DISTRICT COURT OF QUEENSLAND

CITATION:	*Baillie v Jackson* [2015] QDC 31
PARTIES:	**SHANE LINDSAY BAILLIE** (plaintiff) and **DONALD WAYNE JACKSON** (first defendant) and **VICTORIA POINT SHARKS SPORTING CLUB INC** (second defendant)
FILE NO/S:	D3564/2011
DIVISION:	
PROCEEDING:	Trial
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	20 February 2015
DELIVERED AT:	Brisbane
HEARING DATES:	3-5 November 2014
JUDGE:	McGill DCJ
ORDER:	**Judgment for the defendants**
CATCHWORDS:	EMPLOYMENT LAW – Injury to employee – liability of employee – security officer punched at work - whether breach of duty – causation – employer not liable. NEGLIGENCE – Breach of duty – occupier of licensed premises – whether duty to provide more security officers – causation – occupier not liable. *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 – followed. *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839 – cited. *Karanfilov v MSS Security Pty Ltd* [2013] QSC 304 – followed. *Koehler v Cerebos Australia Ltd* (2005) 222 CLR 44 – cited. *Lusk v Sapwell* [2011] QCA 59 – applied. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000)

205 CLR 254 – distinguished.
Packer v Tall Ships Sailing Cruises Aust Pty Ltd [2014] QSC 212 – cited.

COUNSEL: P J Goodwin for the plaintiff
M T O'Sullivan for the first defendant
R W Morgan for the second defendant

SOLICITORS: Murphy Schmidt for the plaintiff
McInnes Wilson Lawyers for the first defendant
HBM Lawyers for the second defendant

[1] As might be expected, the second defendant operates a licensed club at Victoria Point. As at September 2007 it had contracted with the first defendant to provide security services at the club premises: p 3-64. On the evening of 8 September 2007, those services were being provided by the plaintiff who was then doing casual work for the first defendant as a security officer. During the evening a wedding reception was held at the club, and late in the evening as some people who had attended the reception were leaving, one of them punched the plaintiff in the face causing fractures to his right zygoma. Apart from his physical injuries, this led to a significant aggravation of a pre-existing psychiatric condition. The plaintiff claims that those injuries were caused by the negligence of his employer, and of the club, or persons for whom it is vicariously liable. Liability and quantum were both in issue.

Facts

[2] The incident but not the actual blow was caught on a surveillance video in the foyer of the club: Exhibit 13. It shows the plaintiff leaning over the reception desk talking to the receptionist who was on duty there as two men, guests at the reception, are leaving. As the two men walk past the desk, they pause and one of them holds out his hand to the plaintiff, whose attention is attracted by them; he shakes hands in what appears to be a friendly exchange with the man, but immediately afterwards the man punched him in the face[1] and he fell back against the desk. The man's friend took him out of the club, or at least out of camera range. The front doors were then locked, but there was evidence that the man subsequently made an attempt to re-enter the club, was prevented from doing so, and caused some damage to the doors: p 1-25, Exhibit 19.

[3] I was told the assailant was subsequently prosecuted and sentenced in relation to the assault. He gave evidence, in which he admitted that he had struck the plaintiff, but said that he had no recollection of doing so because he was adversely affected by alcohol at the time: p 1-69. In the witness box he seemed quite apologetic: p 1-73. He did not provide any explanation for his actions.

[4] The plaintiff was a licensed security operator (p 34, Exhibit 16), and had done some casual work for the first defendant from time to time in the past, including at this

[1] According to the plaintiff, with his left hand: p 43.

club. He said that on 8 September he arrived at the second defendant's premises at about 6.45pm,[2] signed on, picked up his communication device, and spoke to the receptionist about how the evening was going: p 18. He had previously known that there was going to be a wedding reception that night, and he said that he asked the first defendant for a second security officer, but one was not provided. Initially he had refused to work unless a second officer was provided, but the first defendant had pleaded with him and eventually he agreed to work.

[5] He was told when he arrived that it had been quiet with no one playing up: p 19.[3] He then went for a walk around the club, and while in the function room he saw a male person on the dance floor who appeared to be obviously drunk, although not extremely drunk, and not at that stage causing any trouble. He thought there were 120 to 150 people at the function. He said he stayed for a while because he was concerned for the waitresses, but nothing happened and from time to time he would walk around the whole club: p 20. He said that he did not recall seeing the assailant again for the rest of the night, until he saw him in the foyer: p 1-45, 46.

[6] The plaintiff said that apart from the people at the function, there would normally be about 200 people at the club on a Saturday night: p 20. He thought that night there were at least 200 people there, and it was quite busy. He also spent some time at the front counter, just monitoring what was going on there. He said that if there had been two security officers there, one of them would have stayed in the function room at all times: p 20. He said that he did not recall noticing the man that he had seen earlier when he had been back in the function room from time to time during the evening, or any other sign of trouble: p 21. This man was one of the two men whom he saw in the foyer approaching him, the man that shook hands with him, apparently wanting to be friendly, and then punched him: p 22.

