SUPREME COURT OF QUEENSLAND

CITATION:	*D'Arcy v The Corporation of the Synod of the Diocese of Brisbane* [2017] QSC 103
PARTIES:	**NATALIE KATHLEEN D'ARCY** (plaintiff) **v** **THE CORPORATION OF THE SYNOD OF THE DIOCESE OF BRISBANE** (defendant)
FILE NO/S:	BS No 7281 of 2014
DIVISION:	Trial
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2017; 19 April 2017
JUDGE:	Byrne SJA
ORDER:	
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the plaintiff was employed by the defendant as a personal care worker – where the plaintiff was unloading a wheelie walker from the boot of a car and sustained an injury to her lower back – where the plaintiff argued that she had not been trained about unloading a wheelie walker – where the plaintiff argued that the defendant employer breached duties of care owed to her. DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – whether the injury caused the present symptoms.
COUNSEL:	Mr M Grant-Taylor QC with Ms J Sorbello for the plaintiff Mr G O'Driscoll for the defendant
SOLICITORS:	Morton & Morton Solicitors for the plaintiff Kaden Boriss Legal for the defendant

Mobility aid

[1] The plaintiff ("Ms D'Arcy") was born in March 1980. Thirty years later to the month, she was employed by the defendant ("Spiritus") as a personal care worker. Her responsibilities included transporting clients to and from medical appointments.

[2] On 5 October 2010, Ms D'Arcy took an elderly woman to an appointment, driving a Spiritus sedan motor vehicle. The client, who had limited mobility, used a wheelie walker to get about.

[3] A wheelie walker is an assistive device used mainly by the elderly to aid walking. Typically, it is of light construction, designed to be folded for ease of carriage, and comprises a metal frame to which are affixed two handles, four wheels and a tray or seat.[1]

[4] Ms D'Arcy put the client's wheelie walker into the car boot and drove the client to her appointment.[2] Afterwards, she returned the client home. There Ms D'Arcy attempted to unload the wheelie walker. The device was where she had placed it, with the frame at right angles to the rear bumper bar and the wheels towards the rear of the vehicle.

Injury sustained

[5] Having opened the boot, Ms D'Arcy went to extract the wheelie walker from the floor. Standing near the bumper bar, she reached forward and, she testified, held the frame "sort of midway … with one hand on each side". Then she "just sort of went to pull" the wheelie walker towards her. The device "wasn't coming out". So she leaned further forward, "trying to feel what it was caught on".

[6] With torso bent forward and arms extended to hold the frame at about its mid-point, she raised the wheelie walker from the floor of the boot, using both hands. Bearing its weight, she tried to "jiggle" the device to free it from "whatever" it was "caught on". "Trying to untangle it", Ms D'Arcy experienced "like a stabbing pain" on the left side of her lower back.

[7] The nature of the obstacle to the removal of the wheelie walker is unknown. A cable near the roof of the boot may have come loose and been caught on one of the handles. Whatever the source of the difficulty, when Ms D'Arcy experienced her back pain, she was bent over, reaching forward, lifting the wheelie walker with outstretched hands, grasping it near the middle of the frame, and "jiggling" it to free the device.

Rival cases

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1 The make and model of the client's wheelie walker have not been established. So its dimensions, structure, composition and weight are unknown. The defence alleges (paras 3(e) and 4(b)(iii) of the amended defence) that the equipment weighed 5.6kg. That was neither admitted nor proved. Ms D'Arcy's pleadings did not describe any characteristics of the device. Nor did her evidence.

2 The evidence does not disclose whether Ms D'Arcy unloaded the wheelie walker at the doctor's surgery, reloading it for the return journey to the client's home.

[8] Ms D'Arcy's case that Spiritus breached duties of care owed to her as its employee raised several contentions, including that Spiritus did not train her in safely unloading a wheelie walker from a vehicle.

[9] No such training was given to Ms D'Arcy.

[10] The defence, however, contends that unloading the "lightweight" wheelie walker from the vehicle "was a simple and everyday task that did not require any specific training or instruction".[3]

Risk assessment

[11] Community care workers performing tasks such as those for which Ms D'Arcy was engaged by Spiritus would be expected to transport wheelie walkers in employer-supplied vehicles in assisting frail or disabled clients. And Spiritus expected that its care workers would routinely load and unload wheelie walkers.

[12] In its "Manual Handling Guidelines"[4], with January 2010 as its "Effective Date", Spiritus spelt out its approach to identifying and controlling risks involved in the manual handling of people and objects. The Guidelines identified risk of injury in activities that required the "use of force exerted by a person to grasp, manipulate…carry, move (lift, lower, push, pull) hold or restrain an object…".

