SUPREME COURT OF QUEENSLAND

CITATION:	*Karanfilov v MSS Security Pty Ltd & Ors* [2013] QSC 304
PARTIES:	**LUJPCO KARANFILOV** (plaintiff) v **MSS SECURITY PTY LTD** (first defendant) and **GE CAPITAL FINANCE PTY LTD** (second defendant) and **DOWNER ENGINEERING PTY LTD** (third defendant)
FILE NO/S:	BS 6292 of 2010
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22, 23, 24 and 25 July 2013
JUDGE:	Philip McMurdo J
ORDER:	**The claim is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where plaintiff was employed by the first defendant as a security guard – where the second defendant occupied the building in which the plaintiff worked – where the third defendant was a consultant retained by the second defendant in the management of the building, including provision of security supervision – where the plaintiff developed post-traumatic stress disorder and a major depression as a result of an incident at work – whether any of the defendants owed the plaintiff a duty of care TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the plaintiff was employed as a security guard – where the plaintiff was confronted by two men outside the building he was employed to guard – where one of the men verbally and physically assaulted him – where the plaintiff was working with one other security guard on the night of the incident – where the

other security guard was escorting an employee to the train station at the time of the incident – whether any of the defendants breached the duty of care it owed to the plaintiff

Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, applied
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, applied
Wolters v University of the Sunshine Coast [2012] QSC 298, considered
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: R Lilley QC with J Sorbello for the plaintiff
D B Fraser QC with R W O'Regan for the defendants

SOLICITORS: Murphy Schmidt for the plaintiff
Bruce Thomas Lawyers for the defendants

[1] On 2 July 2007, the plaintiff was working as a security officer at the offices of the second defendant in Buranda, Brisbane. He became involved in an altercation with two men in the street outside the building. He suffered no significant physical injury. But as a result of this incident, he continues to suffer from post-traumatic stress disorder and major depression.

[2] For these injuries he seeks damages for what he says was the negligence of each defendant. The first defendant was his employer, a company providing security services under the name "Chubb". The second defendant, as I have mentioned, occupied the building in which he worked. The third defendant was a consultant retained by the second defendant to provide services in the management of this building, including a service described as "security supervision".

[3] There is no substantial dispute about the facts of this incident. As to the psychiatric injuries suffered by the plaintiff, the defendants put the plaintiff to proof of his case without adducing evidence to contradict it. The substantial issues involve the existence and content of the alleged duties of care and whether each defendant breached any duty which it owed.

The incident

[4] The building where the plaintiff worked is on Logan Road and almost adjacent to where the road is crossed by a railway line. The building is of two stories of offices which are used in the second defendant's business. Some of the staff there are rostered to work on most nights until 9.00 pm.

[5] On the night in question, the plaintiff was one of two security officers who were employed by Chubb at the building. At least for most of the time, they worked from inside the building and were stationed near its front door, which in the hours leading up to 9.00 pm was kept locked. But part of the service which was provided by Chubb was to have a security officer escort any employee, who requested this, from the building to the nearby Buranda railway station when leaving work at 9.00 pm. In the second defendant's office, there was a system whereby that service of a security officer could be pre-booked.

[6] The other security officer at the building on that night was Mr Midgley. He was asked to escort a young woman who was employed by the second defendant from the building to the Buranda station, which was a few hundred metres away, on the opposite side of Logan Road. The two left the building at about 9.00 pm. As they neared the station, they were confronted by two men who asked them for money and threatened to "bash" them. They managed to avoid a fight with the men and made their way to the station. The two men who had threatened them were then seen by Mr Midgley to cross Logan Road and walk towards the building. At this point, Mr Midgley called the plaintiff on a radio which Chubb had provided. He warned the plaintiff that these two men were walking towards the building and to watch out for them. At this stage the plaintiff was inside the building.

[7] When the plaintiff received this call from Mr Midgley, he walked down the few steps from the front door of the building to the footpath to see where these two men were and whether they posed a threat. He encountered them immediately in front of the building. At least one of them was walking menacingly towards a woman who had been waiting to meet one of the employees who was then leaving work. The plaintiff described that this woman was frightened and that one of the men looked very aggressive and was "into her face" as she was "stepping backwards". The plaintiff decided to get this man's attention by walking towards him. At this stage, the other man asked the plaintiff for cigarettes before the man who had been acting aggressively towards the woman asked the plaintiff for money. The plaintiff said that he had no money on him and asked the two men to leave. The more aggressive of the two men acted angrily towards the plaintiff, claiming that he had spent 14 years in jail and was not afraid of anybody, including the police. As he advanced towards the plaintiff, the plaintiff pushed him on the chest, which sent the man backwards for a few steps before he again advanced on the plaintiff, shouting abuse. The plaintiff pushed him again and the man fell. But he got up quickly and then put his hand in a pocket before throwing its contents (some coins) at the plaintiff. The man then spat on the plaintiff's face. The plaintiff sensed the saliva on his face and passing into his own mouth.

