DISTRICT COURT OF QUEENSLAND

CITATION:	*Adlington v Domino's Pizza Enterprises Limited* [2016] QDC 84
PARTIES:	**WAYNE WILLIAM ADLINGTON** (plaintiff) **v** **DOMINO'S PIZZA ENTERPRISES LIMITED** (defendant)
FILE NO/S:	4307-13
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 and 22 July 2015
JUDGE:	Sheridan DCJ
ORDER:	**1. The claim is dismissed.** **2. The parties are to provide written submissions on costs within seven days from the date hereof.**
CATCHWORDS:	EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – CAUSATION AND FORESEEABILITY – where the plaintiff was employed by the defendant as a pizza delivery driver – where the plaintiff was assaulted at the rear of store upon completion of shift – where the plaintiff suffered personal injuries including a psychiatric injury – whether the risk of injury was foreseeable – whether the defendant failed to take measures reasonably open to it – whether any breach of duty was the cause of the plaintiff's injuries TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the plaintiff was employed by the defendant as a pizza delivery driver – where the plaintiff was assaulted at the rear of store upon completion of shift – where the plaintiff suffered personal injuries including a psychiatric injury –where employer owes a duty of care to employee to provide a safe system of work – where employer owes a duty of care to take

reasonable care to protect employee from the criminal behaviour of third parties – whether employer breached their duty of care – whether any breach was the cause of the employee's injuries

Coca-Cola Amatil (NSW) Pty Ltd v Preezer & Ors [2006] NSWCA 45
Karanfilov v MSS Security Pty Ltd & Ors [2013] QSC 304
Kondis v State Transport Authority (1984) 154 CLR 672
Lusk v Sapwell [2012] 1 Qd R
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254
Swain v Waverley Municipal Council [2005] HCA 4
TAB Limited v Beaman [2006] NSWCA 345
Vairy v Wyong Shire Council (2005) 223 CLR 422
Wyong Shire Council v Shirt (1980) 146 CLR 40

Worker's Compensation and Rehabilitation Act 2003

COUNSEL: Ms J. Sorbello for the plaintiff

Mr G. O'Driscoll for the defendant

SOLICITORS: Romans & Romans for the plaintiff

BT Lawyers for the defendant

[1] The plaintiff, Wayne Adlington, was employed by the defendant, Domino's Pizza Enterprises Limited ("Domino's") to work as a pizza delivery driver from its Deception Bay store located at the corner of Bay Avenue and Deception Bay Road, Deception Bay. The business was known as Domino's Pizza Deception Bay.

[2] At about 12.30am when Mr Adlington was finishing the shift he commenced on 20 January 2012, he was assaulted by a group of youths at the rear of the store. Mr Adlington says he was assaulted earlier by that group in the carpark outside the front entrance of the store, although he does not suggest he was injured in that assault.

[3] Mr Adlington says he has suffered a range of injuries as a result of the assault at the rear of the store.

[4] By these proceedings, he seeks to recover damages for negligence for those injuries from Domino's.

[5] The relevant legislative regime is the *Worker's Compensation and Rehabilitation Act* 2003 as it applied after 1 July 2010.

Factual context

[6] Mr Adlington had worked for Domino's on and off since 23 August 2009. On the night of 20 January 2012, he was rostered to work as the close driver.

[7] As the close driver, it was his responsibility to close the store with the store manager. The store close procedure required the cleaning of the store with the rubbish for the evening being placed just outside the back door of the store. Once the store was

closed, the final job was to move the rubbish from the back of the store to the industrial bins located elsewhere in the shopping centre carpark. Given the location of the industrial bins, it was necessary for the rubbish to be placed into the boot of a car and then driven to the industrial bins.

[8] Mr Adlington gave evidence as to the events which occurred immediately around closing time. Krystal Davis, who was the manager rostered on that night, was called on behalf of Domino's to also give evidence as to the events which had occurred around closing time that evening.

Earlier assault

[9] There does not appear to be any real dispute as to the events surrounding what is said by Mr Adlington to be the assault in the carpark at the front of the store.

[10] After Ms Davis closed the door of the store, both Mr Adlington and Ms Davis noticed a group of male youths coming towards them as they walked towards their cars, which were parked directly in front of the store next to each other. Mr Adlington estimated there were 8 to 10 in the group.

[11] Ms Davis gave evidence that she said to Mr Adlington, 'here we go'.[1] Ms Davis said in evidence she meant by that, 'a group of teenagers were not going to be any good coming out in the middle of the night, generally'.[2] She said, 'like, we'd had troubles with teenagers in the store before'.[3] When asked what type of trouble, Ms Davis said, 'so just a lot, like, coming in and pulling down brochures, kicking around stools, it had just started to get worse'.[4]

[12] As the youths approached the cars, they asked for 'a lift'. Both Ms Davis and Mr Adlington said their request was not really directed at anyone. Both said no. Ms Davis said that they then asked for pizza. Ms Davis said she replied, 'we were closed'.[5] Ms Davis said that she had her phone out and one of the boys said to her that there was no need to call the police, to which Ms Davis said that she was not going to.

[13] Mr Adlington opened his car. The youths tried to get into his car; with one trying to get into the rear driver door and the other trying to get into the passenger seat, being the seat where Mr Adlington had placed the pizza he had left the store with.

[14] In cross-examination, Mr Adlington said that when one of the boys went to get into the passenger seat he put his hand out to stop him. Mr Adlington said that got the youth out, but the youth grabbed the pizza. The youth who was trying to get into the back seat also got out and ran away. Mr Adlington accepted that he could not recall any member of the group touching him at that time.

[15] Ms Davis accepted, when asked, that the boys were not overly loud and that they were not 'angry, aggressive or violent'.[6] She said that they did not become 'angry, aggressive or violent', even after one was pushed out of the car by Mr Adlington. Ms

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1 T2-26, L 30.
2 T2-26, LL 33-35.
3 T2-26, L 35.
4 T2-26, LL 37-38.
5 T2-26, L 45.
6 T2-27, L 30.

Davis agreed that there was no threat of violence made nor had they been physically intimidated by the youths. Ms Davis did say that the way that the youths had jumped into Mr Adlington's car was concerning.