[13] The Guidelines canvassed the transportation of wheelie walkers in passenger vehicles, requiring them to be "appropriately secured", preferably in the rear footwell, although "if this is not practical", the device "may be transported in the boot". Either way, the worker was to ensure that "there is adequate space to allow for appropriate manual handling techniques to be utilised". Although silent on what those techniques were, the Guidelines did stipulate that "workers…must be provided with adequate information, training and supervision to enable them to undertake…actions in the safest possible way". The "manager" was responsible "for ensuring training is provided by appropriate persons using best practice manual handling techniques…". Workers were to ensure that "they attend scheduled training and maintain manual handling competency appropriate to the role they undertake".

[14] The Guidelines anticipated that workers would undertake a competency assessment of manual handling skills and knowledge before completion of a probationary period of employment.

[15] About a month after starting with Spiritus, Ms D'Arcy received a 66 page Self-Directed Learning Package concerning Workplace Health and Safety Orientation. Information in it touched upon manual tasks, particularly handling of people, as major causes of injuries to workers providing services in homes. Back and shoulder injuries were said to be the most common and costly injuries in the industry. The Package informed staff that they would undertake manual handling education and competency assessment as soon as

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3 See paras 3(c) and 4(b)(iii) of the amended defence.

4 The document was not shown to Ms D'Arcy during her employment with Spiritus.

practical after commencement of employment and would participate in yearly Manual Handling and Back Care education and competency updates.

[16] The only specific reference in the Package to wheelie walkers was in connection with transportation. The Package directed that:

> "Medical aids (such as collapsible walkers) and other equipment are to be transported in the boot of the car."

[17] About three weeks before she was injured, Ms D'Arcy completed a Manual Handling Questions Form. Invited to describe two types of work injuries associated with manual handling, Ms D'Arcy wrote: "injury from lifting equipment" and "injury from actual lifting of object". Asked: "what does 'balance circle' mean to you during manual handling or work?", Ms D'Arcy answered that multiple choice B response was correct: "The task or load is as close to you as possible so you are stronger" – seemingly, a recognition that lifting should be performed as close to the body as possible to minimise the risk of injury in manual handling.

Experts

[18] Brendan McDougall is a specialist engineer consultant whose May 2015 report speaks of a high rate of musculoskeletal injuries in the community care services industry.

[19] According to Mr McDougall, body stressing during manual tasks accounted for about half of the accepted non-fatal workers compensation claims in the mid-2000s. Of those, more than half were caused by handling objects or lifting, carrying or putting down objects. Such injuries can occur "through repetitive exposure or through sudden single traumatic exposures"[5]: "The size of the problem has been well documented for many years", Mr McDougall writes[6].

[20] Ms D'Arcy's injury resulted from her decision to bend well forward, grasp the frame of the wheelie walker about its mid-point, and lift the device with outstretched hands. By doing so, the full weight of the device was supported at "large reach distances" as she "jiggled" it.

[21] Mr McDougall assessed the horizontal reach distance as Ms D'Arcy stood near the bumper bar, reaching out at close to maximum reach to lift the wheelie walker as 730mm or more: 430mm to the centre of mass plus a 200mm allowance for the width of the bumper bar and another 100mm as the distance between the rear of the bumper bar and the centre point between Ms D'Arcy's ankles.[7]

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5 Page 12.

6 See report page 10.

7 On Mr McDougall's assessment, the raised wheelie walker had a "centre of mass" 630mm forward of the bumper bar, assuming that the bumper bar was about 200mm wide and that the device was being held another 430mm in front of Ms D'Arcy's body when raised from the boot floor.

[22] The horizontal reach distance from body to load is a critical factor. As that distance increases, "the musculoskeletal demands can increase rapidly with the requirements to reduce hand loads if risk is to be kept to within tolerable limits",[8] Mr McDougall has said.

[23] Mr McDougall refers to guidelines published by the United Kingdom Health and Safety Executive that apply to occasional lifting by females using two hands directly in front of the body. The recommendation is that lifting should be restricted to objects within arm's reach distance in front of the body: about 500mm for females. On Mr McDougall's calculations, Ms D'Arcy's reach distance when raising the wheelie walker appreciably exceeded that proposed by those guidelines.