Credibility

[7] There were a number of features of this evidence which struck me as unsatisfactory, and much of it was contradicted by other witnesses. He said that when the two men came towards him in the foyer he saw that the person he had seen earlier in the function room was extremely intoxicated "to the point he was legless. His friend was carrying him."[4] That is not at all what appears on the video, which shows that, if anything, it was the other man who was to some extent leaning on the assailant as they were walking into the foyer, and the assailant was essentially walking normally.[5]

[8] In his evidence the assailant said that he had essentially spent his time in the function room during the evening, as one would expect given he was a guest at the reception, apart from when he went to the smoking area to smoke: p 71.[6] Others who were working in the club that evening said that no one had attracted their attention as being troublesome or particularly intoxicated, which seems surprising if the assailant was very drunk at about 7.00pm, and legless by 9.30pm. The functions

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2 According to Exhibit 27 his start time was 6pm.

3 The receptionist said it was a very quiet night: Robinson p 34.

4 Page 1-23, line 1. See also p 61.

5 Other witnesses described him as walking normally: Robinson p 3-36 (foyer); Sheppard p 3-4 (function room when leaving).

6 There was a smoking areas off the function room which he used: p 1-72; and see Williamson p 2-13, 17; Sheppard p 3-15.

manager who was supervising the wedding reception recalled the assailant being in the room, and purchasing pre-mixed drinks which were not included in the bar tab, but she said that he was pretty quiet during the evening, and mostly she saw him standing at a particular place in the room, though she recalled at one point noticing that he was not there: p 2-10, 11. She did not have any concern about his behaviour during the time he was in the function room (p 2-13) or receive reports about him: p 2-17.

[9] On the evening in question Mr Sheppard was working as a bar attendant in the function room. He said there were about 80 people at the wedding, and it was a nice wedding with a well behaved, jovial crowd: p 3-3. He had seen the assailant at the function around the crowd smiling a lot, and he appeared to be a very happy individual. Alcohol service had not been cut off to him but he had been identified as someone who was a possible concern for them that evening[7] and when some friends of his were leaving he suggested that the assailant go with them,[8] and he was happy to do so; he shook hands with Mr Sheppard, thanked him and left without assistance, walking properly: p 3-4.

[10] Mr Lanyon, who was working as a bar attendant in the gaming lounge of the club that night (p 3-17) said that in the club in general it was a quiet night. He said there would have been about 40 people in the gaming lounge, at the busiest part of the evening for them, but by the time he was told about the assault by the receptionist, it was down to about 16 to 20: p 3-18, 20.

[11] Ms Kuzewicz was the duty manager in the club that night, and also described it as a quiet Saturday night: p 3-27. She was mostly in the gaming lounge that night. That it was quiet is supported by the amount of the bar takings, about $4,600 including from the reception, described by the manager as unusually low.[9] Ms Robinson was the receptionist who was on duty at the time of the assault. She also said that it was a very quiet night, and although there was a wedding, it was a small wedding: p 3-34. She said that about an hour earlier the main bar and the dining room were closed (p 3-36) and it seems that the function room and the gaming room were the only parts of the club really still operating. She noticed the two men come into the foyer from the direction of the function room, but it did not strike her that there was anything unusual about them: p 3-36, 37.

[12] The plaintiff was adamant that there were 130 to 150 people or more at the wedding reception, and a large number of other people at the club that night, about 200: p 1-42, 46, 49, 54, 61. All of the other evidence was to the contrary,[10] and I cannot regard this part of the plaintiff's evidence as reliable. At one point the plaintiff said that, when he first went to the function room, 95% of the people there were drunk: p 59. That is contrary to the evidence of Ms Williamson at p 2-8, and of Mr Sheppard that the bar tab ($990: Exhibit 23) was not all used: p 3-5. That was a very modest sum for 79 adults, and quite inadequate for significant intoxication of most of them. I cannot accept that statement of the plaintiff.

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[7] He was said to be too nice, a bit over the top: Sheppard p 3-5, but see p 3-13.

[8] Most of the guests were still there at this time: Williamson p 2-9. Sheppard p 3-13.

[9] Cochrane p 3-45, 62, 66.

[10] In particular, 81 guests were paid for: Williamson p 2-5, Exhibit 23. See also Sheppard p 3-3; Cochrane p 3-45, 62, 66.

[13] The plaintiff said there would always be a second security officer if there was a function on: p 1-16, 60. If there was a wedding there would be one in the function room at all times: p 17, p 26.[11] Exhibit 27 shows that the plaintiff was the only security officer working on 17 and 18 August 2007, and 1 September 2007 (see also p 1-38) and the club had records of functions booked and paid for on those nights, two of them wedding receptions: p 3-50, 51, Exhibit 26.[12] This significant part of the plaintiff's evidence has been shown to be incorrect, although he was quite definite about it: p 1-39, line 10.

[14] About three days after the event, the plaintiff went to a police station to provide a statement to the investigating officer: Exhibit 19.[13] In the course of the statement he referred to seeing the assailant on the dance floor the first time he went to the function room, but said he appeared to be acting normally and not causing any disturbance. The statement said that he made several visits throughout the evening to the function room and on each occasion observed the male person to be behaving normally. The plaintiff agreed that he would have read the statement through before he had signed it, but suggested that he probably did not understand the importance of the statement at the time: p 1-46. That strikes me as unlikely, given that he was, for 14 years, a member of the police force himself: p 1-12, 13. This is a significant inconsistency.

