

SUPREME COURT OF QUEENSLAND

CITATION: *Sapwell v Lusk & Anor* [2010] QSC 344

PARTIES: **MICHELLE ELIZABETH SAPWELL**
(plaintiff)

v

**ADAM PAUL LUSK and ELIZABETH LUSK trading as
CLARITY BY GERBER & LUSK OPTOMETRISTS**
(defendants)

FILE NO/S: SC No 8309 of 2008

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 September 2010

DELIVERED AT: Brisbane

HEARING DATES: 16-18 August 2010

JUDGE: Atkinson J

ORDER: **Judgment entered for the plaintiff in the net sum of
\$390,558.82.**

CATCHWORDS: EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – CAUSATION AND FORESEEABILITY – FORESEEABILITY – where plaintiff was employed by the defendants as an optical technician in an optometry shop – where plaintiff worked alone during daylight hours and would repair spectacles in the shop’s back room obscured from view – where plaintiff had limited view of the front section of the shop when in the back room – where the back room was not installed with any device to prevent people from following the plaintiff in to the back room or to alert the plaintiff to the presence of an intruder – where plaintiff was sexually assaulted by a customer when she was in the back room repairing his spectacles – where plaintiff claimed that she had a history of child sexual abuse and developed severe post traumatic stress disorder, depression and anxiety following the assault – whether the risk of injury to the plaintiff was foreseeable

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where plaintiff was employed by the defendants as an optical

technician in an optometry shop and was sexually assaulted by a customer when she was alone at work – where plaintiff developed severe post traumatic stress disorder, depression and anxiety following the assault – where employer owes a duty of care to employees to provide a safe system of work – where employer owes a duty of care to employees to take reasonable care to protect employees from the criminal behaviour of third parties – whether defendants breached their duty to take reasonable care to avoid the foreseeable risk of injury to the plaintiff

Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355, cited
Koehler v Cerebos (Australia) Ltd [2005] HCA 15, cited
Makita (Aust) Pty Ltd v Sprowles [2001] NSWCA 305; 52
 NSWLR 705, cited
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000]
 HCA 61; 205 CLR 254, cited
Wyong Shire Council v Shirt [1980] HCA 12; 146 CLR 40,
 cited

COUNSEL: W Campbell with A Williams for the plaintiff
 M Grant-Taylor SC with M O’Sullivan for the defendants

SOLICITORS: Keddies Lawyers for the plaintiff
 McInnes Wilson Lawyers for the defendants

- [1] The plaintiff, Michelle Sapwell, was an experienced optical technician who, in 2005, was employed at an optometry practice owned and operated by the defendants, Adam Lusk and Elizabeth Lusk. The optometry practice was known as Clarity Optometrists (“the shop”) and was situated in a pleasant neighbourhood strip shopping area in Nash Street, Rosalie, an inner suburban area of Brisbane. The shop was relatively new and not particularly busy. As a result, Ms Sapwell was often there on her own during her working hours which, at the time of the incident referred to in this judgment, were 10 am to 6pm, Tuesday to Friday. While there were security measures in place to protect the shop overnight, no particular security measures were in place to protect the safety of employees of the shop during the day time. Cash of up to about \$500 or \$600 was kept on the premises during the day in an unlocked drawer.
- [2] The optometry practice tested eyes and sold prescription spectacles (“glasses”), sunglasses and contact lenses. Ms Sapwell was responsible for ordering and controlling stock and serving customers. In addition, it was common for glasses to be repaired free of charge both for customers to whom they had been sold and for other customers who came in to the shop. It was part of Ms Sapwell’s duties to attend to those repairs.
- [3] One such customer was a man of about 70 years of age who attended about once a week with his wife to have his glasses repaired. Ms Sapwell did not at that stage know his name. One day he came into the shop accompanied by his son rather than his wife. That day was Friday 14 January 2005. Ms Sapwell was not able to repair his glasses immediately so she asked him to leave them with her. The son gave Ms Sapwell his father’s name and phone number so his father could be contacted when

the glasses were repaired. The name, which she wrote on a piece of paper, was “Mr Bart”. She repaired the glasses and left them with a note for the optometry student who worked in the shop on Saturdays. Mr Bart’s glasses were gone when she returned to work after the weekend so she assumed they had been returned to him.

- [4] The next time Ms Sapwell saw Mr Bart was on Tuesday 18 January 2005 when she returned to work after the Friday when she had last seen him. At about 5pm he entered the shop. This time, for the first time, he was alone. Ms Sapwell was also on her own. Earlier in the day, Elizabeth Lusk, the optometrist, had been in the shop seeing patients but she had left at about 4pm.
- [5] Mr Bart wanted his glasses fitted. In accordance with her usual practice, Ms Sapwell came out from behind the reception desk, where she normally sat, to check the glasses on his face. An optical technician typically stands in front of a customer to fit the glasses on the customer’s face. This was done by Ms Sapwell in the reception area of the shop which has a frontage onto the street with large glass windows affording an unimpeded view from the shop to the footpath and street and from there into the shop.
- [6] Once Ms Sapwell fitted the glasses, she went into the back section of the shop to effect the necessary repairs. The area where repairs were conducted was immediately behind the reception desk. It was accessed by a corridor which led to the room in which were stored, *inter alia*, the tools for repairing glasses and a bench on which to do the work. There was a wall behind the reception desk which formed the front wall of the back section. That wall had a window in it which was predominantly frosted glass with 5 slits of clear glass. The frosted glass sections were each 15 cm and the slits of clear glass were 1 cm. The entry to the back section could not be shut or locked as there was no door to that area. There was no view into the back section from the reception area or footpath or street but some limited vision from the back section into the reception area of the shop.
- [7] When Ms Sapwell went to the back section with Mr Bart’s glasses, she put them on the bench, took the appropriate tools out of a drawer where they were kept and bent over the glasses to repair them. She was unaware that Mr Bart then followed her into the back section of the shop. He placed his hands on her hips and she felt some gyrating behind her. He then cupped his hands on her breasts. She told him to “fuck off” or words to similar effect, pushed past him and fled to the reception area of the shop. He followed and bizarrely engaged in normal conversation as if nothing had happened. A female customer came into the shop and Mr Bart left, turning his head in an apparent attempt to hide his face.
- [8] Ms Sapwell was shocked and bewildered. As she said in evidence, it gave her “a hell of a fright.” She served the female customer and another, as she said she was just “going through the motions.” After the last customer left she broke down and started shaking. She locked the front door to prevent her assailant from coming back in to the shop and called the police. She did not wish to stay there so arranged for the police to come to her house that night.
- [9] That night Ms Sapwell’s husband, Danny Sapwell, rang Ms Lusk both before and after the police visit and told her what had occurred. The next day, Ms Sapwell went in to the police station and gave a statement. A police report recorded that while giving the statement Ms Sapwell became quite distressed, “advising that she

was a previous victim of indecent assault as a child and this brought back numerous bad feelings.” That statement was not admitted as evidence of the truth of its contents but as evidence that that was what Ms Sapwell told the police officers taking the statement. She was still suffering from the initial shock of the assault and in her distress connected it with “bad feelings she had had as a child”.

