort to fraud when it was in his financial interests and his attempts to justify and explain the conviction are, at best, for him extremely dubious.

[161] The objective medical evidence which I accept does not support the conclusion that the Plaintiff suffered injuries and consequent disabilities as a consequence of the robbery to the extent to which he claims.

[162] The Plaintiff was not frank about his back disabilities prior to the accident or open in the disclosures that he made to medical practitioners. For example, he did not reveal or downplayed his amphetamine use. He did not disclose the fraud conviction; he lied about or concealed the nature and extent of his gambling activities.

[163] I have not accepted his evidence about complaints to Mahoney or his request to Kikkert. Those are events directly linked to the robbery.

[164] I do not suggest that this is a comprehensive restatement of the factors bearing on the Plaintiff's credibility canvassed in the course of these reasons. Nor do I suggest that any particular factor is decisive. My view on the Plaintiff's credibility is a consequence of the view that I take of the whole of the evidence.

[165] I have taken into account the submissions on the Plaintiff's behalf that his evidence is supported in important respects by the evidence of his wife and Mayne that he was, if complicit in the robbery subjecting himself into risk of physical injury and that some of the steps taken attributed to the conspiracy may not have been apt. Those considerations notwithstanding I am not prepared to accept the Plaintiff as a credible witness.

[166] The considerations being those I have canvassed, subject to any further submissions which might be made in respect of the admission consequent upon the operation of r 166, the action should be dismissed.