[16] Ms Davis said that after they took the pizza, the youths quickly left the carpark and headed across the road. She could not remember what they were yelling as they crossed the road but they were 'yelling something'.[7]

[17] When Mr Adlington was asked what happened after they grabbed the pizza, he said:

> And they all – they all decided to disembark then, and they all, yeah, they all ran away. And I thought that was the end of it. I was just happy to – I was happy for them to take that. I mean, yes, I was frustrated and a little bit angry that I had to, you know, I just wanted to get home and just wind down for the night, but I was happy that there was no damage done at that stage.[8]

[18] Under cross-examination, Mr Adlington was asked whether the youths were giving some parting shots as they walked away, to which the he responded, 'I can't recall. There – they could have been. I – I'm not going to speculate that they were or not.'[9]

[19] Mr Adlington accepted that when he made the decision to go around the back, 'effectively the exchange between the two groups had ceased'.[10] Ms Davis was asked whether she was concerned about going around the corner to get the rubbish. Ms Davis said, 'I was a bit nervous, but they were going…'.[11]

[20] It is the events which occurred once they pulled up around the back of the store to load the rubbish where there is an important discrepancy in the evidence of Mr Adlington and Ms Davis.

The evidence of Mr Adlington

[21] Mr Adlington's evidence was that they both started to get the rubbish and put the rubbish into the boot of his car. Mr Adlington says that the youths were still within sight. He said:

> They weren't far at all. One of them proceeded to return. As he approached my car he saw the bags of rubbish in the car, and he said what's in that and proceeded to tear the bag open and then rubbish started spilling out into the boot of my car.[12]

Mr Adlington continued:

> And I brushed his hand away, and as soon as I touched him – I asked him not to do that and brushed his hand – pushed his hand away. As soon as I touched him the others then proceeded to run back, and that's when they started beating me.[13]

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7 T2-28, L 9.
8 T1-17, LL 27-31.
9 T1-65, LL 14-15.
10 T1-65, LL 37-38.
11 T2-28, LL 26-27.
12 T1-19, LL 38-41.
13 T1-19, LL 42-45.

[22] Under cross-examination Mr Adlington was asked, 'what caused the boys to come back or the group to come back'.[14] Mr Adlington responded:

> I honestly don't know. We pulled up to do the rubbish, I had loaded some boxes – or Chris (sic) and I had loaded some boxes and, from my recollection, two bags of rubbish into the boot of the car and I noticed one of them coming back.[15]

[23] Mr Adlington was asked again, '…you cannot recollect what brought them back?' Mr Adlington answered, 'I can't recollect what brought that single one back'.[16]

[24] Later, on returning to that topic for a third time, Mr O'Driscoll, counsel for Domino's, stated: 'And I put to you that at that stage you started yelling at them?' Mr Adlington responded, 'I can't recall whether I did or not'.[17] Mr O'Driscoll then asked, 'after you yelled at the group after they were walking away they came back over; at least the first one of them came back over'. Mr Adlington responded, 'I honestly can't recall'.[18]

The evidence of Ms Davis

[25] Ms Davis' evidence as to the events which occurred once they both pulled up in their cars out the back was:

> Wayne pulled up first, and then I pulled up behind him, and he opened his boot, and they were yelling backwards and forwards between each other.[19]

[26] She was then asked:

COUNSEL:	And who was yelling backwards and forwards? Who do you mean?
	…
MS DAVIS:	Wayne was yelling backwards towards one of the youths.
COUNSEL:	Did that concern you?
	…
MS DAVIS:	Yeah. I said let's just go, like, put the rubbish in the car, let's just go.
COUNSEL:	Why did the – Wayne yelling back concern you?
	…
MS DAVIS:	Well, I just didn't think it was necessary. Like, we just needed to go, so I can't remember what–
COUNSEL:	Can you recollect what he was yelling?
	…
MS DAVIS:	No. I can't remember what they were yelling backwards and forwards.
COUNSEL:	With respect to what had recently transpired, was there any need for him to be yelling back at the youths?
	…
MS DAVIS:	No, not really.
COUNSEL:	Did it worry you that he was yelling back?

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14 T1-62, LL 7-8.
15 T1-62, LL 8-10.
16 T1-62, LL 15-16.
17 T1-66, LL 5-6.
18 T1-66, LL 17-19.
19 T2-28, LL 42-43.

…

MS DAVIS: Well, yeah, because I wanted him – I just wanted to go.

…

COUNSEL: And after Wayne yelled at them, what happened then? Did they stay in that position where the red cross was?

…

MS DAVIS: There was… One came back.

COUNSEL: Okay. And how did he come back? Did he walk back, run back?

…

MS DAVIS: He just sort of strolled back across the road, and Wayne started putting the rubbish in the boot of the car.

COUNSEL: And as Wayne was yelling out, how long after Wayne yelling out did the one youth stroll back across the road?

…

MS DAVIS: It was not long, it was just, like, between…

COUNSEL: Okay. So did the yelling continue between the two of them as the youth came back across the road?

MS DAVIS: Once he started coming back, Wayne stopped yelling. They stopped yelling backwards and forwards, because he was coming back.[20]

[27] Ms Davis said that at that point, Mr Adlington then just continued to put the rubbish into the boot of his car. She said the boy who had come over started pulling the rubbish back out of the car. When asked, 'And then what happened?', Ms Davis said that '…Wayne just bent down and put it back in the boot quietly'.[21]

[28] When Ms Davis was asked what happened next, she said 'I think Wayne sort of pushed him away'.[22]

[29] Ms Davis was then asked, 'And how did he push him away', to which she responded, 'Just, like, with an open hand to the shoulder, just sort of nudged him away'. Ms Davis was asked did she see what happened to the youth and she said, 'It just made him sort of step back a bit'.[23] Ms Davis said she did not recall any further verbal exchange between Mr Adlington and the youth.

[30] Ms Davis said after that it all happened 'really quick'.[24] Ms Davis said she could not really remember what happened between then and her calling the police. She said the other youths came back over the road.

[31] Under cross-examination, Ms Davis agreed that in her police statement she had not referred to the 'yelling'. In giving evidence in this Court, Ms Davis said, 'There was yelling, but, yeah, I didn't tell the police officer at the time'.[25]

[32] In re-examination, Ms Davis was asked why she didn't tell the police, to which she responded, 'As I didn't want Wayne to get into trouble.'[26] She further explained,

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20 T2-28, LL 45 to T2-29, L 28.
21 T2-29, LL 30-32.
22 T2-29, L 34.
23 T2-29, LL 36-40.
24 T2-29, L 45.
25 T2-32, LL 22-23.
26 T2-35, LL 26-27.

'Because in the end of the day, they did still attack him and that's why I didn't tell the police.'[27]

[33] There is therefore an important dispute as to what caused the first member of the group to return and the remainder of the group to then follow.