- [10] I have had the advantage of seeing a DVD of a record of interview conducted by two police officers with “Mr Bart”. He gave his full name as Brian Phillip Bartholomaeus. He was accompanied in the interview by his wife. He was a seventy year old man who was a retired accountant. He was a tall, well dressed man who expressed regret for what he had done. His account substantiated the complaint made by Ms Sapwell. His wife told the police that he suffered from progressive supra nuclear palsy. This obviously affected his capacity to control his urge to sexually molest the plaintiff when she was vulnerable, concentrating on repairing his glasses out of sight of the public. He told the police that he knew that what he did was wrong.
- [11] Dr Mulholland and Dr Varghese, who were the expert witnesses called by the plaintiff and the defendant respectively, viewed the DVD. Dr Mulholland described him as an unwell elderly man who, while not suffering from dementia, was dementing. He thought that it was likely that the assault was impulsive rather than premeditated and that therefore it was possible, although less likely, that he could have assaulted Ms Sapwell in a similar manner when she was undertaking the adjustment of his glasses in the front area of the shop rather than the back room. Dr Varghese’s observations were to much the same effect.
- [12] While taking account of the fact that he was dementing which reduced his capacity to control his actions, I have reached the conclusion that, as he knew that assaulting Ms Sapwell was wrong, he took advantage of the opportunity to assault her when she was out of sight of the public and more vulnerable. She did not face the same risk of assault from him, or indeed anyone else, while she was in public view.
- [13] The event has had a number of tragic consequences. Mr Bartholomaeus was charged, but died just days before the matter was due to be heard in the District Court. Ms Sapwell has suffered psychological injuries as a result of the assault which has caused great suffering and affected her ability to work.
- [14] The events as so far related are not in dispute. What is in dispute is the extent of the injury caused to Ms Sapwell by the incident and whether her employer is liable for the injury caused to her.

Events after the assault

- [15] On the day after the incident, on 19 January 2005, after attending at the police station, Ms Sapwell saw her general practitioner, Dr Jo-anne Stanley. She told Dr Stanley what had occurred at work, was clearly in great distress and told Dr Stanley that the assault had brought back memories of being molested when she was very small. Dr Stanley prescribed an anxiolytic drug, Frisium, and referred her to a counsellor, Anne Allan. She issued a medical certificate for Ms Sapwell to be absent from work from 19 to 27 January 2005.
- [16] The evidence as to treatment provided by Ms Sapwell’s medical practitioners and sexual assault counsellor is admitted not as expert evidence under Part 5 of the

Uniform Civil Procedure Rules 1999 (UCPR) but rather under r 424(1)(c) of the UCPR which provides that Chapter 11 Part 5 does not apply to:

- “(c) a doctor or another person who has given or is giving treatment or advice in relation to an injured person if the evidence is limited to 1 or more of the following matters in relation to the injured person—
- (i) the results of any examination made;
 - (ii) a description of the treatment or advice;
 - (iii) the reason the treatment or advice was, or is being, given;
 - (iv) the results of giving the treatment or advice.”

- [17] Ms Sapwell was quite incapacitated by her reaction to the Frisium she had been prescribed and did not return to work till Thursday 27 January 2005. She returned to work as she was concerned as to how her employers would cope if she did not attend work. The optometry student who usually worked on Saturdays came in to work on that day so that she would not be alone.
- [18] Ms Sapwell’s memory of how she coped on her return to work has been affected by the sedating drugs she was taking at the time. However she does remember that she did not cope well as she was nervous and “jittery and jumpy”. She was very uncomfortable touching customers. She was not left to work on her own.
- [19] Ms Sapwell first saw Ms Allan on 24 January 2005. Ms Sapwell’s evidence, which I accept, was that she was completely honest about her history of sexual abuse with Ms Allan and with Dr White, a psychiatrist who subsequently treated her; but guarded and less forthcoming when she spoke to other medical practitioners.
- [20] Ms Sapwell worked again on Friday 28 January 2005. On that day Adam Lusk, who was also an optometrist and with his wife, Elizabeth Lusk (nee Gerber), owned and operated the shop, attended so that Ms Sapwell was not alone in the shop. Ms Sapwell saw “Mr Bart” passing the shop. She knew that the police had not been able to contact him so she ran out of the shop and tried to follow him in her car to find out his address but she lost him. She then retrieved Mr Bart’s details from the piece of paper containing his name and phone number which had been discarded in the rubbish bin.
- [21] On 2 February 2005, Ms Sapwell lodged an application for compensation with WorkCover Queensland (WorkCover). Thereafter WorkCover paid for the medical treatment she received.
- [22] On 23 February 2005, Ms Sapwell was seen by a psychologist, Peter Jordan, to whom she was referred by WorkCover for interview and assessment. He recorded the results of his examination of her by relating the history which he took from her including her feelings of anger, guilt and confusion that the assault had caused her such a severe psychological reaction. He observed that from the account provided to him there had been no non-work stressors which had contributed to the onset of her anxiety and negative mood symptoms. She had experienced stressors outside her work environment, such as her husband having been gravely ill and having been retrenched (although he swiftly gained another management position), a number of failed pregnancies and abandonment by her mother when she was five years old, as well her father telling her she had been sexually abused as a child, but they did not

appear to have contributed to her then current symptoms although the earlier sexual abuse had made her vulnerable to the possibility that any further episodes of sexual abuse would trigger repressed memories or images of sexually abusive trauma and associated traumatic anxiety.

- [23] Ms Sapwell told Dr Jordan she was aware that she was sexually abused at the age of 5; her father had told her this. She was also aware that she had been hospitalised and that this hospitalisation was in relation to the sexual abuse. Since the assault, she had experienced images of the abuse that occurred to her when she was a child. She told Dr Jordan that prior to the assault she had experienced no recollections of being abused as a child.
- [24] She also told Dr Jordan that the day after the assault she had a memory of being sexually abused when she was aged 5. The assault on her by Mr Bart had caused her to vividly experience those details “like a movie”. She said she had always known that she was sexually abused as a child but was unaware of the details. She said she was aware that she was hospitalised as a result of the earlier assault and that the information was common knowledge within her family.
- [25] She described to Dr Jordan symptoms of being weepy daily, irritable, restless and agitated and frightened of being home alone and sensitive to noises and smells and prone to panic attacks. She experienced a range of “avoidance symptoms” including being reluctant to tell others what had happened, avoiding social contact and experiencing some sexual inhibition with her husband. Dr Jordan diagnosed her as suffering from post traumatic stress disorder, acute and major depressive disorder, single episode, mild severity.
- [26] On 28 February 2005, Ms Sapwell’s medication was changed from Frisium to Efexor to which she had an unfortunate reaction.
- [27] On 21 March 2005, Ms Sapwell again saw her general practitioner. She was not sleeping well and was having flashbacks and feeling very jittery. Dr Stanley advised her not to work for a couple of weeks to see how she felt then. Ms Sapwell expressed concern that it would be difficult for the practice if she were to take sick leave. Ms Sapwell saw Dr Stanley again on 23 March and was given a medical certificate for a day off work. Ms Sapwell knew that Mr or Ms Lusk would be in attendance at the shop and so on medical advice was absent on 23 and 24 March, the two days before Easter.
- [28] Ms Sapwell returned to work on Tuesday 29 March after the Easter break and continued to work through until 28 April 2005. On that day, which was the day before Mr Bartholomaeus’s first appearance in court, Mr and Mrs Bartholomaeus stood outside the shop and stared at Ms Sapwell. She was at work on her own. She panicked and locked the door to the shop. She left and did not return. Except for the recent work referred to later in this judgment she has not worked since.
- [29] WorkCover referred Ms Sapwell to a psychiatrist, Dr Michael Beech, for an independent report. After giving an account of the assault at work which is consistent with her evidence and all of the other accounts given to various medical practitioners and the police, she told Dr Beech that while giving her statement to police she suddenly “started screaming, crying and carrying on”. She told him that she had known that she had been molested as a child but had not prior to that been able to remember the details. When giving her statement she abruptly experienced

the phenomenon of remembering the details of the abuse “like watching the movies all of a sudden.” She told him that the flow of memories continued intrusively for some time.