[8] At this point, the aggressor took his shirt off, shouting at the plaintiff that he was going to kill him as he again advanced towards the plaintiff. The man threw punches at the plaintiff, who backed away trying to protect himself against the blows. The plaintiff was punched to his body and his arms.

[9] The plaintiff described that he then thought that this man would kill him. Instinctively, he fought back, punching the man who then made a few backward steps. The plaintiff recalls then being conscious of the fact that there were two men who were against him and that he was alone without the assistance of the other security officer. At that point, the plaintiff called Mr Midgley on his portable radio asking him to return quickly.

[10] The aggressor then again advanced upon the plaintiff, this time claiming that he had a gun and saying "I'm going to come back and shoot you … yeah, I kill you. You're dead. You're dead, man."[1] At that point, the other man said to the aggressor that they should leave. The aggressor then threatened to come back again. The plaintiff then noticed that Mr Midgley had returned and was standing nearby on the footpath. The aggressor and the other man then left.

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[1] T 1-38, ll 30-36.

[11] There is some uncertainty as to the precise duration of this incident. In a log book kept by the security officers at the building, Mr Midgley recorded that it was at 21:05 hours that he left with the employee for the station. On the same page, the plaintiff recorded that it was at 21:10 hours that he was “assaulted and attacked at the front of the building”. Mr Midgley thought that he was away from the building for about 20 minutes. The plaintiff was sure that the incident took more than five minutes but otherwise, unsurprisingly, he could not give an accurate estimate. The likely duration of the incident is indicated by the plaintiff’s evidence of it, considered together with the evidence of the eye witnesses who, apart from Mr Midgley, were Ms Ryan and Mr Murphy. There is no substantial difference between their accounts of the incident and that given by the plaintiff. Nor was the substance of his version the subject of any serious challenge. I accept that the incident, measured from the time at which the plaintiff walked outside to the time when the two men left the scene, took some minutes. Mr Midgley was there by the time the incident was finished and he said that he had waited at the station for some time before returning to the building. The plaintiff said that he recalled looking at the clock as he re-entered the building after the incident and seeing that it was 9.25 pm. I accept that it was not 9.10 pm when he made the entry in the log book. Notably, his entry appears on the page after that of someone else who made an entry as “21:45”.

The effect of the incident upon the plaintiff

[12] Soon after the incident the plaintiff saw a doctor who prescribed some anti-depressants. But the plaintiff rapidly developed symptoms of post-traumatic stress disorder. He was treated by his general practitioner and a psychologist but his condition worsened and his general practitioner referred him to a psychiatrist, Dr Mayze, who first saw him in October 2007. In a report dated 12 December 2008, Dr Mayze diagnosed post-traumatic stress disorder with very severe impairment of all aspects of functioning. He wrote that the plaintiff had had “minimal response to treatment and his condition has become chronic and severe”. He noted that the plaintiff’s standard of living and his marriage and family relationships had suffered significantly as a result of his illness. Dr Mayze wrote that he was 100 per cent disabled at that time and he did not expect the plaintiff to be fit for work until after “an extended period of time”.

[13] That was followed by more reports from Dr Mayze, the most recent of which is dated 20 May 2013. Dr Mayze there wrote that the plaintiff continued to suffer “severe domestic, social and occupational disability secondary to Post-Traumatic Stress Disorder plus Major Depression [and that] given the duration and treatment resistance of his symptoms I consider his long term prognosis to be very poor”. Those symptoms were described by Dr Mayze in an earlier report (29 June 2012) as including “increasing inactivity, loss of interest, motivation and negativity [such as] a significant reduction in previously enjoyable activities such as fishing or walking and … gross disturbance to sleep”. Dr Mayze recorded the plaintiff’s description of his “ongoing major marital dysfunction” and his fear of further physical assault. He said that the plaintiff often uses a walking stick in public “just in case”.

[14] In that same report, the causation of this injury was explained by Dr Mayze as follows:

> “The original injury was due to his experience of external threat (his alleged assailant), the belief that there was no one to help him (his

> absent partner/the Employer) plus the perception that the situation was out of his control (he was overwhelmed and all he could do was to wait and try to avoid injury)."