[15] There was another conflict of evidence which I should mention; the first defendant in his evidence denied that the plaintiff had initially refused to work unless there were two security officers provided: p 2-34. There was no question of his pleading with the plaintiff to work, and he was that evening available to work himself if needed, either in place of the plaintiff, or with him. In fact, when he was told of the assault, he notified his stepfather who was available, who attended with a dog.[14] Another security officer from another site was also directed to go there and he also went himself: p 2-35.

[16] It may be that the first defendant has an interest in denying the plaintiff's story, but he is one of number of witnesses who, in some material way, contradicted the plaintiff. Given the number of witnesses who contradicted the plaintiff in some way or another, and given that his account of the incident strikes me as inconsistent with what I can see on the surveillance video and the records of the club, and in one significant respect his account is inconsistent with the written statement he made on oath to the police a few days after the incident, on the whole I conclude that the evidence of the plaintiff is not reliable, and I am not prepared to accept his evidence, except in those cases where it is independently supported, or where it does seem, for some reason, to be inherently plausible. In particular, I do not accept his story that initially he refused to work this night unless there were two security officers, and that he only agreed to work alone after pressure to that effect from the first defendant; in this respect I prefer the evidence of the first defendant. I also do not accept his evidence as to the number of people at the reception, and otherwise in the club, that night. I find there were about 80 people at the reception, and at most about 40 other people in the club while he was there.

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[11] This was contradicted by Williamson: p 2-8, 14: one at reception and one roaming.

[12] This contradicted his evidence-in-chief, that for his last few shifts there was no function or anything: p 1-18, line 17.

[13] The taking of the statement was unexceptional: Gersbach p 2-25-27.

[14] The stepfather normally provided overnight outside protection of the club: p 2-33.

Analysis

[17] The first defendant was the employer of the plaintiff and therefore owed him a duty to take all reasonable steps to provide a safe system of work.[15] The plaintiff was a retired police officer who had the benefit of his police training and 14 years' experience in police work, mostly in general duties, and in addition had worked as a security officer for a time, including for an employer other than the first defendant: p 14. There is no doubt that the first defendant owed a duty of care to him, but the question is whether there was any failure to take reasonable care for his safety. Obviously to some extent a person working as a security officer is exposed to risk of assault by patrons, particularly those who become intoxicated. There are limits however to the lengths that an employer can go to in order to provide protection for a person working as a security officer.

[18] That a security officer may be exposed to a violent confrontation is plainly reasonably foreseeable, and accordingly there was a duty on the employer to take reasonable care to put in place a system of work to minimise the risk of injury from such confrontation, so far as it reasonably could be minimised. For practical purposes therefore the question in the case is whether that duty was breached, that is to say whether the plaintiff has shown that there was some precaution which a reasonable employer would have taken, but which was omitted by the first defendant. If so there was a failure to take reasonable care on the part of the first defendant. I would respectfully adopt as correct the approach of McMurdo J in *Karanfilov v MSS Security Pty Ltd* [2013] QSC 304.[16]

[19] In the case of the second defendant, it was the operator of licensed premises and it had arranged for a security officer to be present on the premises, on this occasion the plaintiff. It was serving alcohol on the premises, and it is reasonably foreseeable that some people may become violent if they consume sufficient alcohol, and in that way represent a danger to other people on the premises. The danger is perhaps particularly acute to someone in the position of the plaintiff given his function, though it might be expected that, in view of his training and experience, he would be in a better position to handle it. Accordingly in my opinion it is incumbent on someone in the position of the second defendant to take reasonable care to avoid injury to persons as a result, including by such steps as having and enforcing a policy of not serving alcohol to people to the point where they become excessively intoxicated, and providing the services of a security officer or officers, if that is indicated.

[20] The evidence was that in the present case it was the decision of the second defendant that one rather than two security officers would be present on its premises on this occasion. If a reasonably careful operator of licensed premises would in the

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15 *Koehler v Cerebos Australia Ltd* (2005) 222 CLR 44 at [19]; *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839 at [12].

16 That case involved only a psychiatric injury, but it seems to me that, once his Honour accepted that psychiatric injury was a reasonably foreseeable consequence of the possibility of the plaintiff's encountering dangerous or apparently dangerous people in the course of performing his work, that his analysis was essentially the same as if the plaintiff had suffered a physical injury.

circumstances have provided more than one security officer, that in my opinion involved a breach of duty on the part of the second defendant to the plaintiff. This of course did not exempt the first defendant from liability in respect of that decision, because he owed a non-delegable duty of care to his employee. There was some discussion during argument about cases where courts have considered whether there was liability on an occupier of premises for an assault which takes place on those premises by a person for whom the occupier is not vicariously liable, such as *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.[17] The special position of the operator of licensed premises has however been recognised: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, at [25].[18]

[21] The plaintiff's case was based heavily on the proposition that there ought to have been two security officers on duty at the club, and there was some evidence that, in circumstances where the number of people at the function together with the number of people to be expected in the club anyway on a Saturday night was likely to exceed 100, the employment of a second security officer was appropriate. The functions manager said that in her experience there were usually two security officers on if there was a wedding reception at the club on the Friday or Saturday evening: p 2-8, 14. She recalled a conversation where two officers for that night was suggested, and she was comfortable with that: p 2-7. The first defendant said that he would normally have about one security officer per 100 people in the function: p 2-30.[19]

[22] On the other hand, the general manager of the second defendant said that the question of engaging security officers did not depend simply on the question of numbers, but on the perceived risk on the night: p 3-54. He said the main bar was usually closed after 8 o'clock on a Saturday night: p 3-55. He gave three examples of functions in the previous month, two of them wedding receptions, when there was only one security officer, the plaintiff: p 3-50; Exhibit 26. On this occasion the decision to have only one security officer was not taken by him, but by the assistant manager, who did not give evidence.