[24] By 2010, the American National Institute for Occupational Safety and Health ("NIOSH") had published criteria to assess the physical stresses of two-handed manual lifting tasks. These allow for the calculation of values known as the Recommended Weight Limit and the Lifting Index. The former is defined for a specific set of task conditions as the weight of the load that nearly all healthy workers could perform over a substantial period of time (e.g. up to 8 hours) without an increased risk. The lifting index provides a relative estimate of the level of physical stress associated with a particular manual lifting task.

[25] Applying those criteria, Mr McDougall reports that the NIOSH recommended weight limit for the task being performed by Ms D'Arcy in the way she lifted the wheelie walker was 0kg: nil for the reason that the maximum horizontal reach distance criteria were exceeded because of the distance between the centre of gravity of the load and the mid-point between Ms D'Arcy's ankles.

[26] On Mr McDougall's analysis, the technique that Ms D'Arcy used for lifting the wheelie walker would put workers at an increased risk of low back damage, even if the handles did not catch on some object.[9] He regards lifting the device in the way Ms D'Arcy did as "high risk activity".[10]

[27] Dr Grigg, Forensic Engineering Consultant, is surely correct in saying: "the task of putting the walker in the boot and removing it is a simple activity that can be performed without risk if a little care is taken". But it does not follow that training was not reasonably called for in the interests of employee safety.

[28] Unloading a wheelie walker of conventional size and configuration from a car boot involved, Mr McDougall says, "well documented" risk factors exposing a risk of musculoskeletal injury. Nonetheless, Ms D'Arcy was given no training pertinent to that danger.[11]

[29] In their joint report, Dr Grigg and Mr McDougall say:

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8 Page 11.

9 The risk of injury would be increased by the catching of the handle as either the load would be supported for longer or, as Ms D'Arcy did, additional forces are applied when attempting to "jiggle" the wheelie walker free.

10 With the risk increased because the wheelie walker was "caught somehow".

11 She did happen to see a co-worker put a wheelie walker into a car boot.

> "Although by reaching to about its centre of gravity to lift the wheelie walker from the boot with its wheels to the rear, as claimed, the task marginally exceeds relevant guidelines, the catching on any obstruction would increase the risk.
>
> If the wheelie walker was loaded side-on the task could be performed within the guidelines and with a lower risk of being caught if the cable in the top left corner of the boot was hanging down.
>
> Although the task can be performed within the NIOSH and UK Health and Safety Guidelines by grasping the frame near the wheels and pulling it back before lifting it at about its centre of gravity, that is not how the Plaintiff claims she was doing it."

[30] So safe ways to load and unload the wheelie walker included placing the device close, and parallel, to the bumper bar: that is, loading it side-on. Or it might have been grasped much closer to the body, limiting the large horizontal reach distance that created the danger of injury. Had Ms D'Arcy used either of those means, the pertinent risk would have been eliminated.

Negligence

[31] The risk of injury to which Ms D'Arcy was exposed in unloading a wheelie walker from a car was a risk of which Spiritus would reasonably have been aware.[12] The evidence, especially that of Mr McDougall, reveals that the degree of the material risk of injury was not insignificant. That risk could readily have been eliminated: simply by instructing Ms D'Arcy in either of the handling methods discussed by Mr McDougall and Dr Grigg in their joint report. In short, the burden of taking appropriate precautions was negligible. A reasonable person in Spiritus's position would have taken the precaution of instructing Ms D'Arcy in the proper handling of wheelie walkers in view of the danger to which she was exposed in frequently unloading wheelie walkers. There was a significant risk of injury in the absence of appropriate instruction in safe handling methods. And the kind of injury to have been expected with an unsafe method of unloading the device could well have been serious.[13]

[32] In these circumstances, Spiritus breached its duty to take reasonable care for Ms D'Arcy's safety in failing to instruct her adequately in how to unload a wheelie walker from a car.[14]

[33] That breach caused Ms D'Arcy's injury.[15]

[34] Liability is, therefore, established.

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[12] The contrary was not suggested in Spiritus's pleading, in evidence, or in address.

[13] Especially if, as with Ms D'Arcy, the worker was of an age where spinal degenerative change was likely.

[14] It is common ground that she was not given any instruction on the topic.

[15] As causation was not in contest, no more need be said to explain my conclusion that the injury was caused by the breach of duty ascertained in accordance with s 305D of the *Workers' Compensation and Rehabilitation Act* 2003; cf *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103, [16], [37] – [42].

Initial medical

[35] Ms D'Arcy told her employer about the injury and was sent home for the afternoon.