[15] Another psychiatrist, Dr Chalk, wrote reports in early 2010 and late 2012. In the latter report, he wrote that the plaintiff continues to suffer from chronic post-traumatic stress disorder and a major depressive illness. Dr Chalk believed that over time, the plaintiff's post-traumatic symptoms had diminished "to a degree" but that his depressive symptoms had not substantially altered. He wrote that the plaintiff required ongoing treatment, needing to see Dr Mayze "for the foreseeable future" and to remain on anti-depressant medication. He did not expect that his condition would substantially alter "in the foreseeable future".

[16] In his oral evidence, Dr Chalk described the effect of the incident on the plaintiff as follows:

> "He couldn't get himself out of the situation, and appears over that time to become increasingly alarmed and distressed and thought that in fact he was the one that was going to perhaps be killed or seriously injured as a consequence of what was occurring."[2]

He was then asked by counsel for the defendants whether "the question of support [from another security officer was] of importance in that respect?", to which Dr Chalk answered:

> "… Certainly the lack of support would … or may well contribute to that [condition]."[3]

Dr Chalk went on to explain that it was the person's perceptions which were important here and in this case, the perception that "there was no-one around to assist him".[4] In his oral evidence, Dr Chalk further explained the connection between a person's perception of risk and the occurrence of post-traumatic stress disorder.

[17] Dr Chalk thought that this litigation was playing some role in inhibiting the plaintiff's recovery and that once the litigation was completed, that would clear "one barrier for him getting better".[5] He believed that the plaintiff would not go back to work as a security officer but was "very hopeful that he would ultimately find some other employment …".[6]

[18] In the cross-examination of Dr Chalk by counsel for the defendants, there may have been a suggestion that the plaintiff was exaggerating or misstating his symptoms. Therefore, counsel for the plaintiff re-examined Dr Chalk on that subject. Dr Chalk said that it was conceivable that the plaintiff was "over representing some of the difficulties that he's had", but added that he did not think that there was any evidence, from his examination of the plaintiff, from which he could suggest that what the plaintiff was saying "didn't have a degree of veracity".[7] Counsel for the defendants objected to that re-examination, submitting that it was for the court to

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2 T 2-21, ll 25-29.
3 T 2-21, ll 36-39.
4 T 2-22, l 14.
5 T 2-22, ll 29-30.
6 T 2-22, ll 40-41.
7 T 2-23, ll 16-19.

assess the veracity of the plaintiff's evidence. That must be accepted, but Dr Chalk's opinion that there were no inconsistencies or other indicia of untruthfulness in the plaintiff's account is of some relevance.

[19] The plaintiff's case is also supported by reports from psychologists, written on various dates in 2007 through 2009.

[20] I accept that the psychiatric diagnosis of the plaintiff is dependent upon the substantial truthfulness of his account of his symptoms and their consequences for his personal life and his work. But I am persuaded to accept his evidence in those respects and others. There is no particular reason to reject it. And ultimately, as I understood the submissions for the defendants, it was accepted that the plaintiff's condition was as described by the psychiatrists.[8]

Duties of care

[21] The plaintiff was employed by the first defendant, which was able to control the matter in which he performed his work and, in some respects, the circumstances in which he did so at this place. The plaintiff was required to promote the security of this building and those who were within it. That required him on occasions to be outside the building. For example, there was a specific service which his employer provided to the second defendant, which was to escort its employees to the railway station. And the plaintiff's duties inevitably required him to be outside the building on other occasions. An example was that which led to the incident in question, which was where there was a person or persons posing some threat to the safety of people leaving the building or of people outside the building waiting to meet those who were leaving. The safety of those persons was properly within the plaintiff's field of responsibility. There could be no proper criticism of the plaintiff for acting as he did immediately prior to and during the incident. In the written submissions for the defendants, counsel rightly abandoned any argument of contributory negligence.

[22] In these circumstances, it was readily foreseeable that the plaintiff might suffer a psychiatric injury as a result of performing his work, from the possibility that he would encounter dangerous or apparently dangerous people. The evidence of the psychiatrists explains the potential for such encounters to result in psychiatric injury even absent a significant physical injury. In particular there was the potential for an injury of the kind suffered by the plaintiff from an incident which created a perception of immediate danger and vulnerability. It is not to the point that a psychiatric injury in these circumstances would be suffered by only some persons in the plaintiff's position.[9]

[23] The reasonable foreseeability of the kind of injury that has been suffered by a plaintiff is a necessary, although not sufficient, condition of the existence of a duty of care.[10] What must also be considered is the legal relationship between the parties.[11] That relationship between the plaintiff and his employer, the first

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[8] T 4-29 l 34-44; T 4-30 l 25-34.

[9] *Tame v New South Wales* (2002) 211 CLR 317 at 333 [16] per Gleeson CJ and 384-385 [199]-[201] per Gummow and Kirby JJ.

