# SUPREME COURT OF QUEENSLAND

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| CITATION: | *McGrory v Medina Property Services Pty Limited* [2017] QCA 234 |
| PARTIES: | **VICKI MARIE McGRORY**<br>(applicant)<br>**v**<br>**MEDINA PROPERTY SERVICES PTY LIMITED**<br>ACN 062 326 176<br>(respondent) |
| FILE NO/S: | Appeal No 12567 of 2016<br>DC No 55 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Civil) |
| ORIGINATING COURT: | District Court at Rockhampton – [2016] QDC 280<br>(Burnett DCJ) |
| DELIVERED ON: | 13 October 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 May 2017 |
| JUDGES: | Sofronoff P and Fraser JA and Brown J |
| ORDERS: | **1. Grant leave to appeal.**<br>**2. Allow the appeal.**<br>**3. If the parties are unable to agree upon the orders, including orders as to costs, that should be made to give effect to these reasons, the parties are to lodge and serve written submissions about the appropriate orders within 14 days of these orders.** |
| CATCHWORDS: | DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – EXPENSE FLOWING FROM PLAINTIFF'S INABILITY TO WORK – GENERALLY – where the applicant was employed by the respondent as a room attendant – where she was required to lift an ice bucket as part of her duties – where she experienced pain while lifting the ice bucket – where she eventually had to cease working for the respondent due to ongoing pain and her inability to perform her duties – where the trial judge found the respondent liable in negligence – where three witnesses, including the applicant, gave evidence at the trial that supported the conclusion that the applicant had suffered a significant disability – where the first doctor |

gave evidence that was inconsistent with the evidence of the three witnesses – where the second doctor gave evidence that was consistent with the evidence of the three witnesses – where the trial judge accepted these witnesses as credible but preferred the evidence of the first doctor over the evidence of the second doctor – where the trial judge relied on the evidence of the first doctor when determining quantum – whether the trial judge erred in evaluating quantum by relying on the evidence of the first doctor over the evidence of the second doctor

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – DAMAGES INADEQUATE – where the first doctor at trial gave a modest assessment of the applicant's impairment – where the trial judge relied on the first doctor's evidence in evaluating quantum – whether the applicant's damages were inadequate because the first doctor underestimated the extent of the applicant's impairment and her loss of working capacity

*District Court of Queensland Act* 1967 (Qld), s 118(3)

*McGrory v Medina Property Inc Services Pty Limited* [2016] QDC 280, overruled
*Pickering v McArthur* [2005] QCA 294, applied

COUNSEL: G R Mullins, with S B Whitten, for the applicant
S Gray for the respondent

SOLICITORS: Bressington & Partners for the applicant
BT Lawyers for the respondent

[1] **SOFRONOFF P AND FRASER JA:** The applicant was the plaintiff in an action for damages for personal injuries. Both liability and quantum were in issue. The learned District Court judge who heard the trial found the defendant liable in negligence. He concluded that the negligence had caused the applicant's injury and assessed damages in the sum of $10,434.38 made up of the following sums:

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| General Damages | $5,900.00 |
| Special Damages | $7,650.25 |
| Past Economic Loss | $1,500.00 |
| Interest on Past Economic Loss | $86.00 |
| Loss of Past Superannuation | $135.00 |
| **Subtotal** | $15,271.25 |
| Less WorkCover Refund | $4,836.77 |
| **Total** | $10,434.48 |

[2] Leave to appeal is necessary under s 118(3) of the *District Court of Queensland Act* 1967 because the judgment that was given was for an amount less than the Magistrates Courts jurisdictional limit.

[3] At the time of trial the applicant was 54 years old. Her Quantum Statement was tendered as an exhibit. In oral evidence she swore to the truth and accuracy of its contents. Relevantly, she said that she had begun to work for the respondent at the Travelodge in Rockhampton as a room attendant on 3 September 2008. Her work required her to clean the rooms after guests had moved out and she also worked as a breakfast waiter. She was prepared to undertake any job that the motel required of her. The applicant was single and relied upon her income to support herself. She had no assets or other forms of support upon which to fall back.