[36] The next day, she saw a general practitioner, Dr Swannell, complaining of ongoing pain "radiating from the low back down the back of the right thigh to the knee", as he recorded the symptoms Ms D'Arcy described.[16]

[37] Dr Swannell arranged treatment with anti-inflammatory agents, including analgesics such as Di-Gesic.

[38] A CT scan of Ms D'Arcy's lumbar spine performed six days after the injury revealed:

- At L5/S1 level, a "central to left paracentral disc prolapse … with contact of the disc to the left S1 root";
- At L4/5, a "minimal broadbased central disc protrusion without evidence of nerve root compression or compression of the thecal sac".

[39] By 22 November 2010, Ms D'Arcy had received nine sessions of physiotherapy and experienced what a WorkCover case manager called a "recent flare of symptoms after attempting light housework at home".

[40] In late December 2010, Dr Mitchell, a radiologist, reported that an MRI investigation of the lumbar spine region revealed:

> "Degenerative changes in the L4/5 and L5/S1 intervertebral discs. Perhaps the most significant pathology is at the L5/S1 level where there is a mild central to left paracentral disc protrusion encroaching on the left lateral recess, however, this does not appear to impinge on the S1 nerve root. The significance of these findings would depend on clinical correlation."

[41] Dr Albietz, spinal surgeon, examined Ms D'Arcy on 23 December 2010. When he inquired about her history, she denied any previous lumbar spine troubles.

[42] Dr Albietz reported that the MRI scan demonstrated a small central annular tear at the L4/5 level as well as a small left-sided L5/S1 paracentral disc bulge without significant compression of the traversing S1 nerve roots. There was discogenic deterioration of both the L4/5 and L5/S1 level.

[43] In his report dated 14 February 2011, Dr Albietz wrote:

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[16] Dr Swannell made a note of the circumstances in which the injury was sustained as Ms D'Arcy had related them to him: "lifting a wheelie walker out of the boot of a car yesterday – caught on the edge of the boot and had to lift it". In his report dated 19 November 2013, Dr Campbell, a neurosurgeon, recorded that Ms D'Arcy had said that the wheelie walker "caught on the edge of the boot and wiring". No reliance was placed on either note as an indication of the way in which the injury occurred.

> "Natalie has either aggravated the degenerative changes present at the L4/5 or L5/S1 levels; however, it is possible that either the annular tear or the small disc bulge is a new finding, particularly the left L5/S1 paracentral disc bulge with the associated left leg symptoms…
>
> From the pathology demonstrated on the MRI scan I would expect Natalie (sic) return to full duties no later than four months post the onset of symptoms… As stated above it is possible that the annular tear at L4/5 or the left-sided disc protrusion at L5/S1 are new work-related injuries although at least one of these findings would be pre-existing. I think it is highly unlikely that Natalie will return to her pre-injury role as a Personal Care Worker."

Occupational physician's evaluation

[44] Dr McCartney, an occupational physician, examined Ms D'Arcy on 31 May 2011, on referral from Spiritus. He obtained a different history than that Ms D'Arcy gave Dr Albietz. In particular, Ms D'Arcy told Dr McCartney that, in the week before the injury, "she was getting a niggly ache in her lumbar back and that persisted until the specific event on" 5 October 2010 when there was a sudden onset of pain while lifting the wheelie walker.

[45] Dr McCartney records that:

- Ms D'Arcy was "continued on conservative management" after chiropractic manipulation, which she found made her pain worse, and physiotherapy sessions[17], which she found of some help;
- after the Christmas break, her symptoms "had plateaued" and she returned to work on 23 January 2011 on a "suitable duties" program;
- later, she experienced an exacerbation of her back pain symptoms. On 7 February 2011, she was again put off work. She returned nine days later on restricted duties at decreased hours.

[46] In relation to symptoms and treatment, Dr McCartney wrote:

> "She takes Panadeine Forte (as required) and anti-inflammatory medication (every few days) and continues with her Pilates exercises … Despite having some pain free episodes she has fairly regular intermittent episodes of thoracolumbar back pain and she finds it easily aggravated with any bending, twisting or lifting movements."

[47] Dr McCartney summarised the CT and MRI scans as revealing "multiple levels of degenerative disc with some bulging and protrusions". He concluded that "lifting" the wheelie walker had "exacerbated / aggravated the underlying back condition". In his assessment, Ms D'Arcy was not fit to fulfil the requirements of the role of a personal care worker without significant risk of injury or aggravation of her condition.

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[17] Physiotherapy was undertaken over about three months.