- [30] She related to Dr Beech her symptoms of anxiety and social withdrawal which culminated on the occasion when Mr and Mrs Bartholomaeus stood outside the shop. She told Dr Beech that since then she had been unable to return to work and remained anxious and sad, with continuing panic attacks, tearfulness and broken sleep and strange dreams.
- [31] Dr Beech diagnosed her as suffering from post traumatic stress disorder and a major depressive episode, which was in partial remission. He reported to WorkCover that her symptoms were for the most part attributed to the assault at her workplace.
- [32] Ms Allan treated Ms Sapwell regularly. By 1 July 2005 they had 21 consultations, that is about once a week. On 1 July 2005, Ms Allan noted Ms Sapwell’s symptoms as sleep disturbance, nightmares about the traumatic event, dissociative states, flashbacks, nausea, tiredness, withdrawal, depression, flat affect, teariness, generalised irritability and specific anger, loss of passion, enthusiasm and direction, and panic attacks. Ms Allan reported to WorkCover that Ms Sapwell’s condition was preventing her from returning to work.
- [33] From 20 January 2006, Ms Sapwell also received treatment from a psychiatrist, Dr Lyndall White. Dr White increased Ms Sapwell’s medication to 250mg Luvox (fluvoxamine) nightly. Luvox is an anti-depressant. She also prescribed 1-2 x 25mg Seroquel (quetiapine) nightly. Seroquel is an anti-psychotic drug. That medication is not covered by the pharmaceutical benefits scheme for this use and so is expensive. It has a very sedating effect making it hard for her to operate efficiently in the morning. She also takes a benzodiazepine, serapax (oxazepam) as needed.
- [34] On 21 March 2006, Dr White reported to WorkCover in response to its request for a comprehensive clinical report that she had diagnosed post traumatic stress disorder, moderately severe and chronic, and major depressive disorder, moderately severe and partially treated. She had seen Ms Sapwell four times by then. Dr White expressed the view that Ms Sapwell was not then fit for work in a full time capacity.
- [35] Dr White related a history given to her by Ms Sapwell of previous adverse life events suffered by Ms Sapwell. These included the intra uterine foetal death or neonatal death of six babies in five pregnancies with one live birth giving her and Mr Sapwell a much loved son. In addition she gave a history of being repeatedly sexually assaulted as a child and adolescent by sequential male partners of Ms Sapwell’s mother. These assaults continued until Ms Sapwell was about 21 years of age. Nonetheless Dr White observed that notwithstanding her complicated history of sexual abuse and bereavement, at the time of the sexual assault in the shop, Ms Sapwell was functioning at a high level personally, occupationally and within her family unit. Dr White recommended that Ms Sapwell attend the Cognitive Behavioural Therapy Unit (CBTU) program at the Belmont Private Hospital.
- [36] Ms Sapwell attended the Belmont Private Hospital as recommended and was discharged on 22 September 2006. The summary sheet for the CBTU program after the program had been completed showed that Ms Sapwell’s depression before the program was moderate, but after the program was extremely severe; her anxiety was

extremely severe both before and after the program; her social functioning was very good both before and after the program; but her social anxiety remained severe.

- [37] On 27 October 2006, however, Dr White reported to WorkCover that Ms Sapwell had benefited from attendance at the Belmont Private Hospital and changes in her medications which were addressing her prominent anxiety symptoms, together with depressive symptoms and previous marked insomnia. Dr White had increased her dose of Seroquel to 75-100 mg nightly. She thought that Ms Sapwell might be well enough to return to employment in 2007 in a situation where she could use her technical skills as an optical technician but without any customer contact for at least 12 months. She gave a diagnosis of post traumatic stress disorder and major depressive disorder, both moderately severe, chronic and partially treated.
- [38] On 5 February 2007, Ms Sapwell's husband was himself assaulted at work and suffered severe physical and psychological symptoms caused by a head injury. He has, according to Ms Sapwell, now recovered well but has not returned to work.
- [39] Dr White told WorkCover on 7 March 2007 that this had led to an exacerbation of Ms Sapwell's post traumatic stress disorder. She said she would need ongoing support and possible attenuation of her treatment whilst her husband underwent extensive rehabilitation.
- [40] On 18 September 2007, Dr White reported to WorkCover that Ms Sapwell had become much more distressed, anxious and depressed and had been her husband's carer and support after his injury; but that in the three months before she was seen in early September she had once again improved. In December 2007, Ms Sapwell told Dr Mulholland that she was in effect her husband's full time carer. However, she also told him that while her husband's assault had set her back she had been improving again over the past six months.
- [41] Dr White thought that if Ms Sapwell continued to improve it was likely that she could commence a graduated return to work in about a year. Before Mr Sapwell's injury Dr White thought that Ms Sapwell could commence a graduated return to work in 2007 so it appears that her husband's injury delayed that for about 18 months.
- [42] Dr White stressed however that Ms Sapwell had highly specialised skills that would make her placement in employment difficult particularly as, in Dr White's opinion, she should not be placed in a situation where she was alone and required to attend to customer service.
- [43] In October 2007, Ms Allan reported that the assault on Mr Sapwell had exacerbated Ms Sapwell's symptoms. In addition she was providing emotional and physical support to him. Ms Allen reported that Ms Sapwell was also struggling to cope with "horrific sexual and emotional abuse and neglect as a child."
- [44] This case presents a number of conundrums. To what extent did she tell the whole story to the various medical practitioners who examined her? What effect did this have on her credibility? What is the effect on her now of the various adversities she has suffered both before and after the assault? Was she sexually abused as a child and young adult? If not, what impact does that have?