[10] *Tame v New South Wales* (2002) 211 CLR 317 at 331 [12] per Gleeson CJ.

[11] *Tame v New South Wales* (2002) 211 CLR 317 at 331 [13] per Gleeson CJ citing *Jaensch v Coffey* (1984) 155 CLR 549 at 579.

defendant, taken together with the reasonable foreseeability of this kind of injury, imposed a duty upon the first defendant to take reasonable care to avoid psychiatric injury to the plaintiff.

[24] At this point it is necessary to discuss the contracts between the various defendants. The position between the first and seconds defendants was apparently according to written documents, one entitled "Master Services Agreement" and the other, "Services Schedule". The former was signed for the first and second defendants in October 2003 and it was expressed to operate until terminated according to its terms and conditions.[12]

[25] Clause 1.1 of the Master Services Agreement provided for the Services Schedule as follows:

> "This agreement establishes the terms and conditions under which you will, from time to time, provide the Services to GE. A Service Schedule will be completed by the Parties each time GE requires Services from you."

The term "Services" was defined to mean the services as specified in Services Schedules.

[26] By cl 2 of the Master Services Agreement, it was agreed that the first defendant would be an independent contractor and not an agent, partner or joint venturer of the second defendant.

[27] Clause 7(a) of that document required the first defendant to:

> "(v) observe, and ensure your employees and authorised agents observe, GE's … reasonable directions and requirements relating to the provision of the Services …"

[28] The Services Schedule which is in evidence was expressed to be for a term of 18 months from 3 March 2005. But it was apparently common ground here that this remained an operative agreement at the time of this incident. It identified six locations, including the subject premises, at which the first defendant was to provide security services to the second defendant.

[29] Clause 4.1.1 of the Services Schedule required the first defendant to provide "at least one person to act as Commissionaire at each of the Sites".

[30] It specified the different times at which a Commissionaire was required at the various sites. For the Buranda premises, it required a Commissionaire between 0730 and 1700 hours, Monday to Friday.

[31] Clause 4.1.2 of the Services Schedule required the first defendant to "provide sufficient personnel to act as Patrol Officers at each of the Sites" and for Patrol Officers to "conduct roving patrols of the buildings and surrounds, ensuring all vacant areas are secure and that persons entering and leaving the premise[s] are supervised." For the Buranda premises, two patrols per day were specified, at 0400 hours and 2300 hours.

[32] The Services Schedule then provided for Escort Officers (in cl 4.1.3) as follows:

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[12] Clause 3.

> "Escort Officers will be required to escort GE staff from their offices to nominated transportation hubs (be they the nearest train station, bus terminal or car park) as required. Escorts at Richmond will be conducted by GE provided vehicle; all other sites by foot escort.
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> Two Escort Officers will be required at each site to conduct dual escorts. When each Commissionaire retires, one Escort Officer will maintain a Static Guard presence in the building foyer whilst the Second Escort officer will continue the Escort service.
>
> Escort Officers *are not required* to wait with staff at train, bus stations etc. …"

Clause 4.1.3 specified that the Escort Officers would be required at Buranda between 1700 hours and 2330 hours, Monday to Friday and at certain other hours on weekends. It provided that at the Buranda site, an escort register would be maintained, whereby GE staff could effectively book the service. It also provided that the officers were not required to escort people to cars parked outside of the Buranda building.

[33] Clause 4.1.4 provided that two relieving officers had to be available "to provide coverage in the event of the unavailability of the regular officers". And it provided that:

> "It is expected that the assigned staff [of the first defendant] be sufficiently skilled, experienced and qualified to carry out the duties."

[34] Clause 5.1 required that guards at one of the sites (Richmond) would be provided by the second defendant with mobile phones, two-way radios and other equipment. Clause 8.8 provided that for other sites, the first defendant was responsible for supplying and maintaining all necessary equipment.

[35] Clause 6 provided for a fixed price for the provision of these services (subject to the operation of cl 8(b) of the Master Services Agreement which allowed for an adjustment of the fixed price according to wage increases).

[36] Clause 9.1 of the Services Schedule required the first defendant to be responsible for the "ongoing development of … operating procedures".

[37] One argument for the plaintiff is that the defendants were negligent for failing to have a system whereby more than two security officers worked at the building at the end of this evening shift. It is said that had the plaintiff not been forced to confront, without assistance, the aggressor, it is likely that the incident would not have occurred as it did and with the consequences for the plaintiff which it caused. I will return to that argument below. But it may be noted at this point that the contract between the first and second defendants provided for two security officers and for one of them to be involved at times in the escort duty. Therefore there was no contractual entitlement in the second defendant to require more than two security officers. That is a matter which is relevant to the existence and content of a duty of care which the plaintiff alleges he was owed by the second defendant.