[23] The booking documents for the function show that the final numbers booked and paid for came to 81, including two children: p 2-5, Exhibit 23. It is possible that the number of people who actually turned up on the night was slightly different from this, but it was quite unlikely that there would be any significant difference. The functions manager did not notice any difference on the night: p 2-21.

[24] The plaintiff's case was that, given the number of people at the function, it was appropriate to have two security officers working at the club. There are, I think, two problems with that case. The first is that the real question is whether it was negligent to have fewer than two security officers working at the club that night. Given the number of people at the wedding, and the fact that there was no particular

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17 In *Karanfilov* (supra) McMurdo J held that the occupier of the premises and employer of the people that the plaintiff was employed to protect owed a duty to the plaintiff, but it was more limited than that owed by his employer: [40].

18 See also *Packer v Tall Ships Sailing Cruises Aust Pty Ltd* [2014] QSC 212.

19 But note the example he gave at p 2-31 line 24, which was to the contrary. Later he said that for 80 people at a Pacific Islander wedding, he would have suggested a second security officer: p 3-36. The assailant and some other guests were islanders, but there was no clear evidence of the proportions: Williamson p 2-5, Jackson p 2-38 line 39 (admission by plaintiff): only a few; Robinson p 3-39: quite a few; Sheppard p 3-6: the majority.

reason to expect a large number of people otherwise at the club,[20] I think it unlikely that the total number of people present would have been closer to 200 than 100, and weddings generally did not result in trouble.[21] In the circumstances it might reasonably have been thought adequate just to have the one security officer. I do not accept that the normal procedure of the club was to have a second security officer whenever there was any function, or in the situation expected that night.[22] There was no independent expert evidence on the point,[23] and on the whole I am not persuaded that there was any negligence on the part of the first defendant or the second defendant in not arranging to have two security officers present that night.

[25] It would still be necessary to show that, if that precaution had been taken, it would probably have avoided the injury suffered by the plaintiff. Where an employer's negligence consists of an omission to provide certain safeguards, the employee must establish that performance of a duty in that way would have averted the harm: *Lusk v Sapwell* [2011] QCA 59 at [76]. Even if there had been two security officers present, it is by no means clear that this would have made any difference. The evidence was that when there were two officers on duty they would not normally be together at the reception desk,[24] one of them would be there while the other one moved around the club. No doubt if something in particular had attracted their attention, such as a troublesome person, they might have got together for the purpose of escorting that person off the premises, but on the evidence, including from the plaintiff, there was no sign of any trouble from the assailant prior to the moment when he struck the plaintiff. On the version given to the police, there was no sign of the assailant misbehaving at any time when he was in the presence of the plaintiff. I am not persuaded that it is more likely than not that the departure from the club of the assailant would have brought the two security officers together on a precautionary basis. Accordingly, even if there had been two security officers at the club that night, it is unlikely that they would both have been present. In any case, even if they had been, without evidence as to why the blow was struck, so as to show whether it was calculated or spontaneous, there is no basis to conclude that the outcome would probably have been any different.[25]

[26] The plaintiff's case was also put on the basis that, if there had been a second security officer employed, there would have been a greater opportunity for the assailant to be observed, and it was more likely that his growing intoxication would have been detected prior to the time when he left the club, and under these circumstances the plaintiff would have been more alert to the possibility of trouble from him. It was submitted that part of the problem was that the plaintiff was caught off guard, though it is not at all clear that this would actually have made any difference. The assailant offered to shake hands with the plaintiff and the plaintiff accepted. I assume that interfered with his ability to move away from the assailant, or to adopt a stance where he could more readily defend himself. Whether that was

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20 About 60 people was at the time usual for a Saturday night: Cochrane p 3-60.

21 Cochrane p 3-60; Lanyon p 3-19. The club had little trouble generally: Kuzewicz: p 3-33.

22 To the extent that this was supported by Williamson and the first defendant, I prefer the evidence of Mr Cochrane, supported as it is by the examples he quoted of functions when there was only the one security officer at the club.

23 The first defendant said he would have recommended two officers: p 2-36. I thought this was said with the benefit of hindsight, and does not mean that the contrary view was unreasonable.

24 Jackson p 2-43.

25 The plaintiff seemed to conceded that it may have been no different: p 62. See also Jackson p 2-37 line 25. At the time of the assault the club's bus driver was standing next to the plaintiff (Exhibit 13) but perhaps he was not very intimidating.

the intention of the assailant in shaking hands with him I do not know. It may be that the punch was a reaction to something that happened at the time of the handshake, to which for some reason, possibly an irrational reason, the assailant took offence. I must say I have some difficulty in seeing how, if the plaintiff had been more alert to the possibility of trouble than he was, this would probably have avoided the assault.