- [45] Ms Sapwell was living a stable well-adjusted life at the time she was assaulted. She had a long and happy marriage. She had coped with the adversities life had given her with fortitude and resilience. That changed after, and as a result of, her being assaulted at work. She lost her sense of security. It was not only that she was sexually assaulted but also that she was surprised by Mr Bartholomaeus coming to the secluded back section of the shop to carry out his assault.
- [46] She had dealt with her childhood unhappiness by filing it away and trying to forget it. She did not tell her husband about the sexual abuse that she later told Ms Allan and Dr White she now believes she endured as a child and young adult. She says she disclosed this abuse to a counsellor and a psychiatrist whom she trusted. It is perhaps unsurprising that she was less willing to discuss these aspects of her life with doctors whom she saw only once or twice. She gave evidence, which I accept, that she found it very embarrassing to discuss such intimate matters with medical practitioners with whom she had not developed a trusting patient/doctor relationship. This view was supported by Dr Varghese's evidence that he was reluctant to press her for details of the sexual assault as he was a male doctor and they were alone. Dr Mulholland also reported that he chose not to take her through the circumstances of the workplace assault as there was an abundance of evidence about it and he did not wish to re-traumatise her. In cross-examination Dr Mulholland said that it is a daunting prospect for a person to reveal all such information in one or even two consultations even though psychiatrists try to put them at their ease.
- [47] Her evidence is therefore entirely credible that her complete disclosures were only made to the two female practitioners, one a counsellor and one a psychiatrist, whom she saw on a number of occasions and with whom she had developed a trusting clinical relationship.
- [48] In addition I have had the advantage of seeing and hearing Ms Sapwell give evidence. While not over-estimating the advantage that this gives a trial judge, she appeared to be a generally truthful witness. She was obviously daunted by giving evidence and reluctant to talk about the sexual assault or assaults upon her in such a formal environment. She also appeared to be unwell and struggling with panic attacks as she gave evidence. Mr Grant-Taylor conducted a skilful forensic cross-examination of her and exposed some weaknesses and inconsistencies in her evidence for which she was able to give adequate explanations.
- [49] Her evidence as to her memory of the sexual abuse she believes she suffered as a child was that she had never forgotten that she had been abused, but that she filed it away and did not tell people about it. This included her husband. She coped by keeping herself busy and not thinking about it. Her counsel, Mr Campbell, did not closely question her about those childhood experiences but rather had her adopt Dr Mulholland's summary of those events which was based on what she told him.
- [50] She gave evidence that she remembers being hospitalised at the age of 5 after an assault; she recalled her birthday occurring while she was in hospital. Her parents divorced soon after that and her father was awarded custody of the three children. She stayed with her mother from time to time and was assaulted by her mother and male partners of her mother. This happened in two phases: firstly when she was a child and then subsequently in her late teenage years until the age of 21.

- [51] In cross-examination about this matter, she said that she always remembered some details of the sexual abuse of her as a child but not all of the details until after the assault when the memories became more vivid. I accept that this is the current state of her memory. The expert evidence was, however, useful in understanding how she came to have these traumatic memories.

Expert evidence by psychiatrists

- [52] Expert evidence was given pursuant to Div 2 of Part 5 of Chapter 11 of the UCPR by Dr Peter Mulholland in the plaintiff's case and by Dr Francis Varghese in the defendant's case. Both are experienced forensic psychiatrists with a sophisticated understanding of their duty to assist the court rather than advance the interest of the party calling them and their evidence was helpful in understanding the complexities of Ms Sapwell's symptoms, history and diagnosis.
- [53] Dr Mulholland's evidence in chief was provided by way of three reports, dated respectively 20 December 2007, 22 September 2009 and 23 September 2009. In addition the defendant's solicitors made a diary note of a conversation with Dr Mulholland signed by him on 6 October 2009.
- [54] In his first report, Dr Mulholland diagnosed Ms Sapwell as becoming psychiatrically ill as a result of the assault on her on 18 January 2005. She had developed post traumatic stress disorder and a major depressive disorder. Additionally the sexual assault activated issues deriving from childhood sexual abuse which had been previously suppressed or repressed.
- [55] With regard to the childhood abuse, she told Dr Mulholland that she was a victim of extreme levels of sexual abuse from when she was 3 or 4 years until she was 20 or 21 years which involved her mother as an offender, instigator and organiser of others to sexually abuse her. Her customary coping style was denial and avoidance which had worked well until she was assaulted in the work place. She did not tell him that prior to the sexual assault she had no memory of the childhood sexual abuse, but rather that she had developed strategies for shutting it out of her mind.
- [56] Dr Mulholland described her main psychiatric symptoms as profound re-experiencing phenomena including intrusive preoccupations and memories and flashback type experiences of severe childhood abuse which for the most part she had previously dealt with by denial and avoidance. She was also intensely distressed, extremely agitated, suffering from hyper-arousal, extremely teary, preoccupied with the assault in question, extremely depressed, suicidal to the extent that she had to stop driving her car because of the risk of suicide. She used uncharacteristic obscene language, engaged in self mutilation behaviour including chewing her hands and damaging her fingernails and the skin around them, suffered from a compulsion to buy toilet paper, and had obsessions and compulsions regarding security issues. She needed to have the television on at all times, 24 hours a day. She had marked insomnia with difficulty getting off to sleep and inability to stay asleep with frequent waking and inability to get back to sleep and then early morning waking, all resulting in her being chronically fatigued. She stopped caring for herself and often wanted to stay in bed all day doing nothing. She had cycles of binge eating and under-eating which resulted in her weight going from 58-60kg to 84kg and then back to 76kg. She ground her teeth and suffered from broken teeth as a result. She suffered from panic attacks in the car and when

out and about and consequently had to stay at home. She was unable to answer the telephone. Her relationship with her husband was stressed and strained and she ceased customary social and recreational activities. She had marked concentration and ongoing memory problems. She suffered from a complete loss of confidence and self-esteem. She was unable to work because of psychological problems.

- [57] In Dr Mulholland's first report, his prognosis was that there was about a one-third chance that her condition would stabilise at its then unsatisfactory level and that was not going to get much better despite treatment; a one-third chance that her condition would improve to a moderate degree with her being left with fairly significant symptoms but able to cope with difficulty; and a one-third chance that her symptoms would improve substantially and she would be able to function reasonably well in life with only minor difficulties.
- [58] In his second report, Dr Mulholland concluded that Ms Sapwell continued to be psychiatrically ill, with post traumatic stress disorder and major depressive disorder. Her condition had improved and she was in partial remission; but she had stabilised out at an unsatisfactory level. Her treatment would need to continue for the indefinite future and she also needed to continue using Seroquel which did not come under the pharmaceutical benefits scheme for her condition.
- [59] So far as her returning to work was concerned, Dr Mulholland thought that she might be able to return to work in a back room situation although he thought it was unclear whether she would be able to cope. After viewing the videotape of the record of interview with Mr Bartholomaeus he concluded that since the offence occurred in the back room of the optometry practice, it would not be appropriate for her to return to work in such a situation where the public had ready access. In his second report Dr Mulholland also mentioned that a return to work was not realistic in view of her increasing age which restricted her options and her role as a carer for her husband. There are multiple causative factors of her inability to work but his view was that the assault made her unable to work in a customer service role or anywhere where the public had access. This was the work that she was trained to do and in which she would have continued had she not been assaulted.
- [60] In his oral evidence, he added that he thought that the medications she was prescribed by her treating psychiatrist strongly suggested that she was thought to be suffering from very significant psychiatric illness. Seroquel is usually an antipsychotic drug but in this case was used to lessen emotional reactivity and relieve panic attacks. He thought it likely that she would continue to need that medication but agreed that it was likely to have a marked sedating effect. Dr Varghese said he would defer to her treating psychiatrist as to the need for the Seroquel.
- [61] Dr Varghese's evidence in chief was provided in the form of two reports dated 17 July 2008 and a diary note dated 9 June 2010.
- [62] He reported that Ms Sapwell told him that the assault upon her by Mr Bartholomaeus had "opened up the flood gates". She told him that while giving her statement to the police she remembered being sexually assaulted as a child. Prior to the assault in the shop she told him that she had "no memory" of the childhood sexual assault although she had odd dreams and when she was unable to sleep or was nervous about sleeping she coped by keeping busy. She said she kept files in

her head which she did not open so that they would not intrude on her consciousness. She said she would “shut down the doors” if she did not feel safe. Ms Sapwell told Dr Varghese that she “felt like she was watching a movie”: she had a vivid memory of the first time she was sexually abused when she was 3 years old. She subsequently disclosed her sexual abuse in childhood to Ms Allan. She also told Dr Varghese that although she had no memory of the sexual abuse she suffered as a child until the recent sexual assault, she knew she had been molested “because she always remembered the first incident in the dream.” She said she knew she had been molested because she “had a feeling”. She asked her father several times whether she had been molested but “he gave no answer” and refused to talk about it. She said her older brother “also thought this” and eventually she “learnt not to talk about it.”