Neurosurgeon

[48] Dr Campbell, a neurosurgeon, saw Ms D'Arcy at the request of her solicitors on 28 October 2013. By then, more than three years had elapsed since the injury. In relating her medical history, Ms D'Arcy "denied any prior history of lower back injury"[18], Dr Campbell recorded.

[49] Ms D'Arcy complained of lower back pain daily, radiating down the left leg to the knee region. The pain, she said, was aggravated by coughing, sneezing, sitting or standing for more than 15 minutes, and by domestic chores such as bending to vacuum and sweep, reaching to clean, leaning forward to wash and wipe dishes and weeding and trimming. She also spoke of difficulty with dressing and undressing as well as intermittent pins and needles in the lower back region, extending down the left leg, which caused her left leg to give way.

[50] Writing in late 2013, Dr Campbell, who was familiar with the 2010 CT and MRI scans, thought Ms D'Arcy's description of the accident "consistent with causing a left L5/S1 disc protrusion" because she "was required to strain to pull the walker out which was caught on wiring and car interior". He reasoned that: "There was no past history of lower back pain and hence the work accident was the sole cause of the lumbar spine injury".

[51] Dr Campbell expected that the symptoms were likely to persist and that "her condition is now stable and stationary". Ongoing management should be based on avoiding aggravating factors and, Dr Campbell said, any exposure to heavy lifting and bending in future will place her at risk of further injury, adding "ideally she would be best suited performing sedentary type work".

[52] Dr Campbell assessed Ms D'Arcy as suffering a 10% whole person impairment which was likely to be permanent. Critical to that assessment was his view that the L5/S1 disc protrusion was attributable to the incident on 5 October 2010.

Orthopaedic surgeon

[53] Dr Williams is an orthopaedic surgeon who, at the request of Spiritus's solicitors, on 2 June 2014, assessed Ms D'Arcy.

[54] Ms D'Arcy indicated the left L5/S1 level as the region of her pain. Taking into account the results of his examination, the CT and MRI scans, the reports of Dr Albietz and Dr Campbell as well as medical records of the Fraser Coast Medical Centre where Ms D'Arcy had consulted general practitioners, and noting that there were no medical records of Ms D'Arcy having reported lumbar spinal pain before 5 October 2010, Dr Williams reported:

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[18] Mr O'Driscoll was disposed to accept that what Ms D'Arcy had told practitioners was true. The concession can have no practical application to this statement (or to the similar account to Dr Albietz) since Ms D'Arcy told Dr McCartney the contrary. Mr Grant-Taylor QC did not challenge Dr McCartney's evidence concerning what Ms D'Arcy had related to him about experiencing prior lower back symptoms.

> "…The diagnosis is musculoligamentous injury lumbar spine – resolved. In all likelihood the claimant has experienced a temporary soft tissue injury which subsided spontaneously not greater than six weeks after onset. Persistent symptoms relate to minor age related degenerative intervertebral disc disease coupled with a degree of aerobic deconditioning.
>
> …the claimant should have been able to resume her usual duties within a period of three months of onset of symptoms. I note that Dr John Albietz was of the opinion the claimant was capable of resuming suitable duties in a timely fashion after review. Any ongoing symptoms relate to pre-existing and age related degenerative processes coupled with a degree of aerobic deconditioning perhaps associated with the claimant's recent pregnancy.
>
> …her true level of disability for employment is difficult to gauge for two reasons. Firstly there is considerable inorganic influence on the perception of her pain, and secondly, she has been away from the workplace on maternity leave for the last five months. In my view I believe she is able to resume her usual occupation as a disability support worker or as a residential support worker in her normal permanent part time hours. Any ongoing impediment to her occupational activity is a result of underlying degenerative processes and not related to the events of 05 October 2010.
>
> …a wheelie walker is a light metal frame which is specifically designed to cater for the elderly and infirm in its use. As a result I would regard the mechanism described as comparatively minor and unlikely to cause a permanent structural change to the lumbar spine."

[55] In other words, Dr Williams concluded that:

- Ms D'Arcy's symptoms at the time of his examination had no relationship to the incident;
- any symptoms related to her musculoligamentous injury would not have persisted beyond six weeks;
- any incapacity for employment was related to degenerative processes and not to the injury on 5 October 2010 from which she had fully recovered.

Joint report

[56] Dr Williams and Dr Campbell met to attempt to resolve their disagreement in accordance with UCPR 429B. Despite the fundamental differences expressed in their reports, in August, in a joint report, they wrote:

> "Drs Williams and Campbell met on 10.08.2015 at 8.00 am to discuss the issues at hand as requested. Upon review of both reports (Dr Williams 30.06.2014, Dr Campbell 19.11.2013) it was felt that the diagnosis provided by both reports should be revised to lumbar soft tissue injury arising in the context of pre-existing degenerative change in the lumbar spine. The latter had been evidenced by MRI examination and this was agreed by both parties.