[27] In one sense of course this argument was quite artificial, because on the plaintiff's evidence, he was amply alert to the prospect of a lack of sobriety on the part of the assailant; he thought the assailant was drunk from the moment he first saw him, and he said when the assailant came into the foyer he was intoxicated to the point of being legless. If that had been true, there was no question of the plaintiff not being alerted to the degree of intoxication of the assailant, and his failure to take effective action to defend himself was not due to any lack of information of that nature. But I do not accept that evidence, so the point must be considered. It seems to me however that on the evidence none of the other people at the club identified the assailant as a possible source of trouble, at least at that time; the closest one came to it was the evidence of Mr Sheppard which I would interpret as indicating that the assailant was not causing any trouble at that stage, but he was identified as somebody who might cause trouble if he stayed at the club longer, and perhaps became more intoxicated.

[28] Significantly, it appears from the statement the plaintiff made to the police that his attention had been drawn specifically to this person earlier in the evening,[26] under circumstances which would indicate that he might be expected to keep his eye on him, and in that process he had not in fact been alerted to the possibility of trouble from him.[27] It is not as though the assailant marched up to the plaintiff and punched him before the plaintiff had had a proper opportunity to assess the situation; the plaintiff was aware that he was there (p 23), and there had been an exchange between the two of them in the course of which they had shaken hands, so the plaintiff had the opportunity to make some assessment of any visible signs of intoxication or aggression. Evidently, he did not detect any.[28]

[29] The plaintiff's argument really has to be that, although he did not himself become alert to the possibility of trouble as a result of such visits as he made to the function room in the course of the evening, had there been another security officer there would have been more visits and it was probable that one or other of them would have been so alerted prior to the time when the assailant left, and in those circumstances the plaintiff would have been in a better position to defend himself effectively. I do not accept that argument, which seems to me to be essentially speculative. The real problem here was that there was no indication given by the assailant up to the point when he punched the plaintiff that he might be aggressive to the plaintiff, or for that matter anyone else.[29]

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26 See also plaintiff p 56, p 59.

27 Plaintiff p 63.

28 The plaintiff had, while working as a security officer, had a punch swung at him after a handshake once before: p 65. Despite this, he was not alerted this time.

29 The plaintiff did not observe any: p 53, p 63..He had no complaints from bar staff: p 58. Neither did the duty manager: Kuzewick p 3-30.

[30] I accept that the assailant was essentially in the function room throughout the function, subject to the occasional cigarette break[30] and perhaps a visit to the toilet, so that the plaintiff would in the course of his rounds have had the opportunity to observe him at leisure in the function room, including presumably not that long before he decided to leave. In those circumstances I am not persuaded that if there had been second security officer present that evening it is more likely than not that the plaintiff would have been more alert to the situation and would in fact have defended himself more effectively, or that the assault would have been otherwise avoided. Accordingly even if reasonable care did require the presence of a second security officer, I am not persuaded that it probably would have made any difference, and therefore that omission was not a cause of the plaintiff's injury.

[31] The plaintiff's argument at one stage seemed to be based on the proposition that the assailant was in fact more intoxicated than everybody else admitted,[31] so that alcohol service to him should have been cut off, and he should have been asked to leave, at an earlier stage of the evening. I do not accept that there was any negligence in that respect. Apart from anything else, the plaintiff himself was observing the assailant from time to time in the course of the evening, and was in a position himself to decide that that should occur, if he had formed that opinion in the course of the evening. This was particularly the case in circumstances where he said his attention had been drawn to that individual when he started work: p 56. I do not accept that the assailant was displaying indicia of intoxication to the point where it would have been appropriate to cut off service of alcohol and ask him to leave prior to the time when in fact he left, and I am not persuaded there was any negligence on the part of the second defendant in failing to take that step.

[32] Overall in the circumstances I am not persuaded that there was any negligence on the part of either defendant in any of the ways relied on behalf of the plaintiff, nor that, had there been an additional security officer present, the assault would probably not have happened in the way that it did. In those circumstances the plaintiff's claim against each of the defendants fails, and must be dismissed. Nevertheless, I will on a precautionary basis assess quantum.

Quantum

[33] The plaintiff said that he thought he blacked out for a second or so, and that afterwards he felt the side of his face caved in, and that he was suffering a bit of concussion: p 1-25. He then helped patrons to leave the club via a back door. He did not recall telephoning the first defendant, but the first defendant did recall that: p 2-34. An ambulance was called, the paramedics suggested he go to hospital, and he was taken to the Redlands Hospital, but eventually sent home: p 1-26.[32] He attended the following day and was x-rayed, and on 19 September 2007 some surgery was carried out, and plates and screws were used to secure his cheekbone.

[34] The plaintiff said he had terrible pain after the injury, through the jaw and through his sinus, and he had two black eyes: p 27. He could not speak properly and he could only drink through a straw until after the operation; he said the pain also lasted until the week after the operation, then it was okay: p 1-27. He said an area

[30] There was a smoking areas off the function room which he used: p 1-72; and see Williamson p 2-13, 17; Sheppard p 3-15.

[31] Except for the assailant himself: p 67-70. But he was a practiced drinker, on his evidence.