Resolving the conflict

[34] I found Ms Davis to be a truthful witness and very considered in the answers she gave. It was obvious from her demeanour whilst giving evidence that she would have preferred not to have to give the evidence she was giving. She clearly thought her evidence may be harming her friend's case. At the time of giving evidence, Ms Davis was no longer an employee of Domino's.

[35] In contrast, at various times during Mr Adlington's evidence, I was left with the impression that he was not being completely truthful. This was not only in his evidence in relation to the events leading up to the group returning to the back of the store, but also in the answers given to other questions concerning the impact of the assault on his daily and social life and the reasons he gave regarding his inability to return to work.

[36] In terms of the discrepancy between the evidence of Mr Adlington and the evidence of Ms Davis, I prefer the evidence of Ms Davis. Whilst it is no grounds for the assault on Mr Adlington and certainly does not excuse that assault, I find that Mr Adlington yelled out at the youths and that in doing so he caused one of the youths to walk back towards him. The remainder of the group then followed.

[37] In examination in chief, Mr Adlington had said that he was frustrated and a little bit angry. This evidence changed slightly in cross-examination. In cross-examination, Mr Adlington said he was annoyed when the youths had stolen his pizza and frustrated by the whole occurrence. He did not accept he was angry, preferring to describe it as frustrated.

[38] The undisputed evidence was that, by the time Mr Adlington and Ms Davis were driving out of the carpark to the rear of the store, the youths had left the scene and had walked away across the road. Whilst they had not dispersed, in their behaviour there certainly seemed no apparent intention to return to the store. The only explanation for them doing so is that they were provoked into returning by the conduct of Mr Adlington. Mr Adlington does not say he yelled at the youths, but he does not deny it either.

The assault

[39] There is no dispute as to what happened after the group returned. Mr Adlington, using an open hand, pushed the first youth away. The others then ran back and started beating him: kicking and punching him multiple times. Mr Adlington had grabbed the torch from the boot of his car and had swung it at them, in an attempt to fend them off.

[40] Ms Davis called the police. As the police arrived, most of the group fled but three of them remained, continuing to beat Mr Adlington. Mr Adlington said the police had

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27 T2-35, LL 27-29.

to interrupt them and sit them on the kerb. The perpetrator of the assault on Mr Adlington was charged and dealt with in the Magistrates Court.[28]

Other incidents

[41] Evidence was led on behalf of Mr Adlington in relation to past incidents which had occurred at the Domino's' Deception Bay store. Evidence was given by two former employees, Mr Ben Lynch and Ms Jayne Couchman, and one current employee, Mr Michael Lark.

[42] Ms Couchman gave evidence of one major and one minor incident which occurred whilst she was one of the managers of the Deception Bay store. Ms Couchman was a manager of the Deception Bay store between March and September 2010.

[43] The minor incident was said to involve Mr Adlington being hit in the back on his head in the carpark at close time. Ms Couchman really had little or no recollection of the details of the incident. Under cross-examination, when asked whether there was a demand for pizza and money, she said she could not recall.

[44] Mr Adlington's evidence was that he was approached by some young teenage boys as they were heading to their cars at closing time. Mr Adlington says he was asked for 'some Tally-Ho papers'.[29] He said as he turned to put his stuff in the passenger seat of the car, he was punched in the back of the head by one of them. He said they then all ran away. Mr Adlington said there were no ongoing affects from the incident.

[45] Mr Adlington said he did not file an incident report, as Ms Couchman was present and witnessed the incident. In evidence, Ms Couchman admitted to not having filed an incident report. Neither could recall the date of the incident.

[46] The major incident involved a delivery driver, Mr Lynch, being injured as a result of an incident in the carpark during what was described as the 'peak period' between about 5:30pm and 8:00pm. Ms Couchman's evidence was that she filed an incident report following that attack. Despite a formal call for that document, the report was not able to be produced.

[47] Ms Couchman was also asked about training. She referred to the magnetic door lock, the emergency call button and the Dotti training. She accepted that training consisted of an instruction to staff that if they were confronted by someone who was demanding money or something, to simply give it to them.

[48] Mr Lynch was called to give evidence regarding the incident he was involved in. Mr Lynch said that he was in his car and about to leave on a delivery when he was approached by a man wanting a lighter. Mr Lynch had said he didn't have one and proceeded on his way. The man had then picked up a witches' hat, which was in front of a store where certain works were being carried out. Having picked up the witches' hat, the man then walked in front of Mr Lynch's car. Once he was past the car, and as Mr Lynch was driving off, the man threw the witches' hat, successfully hitting the back of the car.

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28 Ex 5.

29 T1-16, LL 11-12.

[49] At that point Mr Lynch stopped his car. Mr Lynch's evidence was that he then asked the man 'what the hell'[30] and the guy then proceeded to break his window, punching Mr Lynch through the window. In cross-examination, Mr Lynch was asked whether he could simply have continued to drive, to which he responded, 'I probably should have'.[31]

[50] Mr Lynch was asked about what training he was provided when he commenced at Domino's. Mr Lynch said when he first commenced employment he was given a 'sit-in with another driver just to know the routes, just basic driving, how to handle our float and just basic money-handling skills.'[32]

[51] He said he was given no training in respect of personal safety. Under cross-examination he was again asked whether he received training with respect to assaults in the store. It was suggested to him that he was told that if someone demands money in the store or demands something, you simply give it to them. He responded, 'Yes. That's common knowledge for retail.'[33]

[52] In re-examination, Mr Lynch said that if he had been given training which included a direction not to stop in those circumstances, he 'would have tried to remember to.'[34]

[53] Evidence as to the next incident was given by Mr Lark. Mr Lark currently remains an employee of Domino's, working at the Deception Bay store as a pizza delivery driver. Mr Lark gave evidence that he had been involved in two incidents; one in the store and the other when he was exiting the carpark for the purposes of doing a delivery.

[54] Mr Lark could not remember precisely the date of the incident in the carpark, though indicated it would have been sometime in 2007 or 2008. Mr Lark gave evidence that he was exiting the carpark as two youths on skateboards came up and 'whacked' the window of the back of his car, trying to smash it. Mr Lark said that he then pulled up in the road at the exit of the carpark, got out of his car and asked the youths, 'what their problem was'.[35]

[55] Mr Lark said that the youths then hit him in the jaw and asked him for the money which he refused to give. He said that he asked the youths to leave. The youths then proceeded to take the keys out of his car and throw them down the street. Mr Lark gave evidence that as he turned to go to pick up the keys, one of the youths hit him over the head with a skateboard. Mr Lark was taken by ambulance to hospital and required six stiches. Evidence was given that an incident report was filed, though again the report could not be produced.