- [63] Dr Varghese said that her account of her psychiatric difficulties was quite curious and most unusual. He was, he said in evidence, sceptical that she could have forgotten entirely the childhood sexual abuse as she told him she had. That was not consistent with what is known about memory and research in this area. His opinion was that her memories may well be an artefact of therapy. He suggested that the escalating accounts were an effect of a particular kind of therapy which places emphasis on childhood sexual abuse as a cause of adult psychiatric disorder.
- [64] He explained that if she had a lot of therapy, as she had, which reflected on the past where the aim is to remember what happened in the past and deal with it then she might develop a sense of belief that she remembered it all along. He said that if the therapist has a world view that problems are a result of sexual trauma in childhood then the therapist can seek to find it, that it is the great secret behind the pathology, and therapy can create false memories in that way. It is my conclusion that this is probably what has happened in this case. The fact that the traumatic memory is an artefact of therapy rather than a true memory does not unfortunately change the prognosis. As Dr Varghese observed, the artefact causes the same symptoms of post traumatic stress disorder as if the memories were of real events.
- [65] Dr Varghese said that she described quite serious psychological decompensation following the sexual assault at work. He observed that while objectively it was not the most serious sexual assault, any woman would have found the assault very distressing particularly as she was assaulted at her workplace where she would expect to be safe, she was assaulted by an older man who looked entirely respectable and she was taken by surprise. He said that it was foreseeable that someone receiving treatment for such an assault might develop the artefact of therapy, being extremely traumatic memories of childhood assaults that did not in fact happen.
- [66] He observed that the sexual assault and subsequent developments would have precipitated major depression or aggravated it if it was already present. He noted that the severe assault and subsequent illness of her husband would have aggravated and prolonged the depression. He thought that her major depression was now in remission but she continued to suffer from dysthymic disorder with some associated anxiety which was of multi-factorial origin.
- [67] In the result, it does not matter whether her trauma from the sexual assault which led to her need for treatment has given rise to memories of childhood sexual abuse which did or did not in fact happen. The result has been the same: she suffers from

a post traumatic stress disorder and on the majority of medical opinion, a serious depression from which she continues to suffer the effects. This was, on the expert evidence I accept, caused by the assault and was a foreseeable consequence of it.

Was the employer negligent?

[68] It is uncontroversial that an employer owes a duty of care to employees and that the defendants owed a duty of care to Ms Sapwell. That duty required the defendants to take reasonable care to avoid the foreseeable risk of injury to the plaintiff. If they did not, then they were in breach of their duty of care to Ms Sapwell. The legal test was aptly stated by Mason J in *Wyang Shire Council v Shirt* [1980] HCA 12 at [14]; (146) CLR 40 at 48:

“In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of **the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.** It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.” (emphasis added)¹

[69] In order to be foreseeable, it does not have to be probable that a risk of injury will occur. It is sufficient that it is that the risk is not far fetched or fanciful. It is not far fetched to suggest that a woman working alone in close customer contact, even in an apparently pleasant suburban setting, is vulnerable to assault particularly if the performance of her duties take her to a part of the premises which is not visible to passing traffic and yet is unable to be secured.

[70] In this case Ms Sapwell was in that position and the concentration on the task of repairing the glasses impeded her capacity to be watchful for her own safety. The risk of injury to her was foreseeable.

[71] The duty of an employer to take reasonable care to protect employees from the criminal behaviour of third parties, random and unpredictable as such behaviour may be, was recognised by Gleeson CJ in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61 at [26]; 205 CLR 254. His Honour referred with approval to *Chomentowski v Red Garter Restaurant Ltd* (1970) 82 WN (NSW) 1070, *Public Transport Corporation v Sartori* [1997] 1 VR 168 and *Fraser v State Transport Authority* (1985) 39 SASR 57. The employers were, in each of those cases, found liable for the injury to their employees from the criminal act of a third party because of their failure to implement a safe system of work in circumstances where it was foreseeable that their failure to do so exposed the employee to an increased risk of injury. It is the very nature of the non-delegable duty of care of an

¹ Recently upheld by the High Court in *New South Wales v Fahy* [2007] HCA 20; (2007) 81 ALJR 1021.

employer to his or her employees that give rise to that duty which does not exist in the ordinary neighbour situation where there is no general duty to prevent third parties doing harm to another.

[72] The source and content of the employer's duty to the employee was set out in some detail by McColl JA in *Gittani Stone Pty. Limited v Pavkovic* [2007] NSWCA 355, whose analysis I gratefully adopt as apposite to this case. Her Honour referred to the statement of the duty by Gleeson CJ in *Modbury Triangle* and then continued with regard to the employment situation at [135] – [143]:

“[135] In *New South Wales v Lepore* [2003] HCA 4 at [2]; 212 CLR 511, Gleeson CJ referred to paragraph [26] in *Modbury* to describe the relationship between a school authority and pupil as ‘one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal’. His Honour's remarks clearly also encompassed the relationship of employment.

[136] The reason the employer is subject to that exceptional obligation is because of the heavy burden imposed on employers to take reasonable care for the safety of their employees.

[137] An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risk of injury: *Czatyрко v Edith Cowan University* [2005] HCA 14 at [12]; (2005) 79 ALJR 839. That non-delegable duty is ‘a duty ... of a special and ‘more stringent’ kind’: *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

[138] In *New South Wales v Lepore*, McHugh J at [144] explained that:

‘When a duty is non-delegable, the person owing it must ensure that the duty is carried out. If the duty is to take reasonable care of some person or property, the person must ensure that reasonable care is taken.’

[139] Gummow and Hayne JJ pointed out at [255] that the categories in which the duty to take reasonable care is non-delegable are:

‘... identified as a relationship in which the person owing the duty either has the care, supervision or control of the other person or has assumed a particular responsibility for the safety of that person or that person's property.’

[140] Their Honours explained at [257] that:

‘A duty to ensure that reasonable care is taken is a strict liability ... [and] [t]here is a breach of the duty if reasonable care is not taken, regardless of whether [the person] that owes the duty has itself acted carefully.’

and at [259] that:

‘The duty of an employer to provide a safe place and system of work and a safe staff is said to be non-delegable because ‘the employee's safety is in the hands of the employer’ and

because '[t]he employee can reasonably expect ... that reasonable care and skill will be taken'.'

[141] The content of the employer's obligation in the context of a criminal attack on an employee by a third party was considered by Mason P in *English v Rogers*, [2005] NSWCA 327, a case in which an employer was found liable for injuries to an employee caused by the criminal behaviour of a third party.

[142] In *English*, a cleaner and his wife whose duties required them to work at a hotel in the early hours of the morning were ambushed by a masked gunman, who held them confined, at times tied up, while awaiting the arrival of the hotel manager. When the latter came on the scene he was forced to open a safe containing a sum of money. The gunman escaped. The event was found to have caused the plaintiff psychiatric injury. The plaintiff was employed to clean the hotel by the appellant, which was, in turn, contracted by the hotel.