> Accordingly it was felt reasonable to revise the assessment of whole person impairment to DRE Lumbar Category II, Table 15-3 AMA5, whereby the appropriate whole person impairment would be considered at 5%. In the context of no prior symptoms in relation to the lumbar spine it was felt that this 5% impairment was referable to the event described as occurring on 05.10.2010 and in relation to employment. The 5% impairment was therefore accorded to the event of 05.10.2010 entirely, with no impairment assigned to pre-existent conditions."

[57] Things did not rest there.

Disavowal

[58] Dr Campbell examined Ms D'Arcy again on 5 November 2015. He reported that his examination revealed decreased flexion and extension of the lumbar spine by 40%-50% with asymmetry of movements, tenderness and guarding bilaterally. He wrote:

> "Miss Natalie D'Arcy's lower back condition has largely remained unchanged since she was last reviewed by myself for medicolegal purposes on 28 October 2013. She has ongoing daily lower back pain and left sciatica with pain levels rating up to 9/10. Subjectively she felt her symptoms were more frequent and more severe in nature.
>
> At the initial assessment I made a diagnosis of L5/S1 disc protrusion (albeit small) however this was downgraded to a soft tissue injury of the lumbar spine following discussions with Prof. Williams. It was mutually agreed there was a 5% Whole Person Impairment which was accorded entirely to the work accident on 05 October 2010 with no impairment assigned to pre-existent conditions.
>
> Miss D'Arcy plans to re-enter the workforce as a disability support worker at the start of January 2016. Time will tell if she is able to cope or not. Ideally she would be best suited to light duties or sedentary type work. Any exposure to heavy lifting and bending would place her at risk of re-injury.
>
> No further specific treatment is required apart from rest, painkillers and modification of activities. The type, frequency and cost of painkiller medication such as Tramal and Panadeine Forte would be best itemised by your client.
>
> At five years post injury Miss D'Arcy's condition has reached maximum medical improvement. Surgery is not indicated."

[59] By the time they testified, Drs McCartney, Campbell and Williams had seen video recordings[19] showing Ms D'Arcy carrying out activities at a gymnasium and elsewhere over a couple of days shortly before the trial commenced.

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[19] The occupational therapist, Mr Hoey, interprets the recorded activities differently from Drs Williams, McCartney and Campbell. The expertise of the medical specialists is more relevant than that of Mr Hoey. I prefer their opinions about what the recordings reveal to his.

[60] Having seen the recordings, Dr Campbell altered his views somewhat. In the footage, he thought Ms D'Arcy presented with a full range of movement of the lumbar spine, with no sign of distress. The exercises she performed in the gymnasium would not be able to be undertaken by someone with a serious lower back complaint. He had "no doubt" that hers is "not a significant condition".

[61] Dr Campbell also considers that although the gymnasium activities demonstrated a capacity to manage nursing, Ms D'Arcy would be best suited for light duties or sedentary type work. If she worked as a nurse, she would be at increased risk of relapse. He would advise her not to attempt nursing.

[62] Dr Campbell does, however, adhere to the view that such lower back symptoms as Ms D'Arcy may actually experience are referrable to the 5 October 2010 event.

[63] Dr Williams testified concerning Ms D'Arcy's video-recorded activities. In his view, it would be very difficult or painful to perform her gymnasium exercises if she had any symptoms arising from her lumbar spine. One of the sets of exercises performed involved "considerable effort on the part of the paravertebral muscles of the spine". Yet no symptoms, pain or restriction were apparent in the activities. And in his assessment, the videos indicated that Ms D'Arcy would be "unrestricted in her capacities to undertake her given occupation".

[64] Asked about the potential significance of what Ms D'Arcy had told Dr McCartney in May 2011 about pre-incident lower back pain, Dr Williams said that those earlier symptoms made it "likely that minor degenerative change" revealed by the "radiological imaging, may have been symptomatic prior to any work-based activity…".

[65] Questioned about the different views expressed in the joint report, Dr Williams explained that he and Dr Campbell took into account each other's opinions and, as he thought was expected from the "hot tubbing process" in which they engaged pursuant to court order, he worked with Dr Campbell to "meet some compromise". That compromise was achieved by "meeting in the middle".