[56] The second incident involving Mr Lark occurred when he was working as a shift supervisor. Mr Lark was alone in the store at the time. The store door was not locked as it ought to have been because, on the evidence of Mr Lark, the lock was broken. Mr Lark's evidence was that a man walked into the store with a balaclava over his head, produced a knife which was 25 to 30 centimetres long and demanded money. Mr Lark opened the till and gave him the notes from the till. Once the man had left

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30 T1-75, L 39.
31 T1-78, L 9.
32 T1-75, LL 10-12.
33 T1-78, LL 40-41.
34 T1-79, L 13.
35 T2-5, L 40.

the store, Mr Lark called the police. Once again, the evidence was that an incident report was filed but, despite request, it was not able to be produced.

[57] Mr Lark was asked as to what training he received. He said he watched a video which told him what to do in the event of an armed hold-up. He was also asked, in respect of the first incident he had described, if he had been given training just to continue driving in those circumstances would he have done that, to which he responded, 'I believe I would've.'[36] Under cross-examination, it was put to Mr Lark:

> You indicated to my learned friend that if you were given training, you may likely have kept going, but you may likely have stopped too, to enquire what the hell – they were damaging your car?[37]

Mr Lark responded, 'Yes'.[38]

[58] In cross-examination, Mr Lark accepted that the training he had been given was that if confronted in a robbery situation, he was simply to give them what they wanted. Mr Lark accepted that in the incident outside the store he did not do that.

[59] In cross-examination, Mr Lark also accepted that when he stopped the car and got out and yelled at the youths, they were across the road. When asked what caused them to come from across the road to him, Mr Lark, said 'I probably called out to them.'[39] When asked whether at the time he thought that might be confronting, Mr Lark said 'No' and accepted that he wanted to know why they damaged his car, and that he wanted to confront them with respect to that.[40]

[60] Mr Lark accepted in cross-exanimation that the instruction in the training was to give them the money he had. Mr Lark also accepted that he knew if the money was given in that situation, the money did not come out of his pocket.

Additional evidence about training

[61] Apart from the evidence of these witnesses in relation to the training which employees received when commencing work at Domino's, Mr Adlington and Ms Davis also gave evidence about training.

[62] Mr Adlington referred to having been sent out on a couple of drives with more experienced drivers. He described the purpose as being 'just to see how things operate and what to do, how to interact with customers and such, and what to do with your float which is what we carry our money in.'[41]

[63] Mr Adlington also described the online training, which he referred to as the Dotti training. He described that training as 'all theory work'.[42] Mr Adlington said the Dotti training had some training in respect of personal safety but said it was directed to 'robbery procedure, hold-up procedure, things like that'.[43]

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36 T2-9, LL 1-2.
37 T2-10, LL 32-34.
38 T2-10, L 34.
39 T2-11, L9.
40 T2-11, L 13-17.
41 T1-15, LL 40-42.
42 T1-15, L 43.
43 T1-16, L 4.

[64] Ms Davis confirmed the training was basically limited to armed robberies but spoke in more general terms of being confronted by someone making demands. In cross-examination, counsel for Mr Adlington asked Ms Davis 'If you'd been trained to return to the safety of the store after that initial altercation, would you have done that?';[44] Ms Davis responded, 'Probably not'.[45] When asked why not, she explained that 'by the time you turn around and lock the door, they could be inside with you. Then you've got no one to see you'.[46] She was then asked if she had been trained to just drive away would she have done that, to which she responded, 'Yeah, probably'.[47]

The allegations against Domino's

[65] Mr Adlington alleges that the assault upon him was the result of the negligence of Domino's. The principle allegations of negligence against Domino's were:

(i) failing to recognise the risk of assault on Mr Adlington when Domino's was on notice of other criminal acts which had taken place at the workplace;

(ii) failing to give Mr Adlington any proper warning as to the dangers associated with his employment;

(iii) failing to provide any adequate system of security for Mr Adlington whilst disposing of the rubbish in the early hours of the morning; and

(iv) failing, through the assistant manager, to ensure the safety of Mr Adlington.

[66] In giving particulars, it was said Domino's should have provided an adequate system of security:

(i) by engaging a security service to escort staff upon closing of the store to their vehicles and whilst performing the task of removing the rubbish; and/or

(ii) by engaging a security service to be available to call to attend at the request of staff for concern about security incidents that did not warrant police involvement.

[67] Domino's accepts that, as an employer, it owed a duty of care to Mr Adlington. Domino's disputes the extent of the duty owed and any breach of that duty as alleged by Mr Adlington.

[68] As an employer there is no doubt Domino's had a duty to provide a safe system of work to its employees. Mason J in *Kondis v State Transport Authority* explained the duty in the following terms:

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44 T2-33, LL 45-46.
45 T2-33, L 46.
46 T2-34, LL 16-18.
47 T2-34, LL 28-29.

> '…the employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employees has no choice but to accept and rely on the employer's provision and judgement in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility.'[48]

[69] It is not disputed by Domino's that its duty extended to taking reasonable care to avoid 'unnecessary risk of foreseeable injury' to its employees. In its pleading, Domino's disputed whether that risk extended to ensuring that its employees were protected from criminal assault.

[70] There is, however, a clear line of authority which establishes that a duty of an employer can extend to protecting employees from criminal behaviour of third parties. That duty was recognised by Gleeson CJ in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[49] where he described there being circumstances 'where the relationship between two parties may mean that a duty to take reasonable care to protect the other from criminal behaviour of the third parties, random and unpredictable as such behaviour may be.'[50] He included in these circumstances where there was a relationship of employee and employer. That principle has been applied by a number of courts subsequently.

Elements of the claim

[71] Counsel for Mr Adlington accepted that in this case in order for Mr Adlington to succeed the court would need to be satisfied:

(a) that the risk of an assault was reasonably foreseeable;

(b) that Domino's failed to take measures reasonably open to it to protect Mr Adlington from the risk of an assault; and

(c) that the breach by Domino's of its duty of care to Mr Adlington (if proven) was the cause of Mr Adlington's injuries.

Foreseeability

[72] On the evidence, this was not the first incident involving an assault on a staff member whilst working in the vicinity of the store. In the period between 2007 and 2012, there had been three prior incidents which had been the subject of incident reports to Domino's. That is only three over a 5 year period, but it is clear from the online training manual that the risk of both robberies and assaults were considered a foreseeable risk across the Domino's business. The manual refers to the fact that we live in an unsafe world and that there could be a security situation while working for Domino's.