[143] Mason P (with whom Santow JA and Brownie AJA agreed) held that the plaintiff's employer was liable for breach of its non-delegable duty of care. His Honour described the appellant employer's duty in the following terms:

'[70] In *Czatyрко*, the High Court recently observed, at [12] (citations omitted):

'An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risk 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.'

See also *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28: (2004) 217 CLR 424 at 439[34]; *Cheng Fung Pty Ltd v Heloui* [2005] NSWCA 222.

[71] In *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672 Mason J said at 687-688:

'The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe

system of work. *If he requires his employee to work according to an unsafe system he should bear the consequences.*'

...

[73] The employer's duty was not absolute. Since, however there was in my view a real risk of injury to the plaintiff in the performance of his workplace task, the employer was required to *'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 provision of adequate safeguards'* (Czatyрко at [12]). This passage emphasises that it is for the employer to devise reasonably appropriate measures to eliminate the risk. *If such measures are not taken and the risk comes home in consequence of the breach, then liability will generally ensue.* (emphasis added)'''

- [73] The reasonable response to such a risk depends on weighing up the magnitude of the risk, the degree of probability of its occurrence and the expense, difficulty and inconvenience of taking alleviating action. Here there were no conflicting responsibilities. The risk of an employee being assaulted whilst alone is a serious one, particularly of a woman working alone being sexually assaulted. Of course, while foreseeable, it is not very likely. Nevertheless the adverse effects of any such assault are serious and ought to be guarded against, particularly if it can be done relatively easily and inexpensively.
- [74] An obvious way to reduce the risk of such assault is to have mechanisms in place which enable an employee who is alone and in a situation where she or he does not have the protection of being able to be seen by members of the general public to exclude others from the work space. This would involve no more than placing a door capable of being shut and locked between the employee and the access to the employee's work space. In order to prevent the surprise which generated the plaintiff's inability to repel the assault until it had happened, all that would be needed would be an infra-red beam between the open entry to the back section of the shop which would be triggered if someone entered the area. The first option would have prevented Mr Bartholomaeus (or any other assailant) from following her into the back section of the shop. The second option would have alerted her to his ingress enabling her to be aware of his presence and therefore not to have her back to him and to have been in a much better position to fend off any attack. Neither option would have been expensive, difficult or inconvenient.
- [75] The evidence showed that the cost of purchasing and installing an infra-red security beam would have been \$300.00 plus GST. The cost of a self-locking door with swipe or pin would have been \$1,200 plus GST (not including the door). There was a sliding door between the reception area and a room used by the optometrist for eye testing showing that such a door was hardly unusual. The suggestion by the defence that Ms Sapwell could have moved the tools out to the front reception desk is hardly an answer to the problem. They were kept in the back area of the shop where there was a work bench for them to be used. The employers did not suggest or recommend to Ms Sapwell that she repair glasses in the reception area.

- [76] To fail to install some such mechanism as discussed to protect an employee in Ms Sapwell's vulnerable position was in breach of the employer's duty to her. I have reached this conclusion without having regard to expert evidence led. However, such evidence was led by the plaintiff and it served to reinforce the view I had already reached. I have approached the matter in this way since an objection was taken by the defendant to the evidence sought to be led by the plaintiff as expert evidence as to security measures that could and should have been taken.
- [77] The defendant argues that even if such security measures had been installed there is no evidence that the plaintiff would have used them. The employer's duty is not satisfied, however, merely by installing safety devices. It is also the employer's duty to instruct the employee to use them. Ms Sapwell was a responsible, apparently biddable employee. I am satisfied that if there had been a security system in place and instructions to use it she would have done so.
- [78] When Ms Sapwell had reported to Ms Lusk an incident where an angry young man had aggressively kicked a sandwich board on the footpath outside the shop, Ms Lusk had sensibly advised her if she was frightened to lock the front door to the shop and call Mr or Ms Lusk or the police. However, the employers in this case had not given any other consideration to the personal security of their employees and none at all to their security should they face a threat within the shop. They did not undertake any comprehensive consideration of their duties as employers except by taking an accountant's advice. So ignorant were Mr and Ms Lusk of their duties as employers that they had failed to take out any workers' compensation cover for their employees in the more than two years that they had operated the shop and employed, *inter alia*, the plaintiff. They did not undertake any assessment of workplace health and safety risks at the business except for reviewing the after hours security and taking out insurance against burglary, fire and equipment damage. The lack of a WorkCover policy was rectified the day after the assault when Ms Lusk rang WorkCover to find out what her obligations as an employer were. The defendants were fined and obliged to make back payments for the unpaid premiums but were then covered from the time they owned the business. It should be emphasised that whether or not they were insured is relevant only to showing the employer's carelessness regarding their responsibilities to their employees and not in any other way.
- [79] The previous operator of the shop had taken advice from a security firm about securing the premises overnight when no one was there to guard against theft and break-in and an after hours alarm system had been installed. The fact that neither the previous operator of the shop nor Ms Sapwell's employers had themselves ever felt threatened does not answer whether or not they should have considered the safety of an employee working alone and taken reasonable steps to address the issue.
- [80] The evidence as to security was given by Richard Jennings who described himself as a consultant safety and security analyst. He has both formal qualifications and extensive experience in managing and reducing the incidence of crime. His formal qualifications include nationally recognised certification as a licensed security consultant, licensed security training, assessment and workplace training and occupational health and safety, an advanced diploma in security risk management and a diploma of Business (frontline management). His experience includes 12 years as a detective at New Scotland Yard, including many years as an investigator

of major crime, 10 years as a chief investigator with and then inaugural director of the security division of Websters Investigation and Security Group in Sydney and 17 years as managing director of his own private security consultancy business.

- [81] Mr Jennings had undertaken various tasks such as reviewing, assessing and organising security and safety for many public authorities such as the New South Wales Police, Parliament House, ICAC, the DDP and many private organisations including retail outlets.
- [82] Mr Jennings produced four written reports (dated respectively 8 April 2008, 29 April 2009, 26 October 2009 and 18 November 2009) and was called as a witness at the trial of this matter. I intimated to the parties that I would rule on the admissibility of his evidence, to which objection was taken by the defendant, in the reasons for judgment.
- [83] The admissibility of expert evidence is governed by the test set out by Heydon JA (as his Honour then was) in *Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305 at [85]; 52 NSWLR 705 at 743-744:
- “if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of ‘specialised knowledge’; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be ‘wholly or substantially based on the witness’s expert knowledge’; so far as the opinion is based on facts ‘observed’ by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on ‘assumed’ or ‘accepted’ facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ’s characterisation of the evidence in *HG v R* [1999] HCA 2 at [41]; (1999) 197 CLR 414, on ‘a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise’.”
- [84] The identified area of expertise in this case was the assessment and implementation of measures that can be undertaken to protect employees from criminal behaviour or to promote their security. Mr Jenkins demonstrated expertise in this area by virtue of his training, study and experience. He expressed the opinion that there should

have been some barrier in place to prevent Ms Sapwell being followed into the back room of the shop and that she should have been trained to administer such a security and safety system in an effective manner. If those measures had been carried out, his opinion was that this attack on the plaintiff would “likely not have occurred”. He opined that the plaintiff was exposed to “unnecessary violence by the failure of the business proprietor to institute simple and not costly crime deterrent measures.” The facts on which he based his opinion were proved by the plaintiff by other admissible evidence and identified by Mr Jennings. They provided a proper foundation for the opinions expressed in his first, second and fourth reports. His opinions in those reports based on the application of his specialised knowledge to the facts otherwise proved.² I am therefore satisfied that that evidence was admissible as expert evidence as to the security systems which could and should have been in place to protect the personal security of the employees of the shop particularly when out of the publicly viewed area of the shop, the relative inexpensiveness of implementing such security measures through the installation of a self-locking door and training the employee to use it and the unfortunate result of failing to implement those safety procedures.