[38] The relationship between the second and third defendants was subject to a document entitled Service Level Agreement. According to that document, the second

defendant appointed the third defendant as "Building Manager" at Buranda and another building. The third defendant was engaged to carry out the "Facilities Management Services" which were listed in the document. Those services included "essential service maintenance", "risk and compliance maintenance", "sub-contractor management" and "security supervision". As to "sub-contractor management", the document provided that the third defendant would (amongst other things) "ensure contractor safety".

[39] This agreement between the second and third defendants did provide to the third defendant some ability to control the security arrangements at the Buranda building. But it could not do so inconsistently with the contract between the first and second defendants. I would accept that it imposed upon the third defendant some responsibility to ensure that the first defendant performed that contract. But the third defendant was not engaged to prepare some assessment of the safety of Chubb's employees in the performance of that contract or to recommend amendments to it.

[40] I accept that the second defendant owed a duty of care to the plaintiff from the fact that it controlled the occupation of its premises, including the installation and maintenance of equipment and the conduct of its own employees at those premises. Similarly, I accept that the third defendant, as the building manager, owed *a* duty of care to the plaintiff, as a person who worked there. And I accept duties were owed by the second and third defendants to take reasonable care to avoid psychiatric injury to the plaintiff, though the content of those duties was different from that which was owed by the first defendant. The duties owed by these other defendants were necessarily confined by the limitations upon their control of the plaintiff and the other security officer. For example, it could be accepted that they were obliged to see that the building was secure in the sense of having, for example, an effective lock on the front door. But it is another thing to say that they were obliged to do one or more of the things which the plaintiff says here were required by the exercise of reasonable care. Further, the scope of any duties which were owed by them was affected by the circumstance that it was the first defendant which was the specialist in the provision of security services and which would be expected to have the relevant expertise in guarding against the risk of injury to those working in the building, especially its own employees.

Alleged negligence of the first defendant

[41] I will deal with each of the complaints in the statement of claim, although some of them were barely pressed ultimately. And as I will discuss, there was a further alleged breach, which had not been pleaded or indeed canvassed in the evidence.

[42] The first of the matters pleaded are a series of allegations that focus upon the absence of a proper assessment of the risk to security officers at these premises. It is said that the premises were incorrectly assessed as "low risk", having regard to a number of occurrences in a period leading up to this incident. In particular, about a year prior to the incident, another security officer, Ms Hillier, was confronted by three people outside the building, one of whom tried to hit her. That this occurred is proved here. Then in March 2007, two men harassed a female employee as she was escorted to a nearby bus stop by a security officer. In June 2007, a security officer encountered an aggressive member of the public on the premises, but without any serious outcome. And there were other incidents, as particularised in paragraph

21(a) of the statement of claim, of abusive phone calls and threats made to the plaintiff by individuals at or near the building as well an assault near the building upon an employee of the second defendant.

[43] However, whether or not the building was correctly assessed as "low security" is of no substantial relevance to the present case. The absence of a proper assessment of the risk, if the first defendant failed to act reasonably to avoid the risk of psychiatric injury to the plaintiff, could explain that failure. But of itself, an inadequate assessment of the risk was not causative of the plaintiff's injury, absent a failure to then do something to avoid that risk which the exercise of reasonable care required.

[44] However, I should record my findings as to the adequacy of these risk assessments. In that which is dated 19 January 2006, the first defendant described, against each of the activities "Patrol Duties", "Entry Control of site" and "External patrols of building and crossing street", what were said to have been the relevant hazards and risks, as well as the recommended "controls". Against "Entry Control of site", the author described the hazards as being in "confrontation with public" and "escorting staff to vehicle or train station". The risks were described as "physical injury" and "psychological injury (verbal abuse)". The risk of a psychiatric injury, whether accompanied by a serious physical injury or otherwise, was not identified. Moreover, each of those two risks which were identified was graded as "unlikely to occur" and its likely consequence was graded as "significant - an injury resulting in less than one week of normal duties". In my conclusion, that was an inaccurate assessment of the extent of the risk. The risk of a psychiatric injury was not identified. And even for a physical injury, the basis for assessing the likely consequence as being something which would need less than a week off work, is not apparent.

[45] There was a risk assessment dated 14 November 2006. That referred to a number of activities but not, it would appear, any activity outside the building itself.

[46] So overall, there does not appear to have been a risk assessment which properly recognised the extent of the risk of injury to Chubb employees, in performing relevant tasks at this building.