[73] Both the training manual and the prior incidents make it clear that the risk of an assault to employees was foreseeable.

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48 (1984) 154 CLR 672 at 687-688.

49 (2000) 205 CLR 254.

50 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [26].

Breach

[74] Whilst Domino's submitted the risk of assault in the circumstances was not foreseeable, the focus of the evidence and submissions was more about the reasonable measures which Domino's could have taken to reduce the risk.

[75] In *Wyong Shire Council v Shirt*,[51] Mason J (as his Honour then was) expressed the test of deciding whether there has been a breach of duty as:

> …the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.[52]

[76] Mason J continued in his explanation and stated that:

> …the existence of a foreseeable risk of injury does not of itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.[53]

[77] As indicated by Mason J, and accepted by others, that assessment must be undertaken prospectively, from the time before the event rather than retrospectively, with the benefit of hindsight, after the event.[54]

[78] In her final submissions, counsel for Mr Adlington focused on four failures by Domino's, being:

(a) the failure by Ms Davis as the servant of Domino's to take certain action following the initial encounter in the carpark outside the entrance of the store;

(b) the failure of Domino's to provide any or any adequate security system in the form of either:

  (i) engaging a security service to escort staff at close time; and/or

  (ii) engaging a security service to be available on call; and

(c) the failure by Domino's to adequately train its staff on how to respond to security risks outside the Domino's store.

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51 (1980) 146 CLR 40.

52 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48.

53 Ibid.

54 Ibid, at 47-48. See also Hayne J in *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [124]-[125] and Muir J in *Lusk v Sapwell* [2012] 1 Qd R at [17]-[32].

[79] In relation to the first contention, it was submitted that Ms Davis remained concerned about the youths and fearful and that she should have instructed Mr Adlington to return to the safety of the store. In my view, however, any threat to Mr Adlington's safety which had arisen as a result of the incident in front of the store had effectively dissipated when the youths departed the scene. Given that the youths had decamped, there was no need to retreat back into the store.

[80] The same considerations apply to the contention that Domino's should have engaged a security service to be available on call, and implicitly that Ms Davis could have called them at or about the time of the initial incident, or immediately after the initial incident.

[81] Even if a security service was available to be telephoned, there would have been no reason for a call to have been made after the initial encounter, and certainly pointless for one to have been made during the incident at the back of the store. The evidence was that the security service could take up to 45 minutes to respond. The approach taken by Ms Davis in response to the initial encounter was entirely appropriate.

[82] In relation to the contention that Domino's failed to adequately train its staff, the evidence given by Mr Adlington was that he had completed an online training programme in relation to safety and security: the Dotti training. The parties were unable to provide a copy of the precise on-line training manual completed by Mr Adlington. A copy of the manual which was accepted by the parties to be similar to the course undertaken by Mr Adlington was tendered in evidence.[55]

[83] It was submitted on behalf of Mr Adlington that the emphasis in the manual was on armed robberies rather than more general threats to an employee's safety. The submission was that staff should have been told to avoid confronting persons who posed a risk to their safety.

[84] There is indeed much to be said for the proposition that there was no real reason for such instructions to be given, and as a matter of common sense it was best not to engage with people who are behaving in a manner in which this group had behaved. In fact, Mr Lynch in giving evidence in relation to training as to how to respond when someone demands something of you referred to it being 'common knowledge for retail'.[56]

[85] Nevertheless, given the earlier reported incidents, there is merit in the argument that Domino's should have, through the training manual or other training, reinforced the common sense approach by direct instruction.

[86] The more substantial contention raised in this case is whether the taking of reasonable care necessitated Domino's employing a security guard to escort workers at close time.

[87] In *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer & Ors*,[57] Mason P said:

> In a case of breach by omission the plaintiff must clearly identify what should have been done and prove that it was unreasonable in the circumstances not to do it (cf *Vozza v Tooth & Co Limited* (1964) 112 CLR 316 at 319). A

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55 Exhibit 14.
56 T1-78, LL 40-41.
57 [2006] NSWCA 45.

> breach enquiry is not satisfied merely by positing, with the benefit of hindsight, that something more might have been done.[58]

[88] In that case, Young CJ concluded:

> The main problem for the plaintiff in the present case is that he bears the onus to show that there are precautions which the defendant could and therefore, should have reasonably taken to protect him from the risk. Unless the plaintiff discharges this onus, he does not establish that there was a breach of duty.[59]

[89] As McHugh J said in *Swain v Waverley Municipal Council*;[60]

> The plaintiff bears the legal and evidentiary burden of establishing a prima facie case of negligence. To prove negligence, the plaintiff must be able to point to a reasonably practicable precaution or alternative course of conduct that could have avoided, or reduced the consequences of, the injury to the plaintiff. The plaintiff does not establish a prima facie case simply by asserting that there "must be" a practicable alternative, and that it is for the defendant to provide evidence that no such alternative exists. The plaintiff does not prove a case of negligence, for example, by proving the existence of the risk and then alleging that the defendant took no precautions to protect the plaintiff against that risk.

[90] No evidence was given as to whether incidents occurred at close time at other Domino's stores. Domino's evidently recognised that there was a higher risk of an incident occurring at close time, as it required that there were always two employees present rather than one. The evidence was that two employees were instructed to close the store and then together head around to the back of the store, pack the rubbish into the boots of their cars and transport the rubbish from the back of the store to the industrial bins.

[91] On the other hand, this was the first reported incident at this store which had occurred at close time. The other incidents the subject of incident reports involving Mr Lark and Mr Lynch did not occur at close time.

[92] Evidence was called on behalf of Mr Adlington as to the cost of employing a security person to attend the Deception Bay store at close time. Mr John Ellis, business development manager with NSR Security, gave evidence about the sort of services his business offered in terms of 'call-out services'.

[93] He gave evidence of what he called the staff escort service. His evidence was that a patrol car will arrive at a given time and assist the staff when they 'lock up and knock off and leave the site'.[61] The service is offered in one of two ways: either a designated time each night, or a variable time where the client gives a call 30 minutes prior to lock up.

[94] Mr Ellis also gave evidence of an emergency call service, where a vehicle responds to a call within 45 minutes from first notification.

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58 *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer & Ors* [2006] NSWCA 45 at [3].
59 Ibid at [84].
60 [2005] HCA 4 at [40].
61 T2-37, L 30.

[95] The cost of the designated time call-out service is $1.00 per minute plus GST, charged in 15 minute blocks. The evidence was that a staff escort will generally be done within the 15 minute time block. The cost of the variable time service and the emergency call service is $45.00 plus GST.