[32] He was taken home by the first defendant: p 2-35.

of numbness on the right hand side of his face remained for some time, especially in the lip, and affected his speech for a time, and also interfered with his ability to eat solid foods for about six months. He also is conscious of a clunking in his jaw when he is speaking or chewing. Sometimes the plate used to repair his jaw sticks on the inside of his skin, but otherwise it was okay: p 1-28. All of this is plausible and consistent with the medical evidence, and I accept it.

[35] He was off work as a construction manager for about three weeks, and even after he returned he was somewhat embarrassed because he still had the black eyes and some difficulty in speaking. He was however able to persevere at work, but he gave up the security work as he did not consider that mentally he could face it: p 1-28. He had had problems previously, developing an adjustment disorder while working as a police officer, as a result of which he had become very aggressive at times, and that was what led him to leave the police force in 2004: p 1-13. Since then, he has been taking medication for his adjustment disorder, and he is still taking it: p 31.

[36] He had hoped to be able to continue with the security work to earn some extra money, because he will need some extra money next year when his kids are old enough to go to private school: p 29. But for this incident he said he would certainly have remained doing security work. In November 2011 he changed his job in the construction injury, and he was working long hours so there would not have been the prospect of his doing security work at that stage: p 30. In early January 2013 he came back to Brisbane where he worked with one employer until he was retrenched, and is now working with another but on less money. It would have been helpful to have had security work to fall back on if he had difficulty getting work in the construction industry.

Medical evidence

[37] His surgeon, Dr Lewindowski, saw the plaintiff at Greenslopes Hospital on 13 September 2007 when he noted a depressed fracture of the right zygoma, a periorbital haematoma, and numbness of the right cheek: Exhibit 4. On 25 September 2007 Dr Lewindowski advised WorkCover that he performed surgery on the plaintiff involving the insertion of two metal plates on 19 September 2007. The surgery was successful but he did not expect the plaintiff to return to full physical work until six weeks after the operation: Exhibit 1. On 23 November 2007 Dr Lewindowski reported to the plaintiff's GP that everything had settled down nicely after the repair, although there was slight tethering of the scar on the right lower eyelid: Exhibit 3.

[38] The plaintiff was seen by Dr Harris, a plastic and reconstructive surgeon, on 24 August 2009 for the purposes of a report to the plaintiff's solicitors: Exhibit 7. Dr Harris noted the same sort of complaints that I have already mentioned, and a complaint that the plaintiff feels his dental occlusion is different. There was some continuing area of numbness, and some clunking of the jaw joint which was said to be usually of no great significance. Two fine scars were identified and said to be of no great significance and barely visible. There was said to be a very minor change in the shape of the face as a result of the surgery which would not have been obvious to a casual observer. No treatment was recommended, and whole person impairment was assessed at 6%.

[39] The plaintiff saw Dr Lewindowski again on 28 June 2010 for the purposes of a report: Exhibit 5. At that stage there was still some nerve numbness which was decreasing, and the right lower eyelid was a little less mobile. There was a right temporal scar, and some clunking in the joint. Mouth opening was within the normal range. Further x-rays revealed no evidence of ongoing problems. Dr Lewindowski assessed a 5% impairment for the cranial nerve impairment, and 5% for the scarring and disfigurement, a total whole body impairment of 10%. He did not consider that the jaw was at greater risk of further damage because of the fracture. The plates and screws could be removed; this would cost something of the order of $4,600: Exhibit 6. Dr Lewindowski however did not clearly recommend that that occur.

[40] The plaintiff was seen by Dr Muir, an oral and maxillofacial surgeon, on 14 March 2012 for the purposes of a report to the first defendant's solicitors: Exhibit 21. The plaintiff gave a series of complaints similar to those referred to earlier, and the examination revealed much the same as the earlier examinations, though Dr Muir noted that there was marked clicking or clunking in both jaw joints when opening and closing, that the plaintiff's dentition was very worn so that the jaw was overclosing, and that one of the molars had a fractured crown. Jaw opening and lateral movements were normal in range and pain-free. Dr Muir was inclined to explain the noise in the joints as due to gastric reflux, coupled with tooth grinding or clenching which was secondary to the emotional distress caused by the assault. In that way it was attributable to that injury. Attention to his bite might reduce the severity of the clunking; this would cost about $2,000. The bone plates could be removed at a cost of about $5,000, though the need for this was said to be not very likely. Dr Muir assessed impairment at 6% for scarring and change in the prominence of the right cheek bone, and 2% for sensory impairment; there was no impairment applicable to the jaw clunking.

[41] The plaintiff was seen by a psychologist, Mr Jordan, on 2 December 2010 for the purposes of a report: Exhibit 8. Mr Jordan noted that on testing the plaintiff scored highly on measures of anxiety-related disorders, with elements of obsessive compulsive features and trauma-related anxiety. His score on measures of aggression was elevated, as were stress levels, and there was a perceived lack of social support. On a test for symptoms of depression he indicated a subjective experience of mild depressive symptoms, while other testing revealed mild clinically elevated levels of stress and some behaviours which were consistent with symptoms of post-traumatic stress disorder. Mr Jordan thought that he was experiencing symptoms consistent with the existence of mild post-traumatic stress disorder. He thought the symptoms were present before the assault but had been exacerbated by it. He noted the plaintiff had expressed some interest in undertaking counselling to address his difficulties. He undertook a PRIS rating which produced a 5% psychiatric impairment.