[47] The plaintiff complains that for some time, he had to work alone in this building. This is criticised, particularly in the light of the risk assessment of January 2006 which referred to the presence of two security officers. It was only after an event involving an employee of the second defendant, in Logan Road near the building, a few days before the subject incident, that two security officers were again employed at the building for this shift. There is evidence from the plaintiff that having to work alone had caused him to become anxious. But there is insufficient evidence from which to find that this materially contributed to his injury and I did not understand that the plaintiff's counsel argued that it did. Ultimately, the employment of but one security officer, prior to the night in question, reflects poorly on the first defendant, having regard to the risk assessment of January 2006, which assumed that there would be at least two security officers. There had been no assessment of the risk with the employment of only one officer. But ultimately, this is inconsequential because there were two officers on the night in question.

[48] It should be noted that the reduction to one security officer had been with the concurrence of the other defendants. It is unnecessary to explore their individual

responsibilities for that development, again, because there were two officers working on the night in question.

[49] Paragraph 21(a)(iii) of the statement of claim pleads that the first defendant exposed the plaintiff to a risk of injury which it knew or ought to have known, namely the risk of physical harm from a person such as the man who assaulted him and the risk of psychiatric injury by being exposed to that risk of physical harm. But the first defendant's duty was to take reasonable care to avoid a foreseeable risk, and relevantly for this case, a risk of psychiatric injury. The duty did not extend to preventing the plaintiff being at all exposed to the risk of any physical harm. The plaintiff was employed as a security officer. Inevitably, his duties would require him to come into contact with some individuals who were unfriendly and possibly dangerous. It is unrealistic to suppose that any of the defendants could have eliminated the risk of any encounter with such a person. The particular pleaded in paragraph 21(a)(iii) does not reveal what the first defendant did or omitted to do which unreasonably exposed the plaintiff to a risk of psychiatric injury.

[50] The next of the pleaded particulars of negligence is that the first defendant failed to "assign" a sufficient number of security officers to the building. It is said that by assigning but two security officers, the plaintiff was exposed to the risk of being alone, in confronting a situation such as that which occurred, because the other security officer might be absent in escorting an employee away from the building.

[51] Looking back at the incident, it could be said that the incident may not have occurred if the plaintiff had been accompanied at all times by another security officer. It could also be said that the plaintiff may not have felt as threatened and vulnerable with another security officer at his side. But the present inquiry is prospective, not retrospective, as Hayne J explained in *Vairy v Wyong Shire Council*:[13]

> "[124] Again, because the injury is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. …"

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[13] (2005) 223 CLR 422 at 461 [124].

[52] What would a reasonable person, in the defendant's position, have done in response to the risk of psychiatric injury to an employee, such as the plaintiff, working in and around this building? The answer "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".[14]

[53] The magnitude of the risk and the degree of probability of its occurrence, could be described as substantial rather than very small. It was strongly argued for the plaintiff that the taking of "alleviating action", by the engagement of at least one other security officer, would have been inexpensive and without difficulty or inconvenience. In particular, it was submitted that the first defendant could have arranged for a third security officer to be at this building for but a short time, perhaps only for a one hour shift, around 9.00 pm, when people left their work at the building. The expense, it was argued, would have involved only the cost of a security officer for one hour. That possibility was not explored in the evidence and I am not persuaded that it would have been practicable. It is not apparent that a security officer could have been engaged for a shift as short as one hour. It was said that one of the first defendant's employees working elsewhere could have been rostered to this building for that hour each working night. But again that was not explored in the evidence and I do not accept that it would have been as inexpensive as the argument suggests. Nevertheless, it may be accepted that a third security officer could have been engaged, as apparently Mr Midgley was, for a four hour shift.

[54] But viewed prospectively, would a reasonable person have considered that the engagement of a third security officer would remove or substantially reduce the relevant risk? The presence of three officers would have permitted two of them to remain at the building whilst the third performed an escort duty. But that third officer would have then been alone and particularly exposed to the risk. The same would apply if two of the officers had performed the escort duty, leaving a third alone at the building. Further, one of the foreseeable possibilities was the presence of more than two hostile persons at or near the building. And in any case, from the perspective of any reasonable person in the first defendant's position, it could not have been assumed that the relevant risk would be substantially removed by having at least an equal number of security officers to the number of threatening persons.

[55] Therefore, the suggested alleviating action of the provision of another security officer is not one which a reasonable person in the first defendant's position was bound to take. That is because the employment of a third officer would not have substantially removed the relevant risk.