[96] No witness was directly asked questions regarding the variability of the Deception Bay store's close time. However, some of the witnesses in giving their evidence made reference to the close time. Ms Couchman referred to the store closing at 1.00am over the weekend. Ms Davis said that on the night in question, 'we closed the store roughly about 12.30am.'[62] That evidence is consistent with the incident report filed which reported the incident as having occurred at 12.30am.

[97] Further, once the store is closed, and prior to leaving the store, there was a number of jobs to be undertaken by the close staff. No evidence was given as to the usual time taken to clean the store but it could be assumed the time taken would vary, depending on the staff on duty and whether it had been a busy night. Counsel in their closing submissions did not address this issue. However, on the basis of the evidence, it is appropriate to assume that the store had a variable close time. Given the evidence of Mr Ellis, the cost of the security service would be $45.00 per night.

[98] No evidence was given as to the economic impact to the business of providing a security service. Mr Adlington did not try to demonstrate the economic feasibility by reference to any financial records of Domino's, nor did Domino's proffer any evidence.

[99] In circumstances where there had been no reported prior incident at close time, the reported prior incidents had not resulted in serious injury, the close procedure already required the presence of two staff members and there was an additional cost to the store of providing a security person, I am not satisfied it was unreasonable for Domino's not to have engaged a security service at close time.

Causation

[100] Domino's submitted that Mr Adlington had not established that the failure of duty caused his injuries, and relied upon a number of authorities where the plaintiff had failed on that ground.

[101] In *Coca-Cola Amatil,* the plaintiff was employed by the defendant to service its vending machines and, whilst servicing a vending machine at a TAFE college, he was shot and seriously injured. The plaintiff was responsible for both refilling the vending machine with product and emptying the coin containers. The evidence was that the plaintiff had previously been mugged at the same location where he was shot and, further that, at times vendor fillers could be carrying up to $15,000.00 cash, clearly making them a potential target for robberies. Clearly, the plaintiff was able to establish there was a foreseeable risk of injury.

[102] The plaintiff submitted that the defendant had a duty to train and to provide as much security as is reasonably practicable for the person handling the money, as well as the money itself. The Court of Appeal found that the failure to train could not have been causative as the plaintiff had done everything a properly trained person would have done and yet still was shot.

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62 T2-24, L 43.

[103] In terms of the provision of additional security, the court found that any additional security would not have prevented the actions of the irrational gunman in that case.

[104] In *TAB Limited v Beaman*,[63] the New South Wales Court of Appeal held that the protective measures which may have been actioned would not have prevented the robbery taking place. The plaintiff's case was that the defendant should have provided a bullet proof screen for the plaintiff to stand behind.

[105] The majority found that there was no evidence to show that but for the lack of the screen the robbery would not have occurred. The plaintiff had failed to establish the lack of screen was causative of her injuries. In that case, it had also been suggested that the defendant failed to take other measures, such as employing two people for the last half hour or the provision of a security guard. Again, the court concluded that it had not been shown that the failure to take those measures was causative of the plaintiff's loss.

[106] In this case, there is little doubt that had Mr Adlington not yelled at and engaged in an argument with the youths, the youths would not have returned to his car and the assault would not have occurred.

[107] Counsel for Mr Adlington submitted that had the training manual included more precise instructions not to engage in any way with an assailant, Mr Adlington may not have acted as he did.

[108] The training manual's focus was on robberies, but it was clear in its terms that the safety of employees was a priority. The manual made it clear that the nature of the work being undertaken was such that employees may encounter a security incident. The manual stated in clear terms that employees should not argue with robbers, nor chase or follow robbers. The manual stated, 'Remember money is replaceable, lives are not.'

[109] The manual did not contain a clear direction as to how to respond when confronted by a person or group of persons posing a risk to the employee's safety. As stated above, given the earlier reported incidents, the manual and/or the training offered by Domino's perhaps ought to have been amended to contain such a direction or instruction to employees.

[110] However, even if it did contain a clear instruction, I do not accept it would have prevented Mr Adlington acting as he did. Mr Adlington was clearly annoyed by the action of the youths in stealing his pizza, just as the evidence of Mr Lark made it clear that he was annoyed at the group of youths damaging his car. Upon seeing the same group of youths across the street when he arrived around the back of the store, Mr Adlington could not resist yelling at them. No amount of training would be likely to have prevented his spontaneous reaction.

[111] The question then becomes whether the presence of a security person would have prevented the assault, in any event. Whilst I have found that Domino's were not required to have employed a security person at close time, it is in any event difficult to see that the presence of one additional person would have caused the group of youths to act differently.

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63 [2006] NSWCA 345 at [112]-[120].

[112] The comments made by P McMurdo J in *Karanfilov v MSS Security Pty Ltd & Ors*[64] are particularly relevant. In that case his Honour was considering whether the employment of a third security officer would have removed or substantially reduced the relevant risk. His Honour commented:

> 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.[65]

[113] I do not accept, as submitted by Ms Sorbello, as counsel for Mr Adlington, that here the youths were so concerned about the presence of authority that the presence of a security person around the back would have resulted in different behaviour. At best, their expressed concern was about the presence of police, not security personnel.

[114] In yelling at the group, Mr Adlington had acted in a spontaneous manner, without stopping to think of the consequences of his actions. Similarly, the group of youths reacted spontaneously. A group of 8 to 10 youths could not be expected to act logically or rationally; particularly as the evidence suggested that at least some of them were intoxicated. Mr Adlington described them as 'either drunk or stoned on something'.[66] In those circumstances, it is difficult to see that the presence of one security person would have made any difference.

[115] On behalf of Mr Adlington it was said that the presence of a security person would have prevented Mr Adlington acting in the manner in which he acted, if it should be found that Mr Adlington incited the youths to return. It was said that the security escort was there to regulate the behaviour of the people they escorted. That is doubtful, but in any event the possibility was not explored in the evidence and given the spontaneity of the reaction by Mr Adlington, I am not persuaded that a security person would have been able to prevent him yelling at the youths.

[116] I am not satisfied that Mr Adlington has discharged his onus of proving that the failures of Domino's as alleged were the cause of his injuries.

Contributory Negligence

[117] If I had found that Domino's were liable for the injury suffered by Mr Adlington, then the same considerations would have applied to limit the extent of that liability. In my view, the assault at the back of the store was a consequence of Mr Adlington continuing to agitate his grievance about the action of the group of youths at the front of the store, and in particular their action in stealing his pizza.