[66] Although Dr Williams regarded the conclusion in the joint report as a reasonable solution, it did not reflect his view then. Nor does it now.

[67] In testifying, Dr Williams firmly adhered to the opinions expressed in his first report: that Ms D'Arcy's injury was musculoligamentous, the symptoms of which would have resolved in six weeks.

Dr McCartney's testimony

[68] In Dr McCartney's perception, the activities at the gymnasium – in particular, moving from a flex position at the waist to lift herself while carrying a weight – indicated that the paralumbar musculature was engaged. He did not see any clinical signs that Ms D'Arcy

was in pain or had any restriction in movement.[20] He considers that she has the functioning capacity needed to carry out the duties inherent in nursing.

[69] Dr McCartney characterised the dual level disc protrusions indicated by the 2010 MRI scan as an unusual level of disc disease for someone 30 years old, revealing an underlying degenerative process that was more advanced than would be expected in someone of that age.

[70] Although Dr McCartney cannot say when the improvement in Ms D'Arcy's condition that he anticipated in 2011 was fulfilled, the musculoligamentous strain that she experienced would "usually resolve fairly promptly", he testified.

[71] In Dr McCartney's opinion, such episodes of intermittent back pain as Ms D'Arcy may continue to experience are not causally related to the relatively moderate forces to which she was exposed in the incident. As he put it, "recurring episodes of low back pain over a period of seven years is not consistent with a simple musculoligamentous back strain in the method" that Ms D'Arcy described. He testified that:

> "Without permanent structural damage to a spine, it's too long a period of time for muscles and other soft tissues not to have recuperated or healed. We're now dealing with a chronic back pain problem which is a complex biopsychosocial problem."

Connection between injury and condition?

[72] Dr Campbell's 2013 impression that Ms D'Arcy's injury was consistent with a left L5/S1 disc protrusion was made in circumstances where she had not mentioned her previous lower back symptomology; and he now accepts that his initial diagnosis was mistaken.

[73] So all three medical specialists agree that the injury was musculoligamentous.

[74] Neither Dr McCartney nor Dr Williams shares Dr Campbell's view about the connection between such symptoms as Ms D'Arcy may still experience and her injury. Instead, they conclude that its effects completely resolved well before now: Dr Williams, within six weeks; Dr McCartney, quite some time ago.

[75] The evidence of Dr McCartney and Dr Williams is preferable. Their views on early resolution of the effects of the injury are more consistent with its nature and the surrounding circumstances than is Dr Campbell's impression that there is a continuing connection between injury and symptomology.

[76] The impact of Ms D'Arcy's soft tissue injury was of relatively short-term duration. The effects of the injury abated years ago. The pre-existing degenerative change revealed in the 2010 radiological imaging explains any ongoing lower back complaints. Persisting pain and restrictions are not attributable to the injury.

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[20] There were no signs of discomfort in the gymnasium exercises nor in getting in and out of a vehicle and other observed activities.

[77] Attempting to fix a date by which the injury had resolved is complicated by other considerations. First, there is, as Dr Williams identified, a substantial inorganic component to Ms D'Arcy's complaints: the perception is supported by a number of medical records concerning a variety of maladies, including psychiatric or psychological conditions. Secondly, the video surveillance shows Ms D'Arcy performing, without apparent pain or restriction, activities difficult to reconcile with her complaints.

Past historic fact conclusion

[78] More probably than not, the injury ceased to be influential in Ms D'Arcy's lower back condition before 2012.

[79] The damages should be assessed on that basis.

Economic loss

[80] When Ms D'Arcy returned to work with Spiritus, she was placed on light duties.

[81] According to Ms D'Arcy, her employment with Spiritus ended when she was told that she could no longer be employed there if she could not perform her full duties as a personal care worker; and she could not.

[82] Ms D'Arcy soon obtained other employment: as a behavioural support worker with Bay Support Services Group Incorporated.

[83] Presumably, the parties will agree on the monetary loss associated with an absence from work or reduced hours while Ms D'Arcy remained with Spiritus.

[84] The main economic loss claim is based on the notion that the injury deprived Ms D'Arcy of the chance to work as a registered nurse.

[85] Ms D'Arcy left school in Year 10. Thereafter, she worked in a range of occupations, including staffing the delicatessen counter at a Woolworths store and bar work at an hotel, before joining Spiritus.

[86] In 2008, Ms D'Arcy enrolled in a Bachelor of Nursing degree course at the University of Southern Queensland. At first, her results were encouraging. By the third semester of 2009, however, she had sought "academic withdrawal".