[56] It is convenient at this point to go to the plaintiff's unpleaded argument, which was raised only in final submissions. It was that the first defendant should have instructed its security officers not to leave this building alone. This argument cannot be accepted. Again, it is an argument that is inspired by a retrospective view of what occurred in this particular incident, rather than from a perspective of what the exercise of reasonable care then required. As I have just discussed, the presence of an accompanying security officer would not have substantially removed the relevant risk. Secondly, there would be many circumstances in which it would be

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[14] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48.

unnecessary for a security officer, stepping outside the front door, to be accompanied by another officer. And there could be circumstances where the proper provision of security at the building would be hindered by one officer having to wait to be accompanied by another, before going outside. And without the provision of at least a third security officer, this instruction could have compromised the safety of those within the building.

[57] Next it was pleaded that the first defendant failed to provide for a proper system by which the plaintiff could have called for assistance during the course of the incident. It is unnecessary to explore the adequacy of the system whereby one officer outside the building could have called the other within the building. Any shortcoming in that respect could not have been a cause of this injury. And the plaintiff did call for the assistance of Mr Midgley, which was then forthcoming. The injury was not caused by some breakdown in communication between the security officers.

[58] It is alleged that the first defendant failed to provide sufficient CCTV cameras which would act as a deterrent to persons such as those in this incident. Again, it is unnecessary to discuss whether sufficient cameras were installed and, if not, whether that was negligence on the part of this defendant. That is because it could not be concluded that the absence of another camera or cameras was causative of this incident and, in turn, the plaintiff's injury. There was a security camera above the front door of the building. The evidence does not reveal where and in what numbers the provision of further cameras would have provided a significant deterrent to an agitated person such as the one man who assaulted the plaintiff.

[59] I turn to the plaintiff's case about Mr Midgley. It is said that he was negligent by failing to return to the building "immediately on completing the escort", and upon his return by failing to "offer any support or assistance to the plaintiff during the course of the incident".[15] The first defendant is said to be vicariously liable for his negligence.

[60] His failure to return, it is argued, was negligent in the circumstance where he knew of the danger from these two men in Logan Road. Once he had seen that they were walking in the direction of the building, as he then warned the plaintiff, it is said that he should have returned to assist him. But Mr Midgley was not to know that the two men would continue to walk away from the railway station. He and the young woman whom he was escorting had just been confronted by these two men and it is difficult to be critical of Mr Midgley's decision to remain with her at the station, in case the two men went there. Mr Midgley explained that "there was no-one on the train station [and] I decided to wait there with her, given what had just happened".[16] He was there "a few minutes, not too long". In my view, that was a judgment which was reasonably open to Mr Midgley. Similarly, I reject the argument that Mr Midgley was improperly trained, by not being instructed to return to the building immediately upon reaching the station. The fact that the contract between the first and second defendants had not required Mr Midgley to remain with her does not mean that he was negligent.

[61] Nor am I persuaded that Mr Midgley failed to take reasonable care to prevent an injury to the plaintiff, when he arrived at the scene of the incident. Mr Midgley may or may not have been able to diffuse the situation more quickly. The argument

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[15] Statement of Claim, paragraph 22.

[16] T 3-20, ll 44-45.

seems to be that the exercise of reasonable care on Mr Midgley's part obliged him to enter the fight between the plaintiff and the other man. That cannot be accepted. Moreover, the evidence, particularly that of the plaintiff, indicates that Mr Midgley was there for only a brief time before the incident ended. Indeed, ultimately the plaintiff's counsel submitted that this demonstrated the benefit of another security officer.

[62] Therefore, each of the plaintiff's arguments that the first defendant breached its duty of care must be rejected. It should be mentioned that the plaintiff relied upon opinion evidence given by Mr Draper, who is an independent consultant in the business of providing advice to businesses about appropriate security measures. It is unnecessary to discuss his report, in which he was particularly critical of the adequacy of the first defendant's assessments of the risks at this building. As I have found, there were shortcomings in those assessments. Otherwise the relevant matters within Mr Draper's evidence were the sources of the arguments made for the plaintiff which I have discussed.

Alleged negligence of the second defendant

[63] The arguments against the second defendant largely followed those against the first defendant. The first of them is that the second defendant failed to provide a proper facility for a radio to be kept within its office in this building and to have one of its employees ready and able at all times to respond to calls on that radio from a security officer. There is no basis for supposing that this shortcoming (if any) was in any way a contributing factor to the incident and the plaintiff's injury. The incident was in the plain view of a number of the second defendant's employees.

[64] It was said that the second defendant failed to negotiate with the first defendant for the provision of an additional security officer. For reasons already given, this complaint cannot be upheld as a breach of any duty of care owed by the second defendant.

[65] Similarly, there was the complaint about an insufficient number of CCTV cameras which I have already rejected. And there was a more general complaint that the second defendant failed to provide "adequate or any assistance or adequate plan such as to have a deterrent effect on persons such as the assailant".[17] But that complaint was specifically tied to the other matters pleaded against the second defendant and added nothing to the argument.