- [85] I have not relied upon the evidence in Mr Jennings’ third report which relied largely on hearsay documents from other organisations such as the Queensland Police Service, the Queensland government’s Department of Employment and Industrial Relations, WorkCover New South Wales and the Australian Institute of Criminology as well as various Australian Standards, as none of those were tendered by admissible evidence.
- [86] The defendant argued that even if such security systems had been in place, Mr Bartholomaeus may well have assaulted the plaintiff in the front reception area of the shop. However, in that area, the plaintiff was in full view of the passing traffic on the footpath and any other customers who walked into the shop. She did not have any reason to be facing away from Mr Bartholomaeus. All of those factors made any assault much less likely. It does not diminish the duty of the employer to take reasonable care for the safety of an employee who is alone and out of sight of the public and therefore more vulnerable to attack.
- [87] The defendant also argued that there was no evidence that had a self-locking door been in place, Ms Sapwell would have used it. However, this ignores the important fact that it is insufficient simply to put a security system in place, staff must be trained and required to use it. These are duties cast on an employer.
- [88] The defendant did not argue the psychiatric illness suffered by the plaintiff was not a foreseeable consequence of the assault. With respect that concession was properly made in light of the view expressed by the High Court in *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15 at [33].

Pain, suffering and loss of amenities

² The only fact which he relied upon in his first report which I did not find proved by other evidence was that the employee could not see the front of the store through the frosted glass window. The frosted glass window with slits of clear glass did give some limited view to the front of the shop but, significantly not a view from the public area of the shop in the back section. This fact does not affect the reliability of Mr Jennings’ opinion and was in any event not repeated in his subsequent opinions given after he had physically inspected the shop.

[89] As well as the suffering which has manifested itself in the psychiatric illnesses referred to, Ms Sapwell has lost her former activities of daily long walks and regular gym workouts because of her fears about people. Her hobby of reading had markedly decreased because of loss of concentration and she no longer socialised as she had lost friends due to her psychiatric illness. It is, however, the suffering caused by her psychiatric illness that has most impact on the quantum of general damages. The plaintiff claimed \$60,000.00 in general damages relying on a decision by Dutney J in *Cranston v Consolidated Meat Group P/L* [2008] QSC 41 with regard to psychiatric illness. The defendant submitted that no more than \$35,000.00 was adequate.

[90] There is no doubt that the plaintiff suffered a severe depression as a result of the incident and the psychological sequelae have been devastating. She is not as ill as she was but continues to require a significant drug regime to prevent further suffering. Her illness has stabilised at an unsatisfactory level. I would assess this head of damage at \$60,000.00.

Interest on general damages

[91] This should be assessed on the basis that she has suffered about 75 per cent of the general damages to date. Interest on 75% of \$60,000.00 at 2 per cent per annum for the 5.6 years since the assault is \$5,040.00.

Special damages

[92] The plaintiff's special damages and the *Fox v Wood* component of damages were agreed between the parties in the sum of \$73,418.07 as set out below:

Medicare refund	\$4,417.00*
WorkCover – Private Hospital	\$3,157.00
WorkCover – Medical	\$14,160.26
WorkCover – Rehabilitation	\$21,447.11
Workcover – Travel to and from appointments	\$70.70
Fox v Wood	\$18,866.00
Prescriptions and medications - estimated at \$30 per week for 280 weeks - anti-depressants	\$8,500.00
Travel expenses - to and from medicals, collection of pharmaceuticals and medical appointments - -estimated at 20km/week for 280 weeks at \$0.50/km - no receipts	\$2,800.00
TOTAL	\$73,418.07

*The defendant submitted that \$250.95 for pathology expenses be deducted from the Medicare charge, but as the evidence showed that Ms Sapwell was on a medication regime which was adapted during treatment and which was subject to maintenance I can see no reason not to allow this amount.

Interest on special damages

[93] Interest should be allowed on the special damages which she paid herself of \$11,300 at 5 per cent for 5.6 years being \$3,164.00.

Loss of income and earning capacity

- [94] Ms Sapwell had a very steady working history as an optical technician. She had trained in that role for four years in house in Melbourne after emigrating from New Zealand. She had been employed in that capacity for about 16 years and had never had any difficulty finding or keeping work. At the time of the incident she was working 32 hours per week, 4 x 8 hour days. She had commenced working at Clarity Optometrists on 25 August 2002, working 20 hours per week job sharing with Elizabeth Lusk's mother. From 19 September 2004, her hours were increased to 32 hours per week. Ms Lusk was entirely satisfied with her performance. She had every intention of working as an optical technician until the age of 65.
- [95] Ms Lusk found her hard to replace and was obliged to pay her replacement a higher salary although she was dismissed by Ms Lusk when she found she could not afford to pay that salary. I have formed the conclusion that Ms Sapwell would have retained the modest salary that she was earning at the time of the assault with the usual adjustments for wage movements.
- [96] After the assault, Ms Sapwell lost her confidence and sense of security. There seems little doubt that she has lost the capacity to work on her own in a customer service role. She is not able to work as an optical technician without a customer service role as such a position does not exist.
- [97] There is a possibility that she might be able to work as an optical technician at some time in the future if she was not on her own but she is still nervous interacting with the public.
- [98] Dr Mulholland reported that she was extremely anxious at the prospect of returning to work. In December 2007 he thought that the issues that would impact on her ability to return to work were her panic attacks, the increasing problem of her now having a work history with a then 3 year history of being absent from work for psychiatric reasons, being out of date and therefore needing some retraining, her ageing meaning that she would run up against age discrimination, and the need to look after her husband.
- [99] In my view there was a period of time when, had Ms Sapwell not been assaulted, she would have been out of the work force caring for her husband after the assault on him. Although it is difficult to put a precise period on it, after that she would have returned to work notwithstanding his ongoing needs. Their financial predicament and her own skills as well his decreasing needs would have made such a return to work by her inevitable. Her continuing incapacity to work is not caused by the assault on her husband but rather the sexual assault on her. The best estimate is based on her treating doctor, Dr White's assessment, that it delayed her return to work by 18 months. Attributing 18 months of her absence from work to her husband's injury may be somewhat generous to the defendant; but is the best evidence on which to calculate loss of earnings.
- [100] Ms Sapwell has engaged in voluntary work for her local church. Recently she commenced part time casual work as an administrative officer for the University of Queensland working from home. It might be expected to produce up to 10 hours work per week although she had only worked two hours in that position at the time of the trial. That job was arranged through her local church. Her husband produced a resume for her which she used in obtaining that work. It was a short, double-

spaced two page document which set out her personal details and education, hobbies, work experience, referees and the statement that others regarded her as a friendly out-going person, interested in others and happy to take on new tasks and skills. He said in it that she was dependable and enjoyed achieving challenges in both life and work. It said she was “available to work when and where as required.”