[118] The extent of his responsibility for his injuries would in any event have been 80 percent.

Consequences of assault

[119] Immediately following the incident, Mr Adlington was given a week off work which was covered by WorkCover. Mr Adlington said that during that time the incident just kept playing over and over in his mind.

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64 [2013] QSC 304.
65 Ibid at [54].
66 T1-43, L 16.

[120] Mr Adlington then returned to work but on a gradual program, commencing with two hours a day for a maximum of four days per week. These shifts were during daylight hours. The shifts increased to four hours per day. The shifts were predominately afternoon going into the night time from 4:00pm to 8:00pm.

[121] Mr Adlington continued working for Domino's at the Deception Bay store until January 2014. During that period, Mr Adlington on only one occasion performed the shift as the close driver. Mr Adlington found the performance of that shift too stressful.

[122] In January 2014, Mr Adlington broke the tibia of his right leg in a fall, whist assisting an intoxicated friend to his car from a party. The injury to his right leg necessitated three months off work. In fact, Mr Adlington has not returned to work at Domino's since that date.

[123] Mr Adlington's claim is put on the basis that as a result of the incident, he sustained the following injuries:

1. A psychiatric injury;

2. A soft tissue injury to the right thumb, left ring finger, right elbow and left ribcage;

3. An aggravation of pre-existing arthritis of both knees; and

4. Bruising.

[124] The evidence lead by Mr Adlington focused on his psychiatric injury and the aggravation of the pre-existing arthritic condition in his knees. Mr Adlington was asked about the period between the incident and January 2014. The evidence he gave was that after the incident 'I pretty much kept to myself as much as I possibly could'.[67] He said he lost all motivation to do anything. The evidence given by Mr Adlington appeared to be exaggerated given the evidence as to the activities in which he had engaged during the relevant period.

[125] Evidence was given by him as to his continued bar work for a Theatre Group with which he was involved. The bar work with that group would mean often leaving the premises at around 3:00am; though Mr Adlington said he always left with others and that security patrolled the area. In addition, Mr Adlington had appeared in two performances.

[126] There was also a YouTube clip showing Mr Adlington singing a song whilst dressed up as Britney Spears. The YouTube clip had been made in 2013.

[127] Medical evidence was given by Dr Slack, a consultant psychiatrist who had reviewed Mr Adlington on three occasions and had provided three written reports. The medical records from the Albany Hills Radius Medical Centre were also tendered. Those records contained notes of consultations predominately by two of his treating practitioners, Dr Sapsford and a psychiatrist, Dr Boynton.

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67 T1-24, LL 23-24.

[128] Dr Slack concluded in his report dated 2 September 2014 that as a direct result of the assault, Mr Adlington had suffered an Adjustment Disorder with anxiety and depressed mood. On his last consultation in September 2014, Dr Slack concluded there was still some ongoing low grade anxiety symptoms. He concluded at that time that Mr Adlington was 'fully fit to return to full-time employment'.[68] In his September 2014 report, he said the only difficulties Mr Adlington may have would be if he was expected to work late at night or close up a business late at night. Dr Slack further said Mr Adlington would probably struggle in crowded situations in the workplace.

[129] Dr Slack was called to give evidence and did so by telephone. He had been sent the YouTube clip. Dr Slack confirmed that the video was inconsistent with somebody having a major depressive episode. Dr Slack said, however, it was not inconsistent with an adjustment disorder.

[130] Dr Slack was asked questions regarding the evidence of Mr Adlington being responsible for the operation of the bar of the local theatre group. Dr Slack was told that meant on occasions Mr Adlington leaving from an isolated car park at around 3:00am in the morning. Dr Slack said, 'That would suggest to me that his adjustment disorder has fully resolved'.[69]

[131] Dr Slack also agreed there was inconsistency in the reason offered by Mr Adlington as being unable to return to work at Domino's in 2014 because of the change in the store location, to being next to the pub. Dr Slack agreed there could perhaps be a difference if Mr Adlington knew all of the people well but confirmed, 'I guess one would have to be there and on how busy the bar was and that sort of thing.'[70]

[132] He was then asked, 'But to your mind, from a psychiatric perception, any of the effects of the adjustment disorder have dissipated by that level of interaction and social functioning', to which he responded, 'I would believe so, yes.'[71]

[133] In re-examination, Dr Slack conceded that Mr Adlington's position is more understandable if he knew the people at the theatre, the numbers were small, he was never alone and security patrolled the area. However, this does not appear to have been entirely the situation. In Dr Slack's September 2014 report, he referred to Mr Adlington having worked the bar the previous weekend when there was a festival involving lots of community theatre groups. This does not sound as if only a small number of people were involved, nor does it suggest that Mr Adlington knew or could have known all the people in attendance. The evidence also does not make it clear that the area around the carpark was constantly patrolled by security.

[134] Importantly, Dr Slack in answer to an earlier statement, 'From what we've spoken about the theatre, he has a capacity to embrace full-time employment now if he chose to do so?'; Dr Slack responded 'I believe so. Yes'.[72]

[135] On the evidence before the court, it is difficult to determine the date which Dr Slack formed the view that Mr Adlington had the capacity to embrace full-time work. His last report was written following a consultation on 2 September 2014. In that report,

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68 Report dated 2 September 2014, p 6, para 9.
69 T2-46, LL 27-28.
70 T2-47, LL 20-21.
71 T2-47, LL 25-27.
72 T2-48, LL 12-14.

Dr Slack stated that he believed Mr Adlington was 'fully fit to return to full-time employment', though the report stated Mr Adlington may have difficulties if he was expected to work late at night, closing or in crowded situations. Given his theatre bar work, it would seem Mr Adlington was able to overcome those difficulties.

[136] In giving evidence, Mr Adlington also referred to having worked at the bar of the Soundwave Music Festival for a weekend in early 2015. That festival is a large event. Again, I am not persuaded by the explanation offered by Mr Adlington as to why he could cope with working at that event.

[137] In terms of the aggravation of the knee injury, reports were tendered from Dr Peter Steadman, Associate Professor of Orthopaedics. Dr Steadman prepared a report following an examination of Mr Adlington in September 2013. In that report, Dr Steadman concluded that:

> To confine the examination today to his knees, his difficulties by and large reflect his patellofemoral arthritis and his weight without any substantial evidence of change or deterioration as a direct result of the events that occurred.

[138] Dr Steadman's evidence, as further detailed in the note of a telephone conference,[73] was:

> Mr Adlington's pre-existing pathology was significant and him falling over as a result of the pre-existing arthritic condition in his knees during the course of the assault did not cause any permanent damage nor any acceleration of the underlining condition.