[66] Accordingly, the case against the second defendant also fails.

Alleged negligence of the third defendant

[67] It was argued that the third defendant was negligent by failing to advise or recommend to the second defendant that additional security officers be provided and that additional CCTV cameras be installed. Again, these arguments must be rejected. If it was not negligent of the first defendant to arrange for a third security officer, it cannot be said that the third defendant was negligent in failing to advise the building owner that a third officer should be present. On any view, the third defendant's duty of care had a narrower content than that of the employer.

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[17] Statement of Claim, paragraph 21 (b)(v).

[68] It was further alleged that the third defendant negligently failed to advise or recommend to the second defendant or to cause the first defendant to carry out a proper risk assessment of the premises. What I have said already about the relevance of an inadequate risk assessment applies here also.

[69] It follows that the plaintiff's claim against the third defendant also fails.

Damages

[70] Nevertheless, I should assess the damages which would have been awarded to the plaintiff, had he succeeded against any of the defendants.

[71] Ultimately there were three issues affecting the quantification of damages.

[72] The first of them was the component for pain and suffering and loss of amenities. The plaintiff was born in 1961, so that he was injured at age 45. His injury has had devastating consequences for his personal life and his working life. He is, and is likely to remain, a person with symptoms which Dr Mayze described as "pervasive and persistent anxiety, exaggerated startle reactions, fear of loss of control, at times intrusive recollections of past trauma, sleep disturbance, irritability, poor concentration, lack of motivation and lack of pleasure".[18] For the plaintiff it is submitted that he should be awarded $85,000 for this component. The defendants submit that an appropriate award is $60,000. The plaintiff's submissions referred to an award of $50,000 for this component in *Wolters v University of the Sunshine Coast*.[19] That case involved an injury which was less severe than in the present one, but the plaintiff's point is that the difference would not correspond with an award here of $60,000. I would have awarded $70,000 for this component.

[73] The next component in issue was future economic loss. It is well established that the plaintiff will not be able to return to work as a security officer. There is evidence he will not be able to work at all. Dr Mayze said that his symptoms and their duration make it "extremely unlikely" that he will be able to return to work.[20] But Dr Chalk said there might be some improvement in his symptoms once this litigation is completed. And Dr Chalk was "very hopeful that he would ultimately find some other employment".[21] The plaintiff sought an award for this component based upon what he would have earned in his employment as a security officer until aged 67, allowing a discount of nine per cent for the vicissitudes of life. That resulted in a calculation for this component of $419,050. The ultimate submission for the defendants was that there should be a discount not of nine per cent, but of 15 per cent, to allow for the prospect of some further employment. That would result in a figure of $391,420. I was persuaded by that submission.

[74] That would have a further consequence for the component for future loss of superannuation. But the loss of superannuation benefits was controversial for another reason. Each side suggested a calculation as a percentage of the future loss of earnings. Each acknowledged the need for some allowance for the recent increase in the required rate of contribution to superannuation by an employer. The

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18 T 3-2, ll 38-40.
19 [2012] QSC 298.
20 T 3-3, 11 45-46.
21 T 2-22, ll 40-41.

defendants suggested that this would be adequately covered by an allowance of 10 per cent of lost future earnings as the lost superannuation.

[75] The plaintiff relied upon an analysis within a paper published by accountants, in which it is said that the more appropriate allowance would be 13.59 per cent of lost future earnings.[22] It is unnecessary for me to assess the merits of their analysis. Should an assessment of damages become necessary in this case, the resolution of this question would not require any further factual finding. For present purposes, I will accept the defendants' submission.

[76] As I have said, the other components were agreed. They would require some adjustment for the three months which have passed since the trial, in that there would be an increase in past economic loss and a decrease in loss of future earnings and superannuation. But for present purposes, it is sufficient to make an assessment which records the amounts agreed between the parties.

[77] Therefore, I would have assessed the plaintiff's damages as follows:

Pain and suffering	$70,000.00
Interest on that component	$1,400.00
Special damages	$32,582.71
Interest on "out of pocket" expenses	$1,370.50
Past loss of earnings	$230,719.68
Interest on that component	$32,772.94
Past loss of superannuation entitlements	$20,764.78
Future economic loss	$391,420.00
Future loss of superannuation	$39,142.00
Fox v Wood	$8,936.00
Future treatment expenses	$32,000.00
Future pharmaceutical expenses	$22,000.00
Total	**$883,108.61**
Less WorkCover refund	$179,045.01
Total	**$704,063.60**

22 Mark Thompson and Michael J Lee, "Impact of Changes in Superannuation Rates on Personal Injury Damages" 19 April 2012.