[42] The plaintiff was seen on 13 October 2011 by Dr Chalk, a psychiatrist, for the purposes of a report to the first defendant's solicitors: Exhibit 22. Dr Chalk noted a history of an adjustment disorder from the plaintiff's time in the police force, said to have been the result of the cumulative effect of confrontations with the public, and feeling unsupported. Dr Chalk noted that the plaintiff had been on antidepressants since 2003 but had not been receiving psychiatric treatment since he saw a psychiatrist about the time he left the police force. Dr Chalk noted significant alcohol consumption although this fluctuated with his use of antidepressants. On a

mental state examination there was a degree of anxiety and very mild depression in his mood.

[43] Dr Chalk was of the opinion the plaintiff had developed symptoms of an adjustment disorder with depressed and anxious mood, which produced a significant increase in symptomatology from his pre-existing condition: this had only slowly improved over time, and he considered that the plaintiff's level of anxiety had been permanently increased by this incident. His symptoms were generally under good control if he kept up his medication. Dr Chalk thought the current diagnosis was chronic dysthymia or a chronic mixed anxiety and depressive disorder, of long standing but exacerbated by the relevant incident. He considered that there was total impairment under the AMA guidelines of 7%, two-thirds of which was attributable to his pre-existing condition. He did not think that the plaintiff could return to work in the security industry, though his employment in the construction industry should not be affected.

Assessment

[44] I accepted that as a consequence of the injury suffered by him the plaintiff suffered the physical injuries referred to in the reports, which would have been very unpleasant for a time but which generally have resolved with minimal ongoing adverse physical consequences. The main continuing complaint of jaw clunking is I think largely attributable to other factors, though it may have been made worse by the emotional distress associated with this injury. His pre-existing psychiatric problems have been exacerbated, but the main consequence of that seems to have been a limitation in his ability to do work which might bring him into contact with intoxicated and potentially aggressive people, since his confidence in his own ability to handle such confrontations appears to have been destroyed.

[45] As against the second defendant, the provisions in relation to the assessment of damages in the *Civil Liability Act* 2003 do not apply, because the plaintiff's injury was one for which compensation was payable under the *Workers' Compensation and Rehabilitation Act* 2003: s 5(1)(b). For an assessment at common law, I would assess pain, suffering and loss of amenities in the sum of $35,000, of which I would attribute $15,000 to past loss. I would allow interest on that sum at 2% per annum for seven and a-half years, an amount of $2,250.

[46] With regard to economic loss, the plaintiff prior to this incident had been doing some part-time work as a security officer for the first defendant, in addition to his main occupation in the construction injury. The plaintiff said that initially he was just helping the first defendant as a friend, but that from around 1998 he began to be paid for the work: p 14. He said that the work became frequent after he left the police force in 2003. He said that he had been working at the second defendant's club for the first defendant for at least six weeks prior to this incident, and that he would work regularly on Friday and Saturday nights, and sometimes also on Thursday or Sunday nights: p 16. The plaintiff's tax records, Exhibit 9, reveal net earnings as a security officer in 2007 of $4,648, and in 2008 of $2,400 gross; given that that year the plaintiff paid tax of $13,791 on a taxable income of $63,970[33] so that effectively he was paying 21.5% tax, and the latter payment was the equivalent of $1,884 net.

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33 According to an estimate apparently prepared by his tax agent which is included in Exhibit 9; I have not located the notice of assessment for that year in that exhibit.

[47] I was provided with an extract from entries on the second defendant's register of crowd controllers: Exhibit 27. The document however is somewhat curious, because it appears to have significant gaps in it. It starts on 15 September 2006, then jumps from 23 September to 4 November 2006; presumably there was some security provided during October that year. There is also a gap between 8 December 2006 and 27 January 2007, and from that date to 7 March 2007. There are some other gaps. I was told by the general manager of the second defendant that the club has a security officer on the premises on Friday and Saturday nights, and he was not able to explain the gaps in Exhibit 27: p 3-59. He said it was possible that there was another book also in use.

[48] Exhibit 27 shows the plaintiff working on 17 occasions after 30 June 2007 for a total of 114½ hours. He said that he was paid about $20 an hour, so that he made about $120 per shift: p 16. That would roughly match the figure in the tax return, but it is clear that the plaintiff had been working at the club for much longer than that, as he also has entries dated 11 November 2006, 24 November 2006, 13 April 2007, 28 April 2007, 2 May 2007, and a further five in June 2007, in Exhibit 27. It appears that by June 2007 he was working fairly regularly at this club. The first defendant was vague about when the plaintiff had worked and how much he had been paid; he did not recall a particular rate then being paid, but thought it would have been about $25 an hour: p 2-45. He said that at one stage the plaintiff had borrowed $900 from him, and subsequently they had agreed that the plaintiff would do some work for him in order to repay the money: p 2-29.[34] He initially thought the plaintiff had only been working for about two weeks before the night of the assault (p 2-30) but after being shown the roster he accepted that the plaintiff had been working much longer than that: p 2-40.

[49] On the whole, I think that Exhibit 27 is the best available record of when the plaintiff was working, despite my misgivings about whether it was comprehensive, and it suggests that at least in the few months before this incident the plaintiff was working quite regularly at the premises of the second defendant. If the earning rate achieved during that period were maintained he would have been earning about $8,500 per annum net, but it is possible that that rate was greater than usual because the plaintiff was working as much as he could in order to pay off the debt. On the whole, and given my concerns about the reliability of the plaintiff otherwise, I prefer the evidence of the first defendant in relation to these matters. The previous years' earnings might be a better guide.