- [101] Ms Sapwell was cross-examined at length about a job interview she underwent in the week before the trial at Franz Felfer Optometrist. She initially denied having attended any job interviews in the past two years apart from for the part time casual work for the University of Queensland. However when asked directly, she admitted going to Franz Felfer’s on the previous Tuesday at his invitation. She said that two of his female employees, Sharyn and Julia, interviewed her for a job. She said that on the Tuesday morning her friend Donna, who worked for Franz Felfer, rang her and told her that it was a job interview. She told Donna that she wasn’t ready but she went to see if she could do it. The position was as an optical dispenser working with customers. Her husband printed off the resume which she had prepared for the University of Queensland work and she took it with her. He drove her to the interview and waited for her and then drove her home.
- [102] Sharyn Crilley, who was the principal interviewer, gave evidence that Ms Sapwell was one of nine people interviewed for the position. Mr Felfer told her that Ms Sapwell would be ringing for an interview. Mr Grant-Taylor asked Ms Crilley to describe Ms Sapwell’s demeanour. She said she was “Fine, yeah, good.” She said she did not seem anxious. Ms Sapwell told Ms Crilley that she had not worked for five years as she had been looking after her husband who had been injured at work.
- [103] Ms Sapwell said she didn’t get through the interview very well; that she suffered a panic attack as the interview went on. The difference in point of view about how Ms Sapwell seemed is not particularly probative. There was no suggestion that Ms Crilley had any expertise in determining whether or not someone was suffering from a panic attack or was otherwise suffering from a psychiatric illness. Ms Sapwell agreed that she said that she had been absent from work for five years looking after her husband who had suffered a brain injury at work. She said she did not tell them that she was sexually assaulted because of her embarrassment in talking about that and the fact that people tended to be judgmental about that. In fact Ms Crilley gave evidence that she already knew that Ms Sapwell had been assaulted “through the industry”. Importantly she said in her evidence that Ms Sapwell would be required to work on her own from time to time although she had not mentioned that to Ms Sapwell, who had not asked about it. Ms Sapwell had assumed that the job at Franz Felfer would not have required her to work on her own.
- [104] She was recalled to be cross-examined about the resume which was not revealed until during the trial. In her resume she attempts to present herself as a person who was ready and able to work but that was not, in my view, a realistic representation. It was reasonably clear from her evidence and from the medical evidence that she would not be able to cope with customer contact work. In a sense the resume and the job interview reflect both well and badly on her. It reflects badly on her that she did not freely reveal that she had been for the job interview and disclose the resume. On the other hand it reflects well on her that she was trying for a job no matter that her prospects of doing the job were not realistic. I have not formed the view that her failure to be frank about the job interview and disclose the resume is fatal to her

credit. In any event, her evidence was in critical respects either not in issue or supported by the record of interview with Mr Bartholomaeus and the medical evidence of her treating doctors and of the experts called at the trial.

- [105] A newspaper advertisement for the job at Franz Felfer Optometrist was tendered by the defendant. It is for a permanent part time position with a minimum of 16 hours per week. It says that the “successful applicant must possess strong customer service skills with the ability to work as a team.”
- [106] Ms Sapwell went to the interview in an optimistic attempt to see if she was able to be employed as an optical technician again, particularly for a sympathetic employer for whom she had worked before. During and after the interview she was forced to face the unpalatable truth that she was not realistically going to be able to return to the workforce as she had worked before the assault as she had lost the capacity to work with customers without feelings of panic and insecurity.
- [107] I would assess that she has been left with a residual capacity to work of about 5 hours a week.
- [108] I have been assisted in the calculation of the economic component of her loss by the report by Mark Thompson of Vincents Accountants which was admitted by consent. Past economic loss should be assessed on the basis of his Scenario 1, that is that she would have earned income in line with her pre-assault rate of pay increased by the movements in Average Weekly Ordinary Time Earnings for Full-Time Queensland Employees (ABS Catalogue 6302.0) (“AWE”). It has been assessed to the time of trial as \$142,020.00. From this I would deduct a period of 17 months to account from her absence from work because of her husband’s injuries. The period of 17 months from 5 February 2007 to 30 June 2008 is appropriate given this is close to the estimate given by Dr White of the period of set back in her recovery caused by her husband’s injuries. Twenty-one weeks’ salary from 5 February to 30 June 2007 ($\$553.83 \times 21$) is \$11,630.43. One year’s salary from 1 July 2007 to 30 June 2008 ($\$585.22 \times 52$) is \$30,431.44. This brings the loss of earnings to \$99,958.13 which I propose to round to \$100,000.00.
- [109] From the amount for lost earnings I have deducted the notional cost of travelling to and from work calculated by the defendant at \$58.00 per week or about \$12,655.60. I shall round that to \$12,500.00. That leaves her net loss of earnings at \$87,500.00

Interest on past economic loss

- [110] This should be allowed after the deduction of \$24,454.68 payment from Centrelink and \$50,817.40 WorkCover payments at 5 per cent per annum for 5.6 years being \$3,423.82 ($(\$87,500.00 - \$24,454.68 - \$50,817.40) \times 5\% \times 5.6$).

Superannuation on lost earnings

- [111] On the basis of a finding of lost earnings in the sum of \$87,500, lost superannuation was agreed between the parties at \$7,875.00.

Future economic loss

- [112] I have based this on Scenario 1/ Residual B of Mr Thompson’s report on the finding that she has a residual capacity for work of 5 hours per week and that she would have worked until she was 65 years of age, which is calculated in Schedule J of Mr

Thompson's report. Her capacity to work in the future would not have been adversely affected by her husband's injuries. If anything they would have it more rather than less likely that she would have continued to work to support the family. That amount is \$261,181.00. This should be further discounted by 15 per cent to allow for the usual contingencies. The loss of future income is calculated therefore at \$222,003.85 which I will round to \$200,000.00 which takes account, inter alia, of the cost of travel to and from work

Superannuation on future income

- [113] On the basis of a finding of loss of future income in the sum of \$200,000.00, lost superannuation was agreed between the parties at \$18,000.00.

Future medical treatment

- [114] Ms Sapwell continues to need to see Ms Allan and Dr White. It seems likely that she will need a further 8 consultations a year with Dr White for the next, say, 10 years. Those consultations cost \$106.95 each. Applying a discount for present value, this amounts to \$6,793.85. She seems likely to continue to require fortnightly counselling sessions for the future. I have allowed \$90 per consultation for a period of 10 years. Discounted for their present value, this amounts to \$17,870.00. Future travelling expenses to attend these appointments will be about \$400 per annum discounted over 10 years or \$3,177.00.
- [115] Her future medication needs appear to be for a continuation of the present regime of Luvox, Seroquel and Serapax as needed. I have accepted the plaintiff's calculation of \$1,701 per annum discounted over 10 years which is \$13,510.00.

Quantum of Damages

- [116] In summary, I assess damages as follows:

General damages:	\$60,000.00
Interest on general damages:	\$5,040.00
Special damages:	\$73,418.07
Interest on special damages:	\$3,164.00
Loss of income:	\$87,500.00
Interest on lost income:	\$3,423.82
Superannuation on loss of income:	\$7,875.00
Loss of future income:	\$200,000.00
Superannuation on future income:	\$18,000.00
Future medical expenses:	\$41,350.85
Gross assessment:	\$499,771.74
Less agreed refund to WorkCover	\$109,212.92

Net damages awarded: \$390,558.82

Conclusion

[117] Judgment should be entered for the plaintiff in the net sum of \$390,558.82. I will hear submissions, if necessary, on the calculations and submissions as to costs.