[139] In the course of the telephone conference, Dr Steadman confirmed that the right knee injury occasioned when Mr Adlington was pulled down whist assisting his intoxicated friend to the car was a 'more substantial injury and significant injury.' With respect to that injury, Dr Steadman said that injury was 'not a temporary aggravation but a substantial alteration in the course of the disease.'

General damages

[140] In their submissions, both parties agreed that Mr Adlington's injuries fell within Item 12 of the *Workers Compensation and Rehabilitation Act* 2003. Item 12 applies to moderate mental disorders and gives an Injury Scale Value ("ISV") range of between 2 and 10. On behalf of Mr Adlington it was submitted that an ISV of 10 was appropriate, given his young age and the affect the injury is likely to have on the remainder of his life, particularly overlaid with his pre-existing condition.

[141] Domino's submitted that an ISV of 6 was appropriate.

[142] Unfortunately, Dr Slack's report did not include, as would be expected, a PIRS rating. Absent that evidence, it is difficult to resolve the difference. Having regard to the medical evidence, the ISV nominated on behalf of Mr Adlington is excessive. His condition has resolved such that he could have returned to full-time work certainly, by September 2014, if he had so chosen. In the circumstances, an ISV of 8 is appropriate.

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73 Ex 10.

Past economic loss

[143] Mr Adlington had returned to work within a week of the assault, initially working reduced hours and only day time shifts. Mr Adlington continued to work under those conditions until January 2014, with his hours of work being gradually increased. By January 2014, he was working four hour shifts four days a week. Mr Adlington gave evidence that he was sometimes sent home early from the day timeshifts.

[144] In January 2014 Mr Adlington suffered an injury to his knee which was not associated with his work. He has not returned to work with Domino's since suffering that injury.

[145] In terms of his past economic loss, based on the evidence of Dr Slack, Mr Adlington clearly suffered an adjustment disorder as a result of the assault. That disorder would have impacted Mr Adlington's ability to work late at night and to be the close driver.

[146] As a result, Mr Adlington worked only daytime shifts, which impacted his weekly earnings. In the agreed facts,[74] it is accepted Mr Adlington's average net weekly earnings from his work with Domino's in the period prior to the assault was $488.00. That would have given Mr Adlington an annual net income of $25,376.00. That figure assumes no leave was taken.

[147] In the period after the assault until his injury in January 2014, the parties agreed[75] that Mr Adlington's net earnings were:

> 01.07.11 to 30.06.12 - $13,692.00.
>
> 01.07.12 to 30.06.13 - $11,006.86.
>
> 01.07.13 to 05.01.14 - $6,274.91.

[148] The net earnings between 1 July 2012 and 5 January 2014 were therefore $17,281.77. To determine the net weekly earnings from the date of the assault[76] to 30 June 2012, it is appropriate to use the annual net earnings in the period 1 July 2012 to 30 June 2013 as a guide. In that period, assuming no leave was taken, Mr Adlington's net weekly earnings were $211.67. Using those weekly earnings for the purposes of determining the net earnings in the period between 21 January 2012 and 30 June 2012, Mr Adlington earnt an additional amount of $4,868.41. Mr Adlington's total net earnings for the period from 21 January 2012 to 5 January 2014 was therefore $22,150.18.

[149] If Mr Adlington's income had remained at the level it was prior to the assault, his income for the period up to 5 January 2014 would have been $49,776.00, which makes his economic loss in the period up to 5 January 2014 a total of $27,625.82.

[150] It was on that date that he ceased working following the injury to his knee from an event completely unrelated to the assault. That injury resulted in Mr Adlington being off work for 3 months. Mr Adlington is not entitled to claim any economic loss in these proceedings for that period.

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74 Ex 6.

75 The agreement is recorded in the Agreed Statement of Facts (Exhibit 6). That document also records an agreement that the total amount earnt by Mr Adlington from Domino's in the period subsequent to the assault was $26,200.00. Counsel was unable to explain the discrepancy.

76 The assault occurred at the conclusion of the shift commenced on 20 January 2012.

[151] Assuming that injury resolved by early April 2014, and accepting the evidence of Dr Slack, Mr Adlington is entitled to continue to claim economic loss until, at the latest, September 2014. That is an additional period of 22 weeks. Using the difference in net weekly earnings amounts identified above, the additional loss is $6,079.26, making the total amount for past economic loss $33,705.08. After deducting the net weekly workers' compensation benefits received by Mr Adlington of $10,606.73, the total amount owing for past economic loss is $23,098.33.

[152] Compensation for loss of superannuation entitlements at the agreed rate of 9.25% on the net amount of past economic loss is $3,117.72.

[153] Interest on past economic loss and 'out of pocket expenses' is agreed to be at the rate of 1.165% per annum. The interest is payable for the period from the date of the event giving rise to the loss and the date of judgment; a period of 4 years and 12 weeks.

Future economic loss

[154] Based on the report of Dr Slack, certainly by September 2014, Mr Adlington was in a position to return to full-time employment. Following the resolution of his knee issue, Mr Adlington gave evidence of having attended an interview with the current management of the Deception Bay store. Mr Adlington accepted that he was offered a job. He accepted that he was told 'Wayne, we'll make a place for you. Come back'.[77]

[155] Mr Adlington proffered a number of explanations as to why he did not accept the job. I do not accept that the relocation of the store nor the change in management justified Mr Adlington refusing to accept the job offered to him. Mr Adlington described himself as no longer enjoying the work. He clearly had decided he wanted to move on from Domino's. Whilst Mr Adlington is free to do that, given the resolution of the issues that occurred as a result of the assault, he cannot look to Domino's to fund that choice. Domino's cannot be held liable.

[156] I do not accept Mr Adlington is entitled to any sum for future economic loss.

Summary

[157] If I had found for Mr Adlington, his damages would be calculated as follows:

Head of damage	Amount
General damages	$10,400.00
Special damages (as agreed)	$9,681.21
Interest on 'out-of-pocket' expenses of $400 (as agreed)	$19.72
Fox v Wood (as agreed)	$2,567.00

[77] T1-59, L 6.

Past economic loss	$33,705.08
Interest on past economic loss	$1,661.27
Past loss of superannuation	$3,117.72
Gross Assessment	$61,152.00
Less agreed refund to WorkCover Queensland	$18,034.79
Net Assessment	**$43,117.21**

[158] Orders:

1. The claim by Mr Adlington is dismissed.

2. The parties are to provide written submissions on costs by within seven days from the date hereof.