[87] Ms D'Arcy's letter requesting the temporary postponement of her studies said that she had been "suffering from ongoing anxiety for quite some time" but had not realised its severity until the end of Semester 2 2009 when she "started to exhibit new symptoms in the form of depression and anxiety attacks". She began to withdraw from "everything in my life, including my studies". The letter admitted to severe anxiety and obsessive tendencies which had caused her to lose her job and "all ability to involve" herself "in any activities involving public interaction". She "felt" that her "whole life was falling apart" and had consulted a psychiatrist. She "may be suffering from rapid cycle

bipolar/obsessive compulsive disorder which may have been triggered by the recent death" of her mother, she wrote. She characterised her condition as a "very serious mental illness".

[88] By early October 2010, Ms D'Arcy was still not pursuing nursing studies.[21] Nor was she showing any sign of intending to resume them.

[89] Not long after suffering her injury, it seems, Ms D'Arcy abandoned the nursing course.

[90] It is by no means clear that Ms D'Arcy gave up her nursing studies because of her back, although she looks to have made the decision when she was experiencing discomfort to which the injury had contributed. The occupational therapist, Mr Hoey, recorded[22] that she had told him that she discontinued participation in the course because she felt that she would be unable to undertake the duties of a registered nurse and would have difficulties participating in the practical side of the study. Given Mr O'Driscoll's concession[23], it should be taken that Ms D'Arcy abandoned an ambition to work as a registered nurse because she supposed that the consequences of her injury precluded her from achieving that goal.

Hypothetical past

[91] What might have happened had Ms D'Arcy not been injured on 5 October 2010?

[92] Three factors show that there is but a slim chance that she would have completed her nursing degree and joined the workforce as a registered nurse.

[93] First, her letter seeking academic withdrawal indicates the disabling effects of her mental health difficulties. The evidence does not show that those problems resolved. And many entries in records and reports over the years speak of mental health concerns – more than one of them relatively serious.

[94] Secondly, after abandoning the nursing studies, Ms D'Arcy enrolled for a Bachelor of Human Services degree. She made no progress towards satisfying the requirements of that degree,[24] which raises considerable doubt about her enthusiasm for tertiary studies.[25]

[95] Thirdly, the lumbar spine would inevitably have been adversely affected by progressive degeneration, with consequences that would have afforded a compelling reason[26] to look to a future in a vocation other than nursing.

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[21] There is no explanation for the length of absence from the nursing course. Ms D'Arcy does not, for example, suggest that employment with Spiritus adversely affected her ability to pursue nursing studies. There is no foundation for an inference that her decision not to return to nursing studies was due to some, merely temporary, adverse mental affliction.

[22] See para [9] of his report dated 25 November 2013.

[23] See footnote 18.

[24] She did not sit for any examination in the new course.

[25] There is no reason to suppose that any consequences of the injury contributed to her choice not to pursue the new course.

[26] For her at any rate.

[96] In the most unlikely event that Ms D'Arcy had secured employment as a registered nurse, the spinal degeneration, in conjunction with her pronounced tendency to hypochondria, would have seen her turn to other employment: very probably, considerably sooner than later.

[97] Although the possibilities cannot be evaluated with any pretence to precision, the chances that, had she not been injured, she would have worked as a registered nurse are to be reflected in the award for diminution in earning capacity.[27]

[98] It seems quite unlikely that, had Ms D'Arcy qualified as a registered nurse, she would have worked as such for more than a year or two.

[99] On the assumption that Ms D'Arcy would have completed her nursing course by the beginning of 2013, her lawyers have calculated her economic loss to trial at about $122,000. The projected loss over the next 30 years, discounted at 5%, and based on the difference between the income of a retail assistant working 30 hours weekly and the current average net weekly income of a registered nurse, has been estimated at about $450,000.

[100] The prospect that Ms D'Arcy would have derived economic benefits of that order is, in a word, remote.

[101] The parties accept that only a global assessment can be attempted. My impression[28] is that $20,000 is fair compensation for this component of economic loss.

Other components

Some components are agreed: compensation for the personal injury itself, as distinct from its economic consequences, is agreed at $5,900; special damages at $9,762.10; the *Fox v Wood* allowance at $527[29]; and a Medicare refund at $1,451.50.

Disposition

The parties will be heard further on any remaining components that are not agreed.

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[27] See *Reardon-Smith v Torres-Farr* [2007] QCA 211.
[28] Cf *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, 499.
[29] Mr O'Driscoll's outline puts the figure at $5,827, presumably by mistake.