[50] I accept that the plaintiff has lost the ability to do the part-time security officer work as a result of this incident, and so has lost the income he would otherwise have made. It appears that in the few months before this incident he was working with particular intensity, and there may well have been a temporary reason for that, but even if there were, once it had disappeared the plaintiff may have continued to do more work than he had been doing. On the whole I would allow a net loss of $6,000 per annum, but this should only cover six years, because for a time the plaintiff was working in a job with long hours and good pay, and would not then have been doing security work anyway: p 30.

[51] There should be a relatively large discount for vicissitudes of life because, given the plaintiff's pre-existing psychiatric issues, it is quite possible that he would have

[34] The plaintiff denied this: p 39.

reacted badly to any other difficult confrontation, something which security officers may face at any time, so some allowance should be made for the chance that something might have occurred anyway in the last seven and a-half years which would have prevented the plaintiff from continuing to work, or work to that extent, in the security industry. In all the circumstances therefore I would assess this past economic loss at $24,000.

[52] The plaintiff also lost some time off work as a result of his physical injuries and that appears to have been covered by the workers' compensation payments, for which I would allow $4,091.04: Exhibit 10.[35] Past economic loss therefore comes to $28,091.04. I would allow interest on $24,000 at 5% per annum for 7.5 years, an amount of $9,000. I would allow a further 9% of past loss to cover loss of superannuation benefits, a total of $2,528.

[53] In terms of future economic loss, the plaintiff was born on 14 June 1970 and is now 44 years of age: p 65. I suppose he had potentially 20 years' work of this nature otherwise ahead of him, though as time went on the possibility that some other incident or incidents might cause a flare-up in his psychiatric problems and prevent him from doing the work would obviously increase. $6,000 per annum is the equivalent of about $115 per week, which discounted over 20 years on the 5% totals, with a multiplier of 666[36] is an amount of $76,590. This may be an unduly conservative starting point, given that the plaintiff had the prospect that, if he lost work in the construction injury, he could fall back on additional work in the security industry.

[54] I think therefore that the starting point is probably more like $90,000, but this should be substantially discounted, not just for the ordinary vicissitudes of life, but for the significant prospect that some other incident or incidents might well have stirred up the plaintiff's psychiatric problems anyway and rendered him unable to work in the security industry, either temporarily or permanently. On the whole I think a discount of 50% is realistic, and I will assess future economic loss at $45,000. There should be 11% allowed for the loss of superannuation, $4,950.

[55] With regard to special damages, there were amounts paid by WorkCover for hospital and medical expenses totalling $5,065.30: Exhibit 10. There was a further amount claimed by the Redlands Hospital of $629.15 (Exhibit 11), and an amount refundable to Medicare of $95.30: Exhibit 12. These amounts are all recoverable. Apart from that the plaintiff claimed for two doctors' fees totalling $134, travelling expenses of $382.65, and chemist's expenses of $28.14: Exhibit 14. None of these amounts appeared to be particularly contentious, and accordingly I would allow special damages totalling $6,334.54, including out of pocket expenses of $544.79 on which I would allow interest at 5% per annum for seven years, an amount of $190.68.

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[35] The first defendant said he made a cash payment to the plaintiff of about $900 to cover his loss of wages for a time: p 2-46. The plaintiff was not cross-examined about this, and in the circumstances I will not deduct it.

[36] Luntz "Assessment of Damages for Personal Injury and Death" (4th ed, 2002), table 2, p 683.

[56] There is a *Fox v Wood* component of $1,239 which was uncontentious, at least on the part of the first defendant, and I would allow that. The remaining issue is as to future expenses. These I think come into the category of a possibility rather than a probability, except for the figure of $2,000 to cover treatment of his bite, accepted by counsel for the first defendant as reasonable, and I adopt that. The cost of the operations to remove the plates, which could be undertaken, was much more than this but on the whole I think the chance of its being in fact required in the future is quite low. That was the effect of the evidence.[37] There is I suppose some possibility of other expenses as well, and overall I would allow $3,000.

[57] Accordingly my precautionary assessment of Mr Baillie's damages may be summarised as follows:

(a)	General damages	$35,000.00
(b)	Interest on $15,000	$2,250.00
(c)	Past economic loss	$28,091.04
(d)	Interest on out of pocket loss	$9,000.00
(e)	Loss of past superannuation	$2,528.00
(f)	Future economic loss	$45,000.00
(g)	Loss of future superannuation	$4,950.00
(h)	Fox v Wood	$1,239.00
(i)	Special damages	$6,334.54
(j)	Interest on out of pockets	$190.68
(k)	Future expenses	$3,000.00
	SUBTOTAL	$137,583.26
	Less WorkCover refund: Exhibit 10	-$9,156.34
	TOTAL	$128,426.92

[58] For the reasons given earlier however the plaintiff's claim on liability fails, and there will be judgment for the defendants. I will invite submissions on costs when these reasons are delivered, but expect that they will follow the event.

[37] Apart from the medical evidence, see plaintiff p 31.