[4] On the morning of 30 January 2011 the applicant was at work. She had to lift a metal container that contained ice in order to service it. In lifting the ice bucket, which was positioned in an awkward way, she experienced pain immediately in both shoulders. Her right shoulder felt the worst. She felt like going home but instead remained at work. She was in pain for the rest of the day. She did not thereafter take any time off work, believing she could not afford to do so having regard to her expenses. She said that after work she would go home and usually "just simply collapse, have a hot shower and put heat packs on. I was usually in bed by 6.30pm".

[5] The applicant said that she did not seek medical attention because she thought she had merely pulled a muscle and believed that the condition would get better on its own. She took Panadol for the pain as well as anti-inflammatory tablets. She used heat packs and had hot showers. By May of the same year her condition had not improved. One day in early May her supervisor, Mr Barford, instructed her to put out a sign and to install a non-slip mat behind the bar. He asked why those things had not already been done. The applicant explained that she was unable to lift the objects because they were too heavy. He observed to her that a co-worker who was smaller than she was could do it. She explained to him that she had hurt herself and how that had happened. She said that he immediately instructed her to go home and that he would arrange a doctor's appointment. This was done and she visited Dr Roy Davey, a general practitioner. Upon his first examination of her on 12 May 2011, he recorded that the applicant exhibited right shoulder pain with internal rotation. He also recorded that she had some pins and needles on the right side of her neck and pressure pain in the bicipital groove region right. He ordered x-rays and prescribed Voltaren. On a subsequent examination on 26 May 2011 he recorded that the applicant was suffering from the same restrictions of movement of the right shoulder. His own examination demonstrated internal and external rotation restriction. On 24 June 2011 he recorded that the applicant had told him that her right shoulder continued to give her pain. His examination showed that all her movements were restricted and painful and that movements up to the point of restriction were painful. Dr Davey ordered x-rays and ultrasound but these revealed nothing that would explain the restriction of movement or the pain. Cortisone injections which had been administered at the request of Dr Davey did not alleviate her condition.

[6] In her oral evidence the applicant said that she had not experienced that kind of pain before the incident but that the pain had continued to the time of trial. It became worse over time.

[7] At work the applicant found that she had to favour her right arm. This meant that she was doing the heavier work with her left arm and this caused her left arm to suffer more pain. Resting her left arm eased that pain; resting her right arm had no

such effect. Under a doctor's advice she began taking a strong form of Brufen as well as Panadol. She undertook physiotherapy treatment and did the exercises recommended by the physiotherapist; this helped a little only while she was undergoing therapy.

[8] Over many months the right shoulder did not improve; rather the pain increased to the point that, according to the applicant, "on some days it was unbearable".

[9] Two years after the incident the applicant found herself having to change bedding at the Travelodge using new doonas. These were heavy. The doona covers had to be changed every day on about 15 beds and lifting these doonas caused the pain to be severe. The applicant found she was unable to do the job. As a consequence, she resigned. Having no employment, she was unable to meet her rent of $400 per week in Rockhampton. She moved in with her daughter on the Gold Coast and remained there for some time. Her mother lived in Newcastle and had suffered a stroke. She went to live with her mother to help her and this gave her a place to live.

[10] In February 2015 the applicant travelled to Rockhampton to consult her solicitor. While she was there she was offered a job at the Centrepoint Motel. This was a part time casual housekeeper's position. She told her new supervisor, Ms Leanne Tucker, about her injury and the limitations it placed upon her ability to work. She was not able to cope well with all of the work. She did it putting up with the pain. She would tape up her shoulder to assist. The work was constantly painful and forced her to work slowly. She began to take more medication in an attempt to reduce the pain. As a consequence of her known disability her employer limited her physical tasks to those that she could apparently manage.

[11] The applicant found it difficult to reach with her right arm and even washing her hair caused extreme pain in her right shoulder. Lifting her arms any higher than parallel to the ground was difficult. She simply avoids doing anything which requires lifting or twisting. She no longer even enjoys reading books because she cannot hold a book up for any period of time.

[12] Until the trial commenced, the defendant disputed that the incident with the ice bucket had even occurred. At the commencement of the trial the defendant admitted that fact. Whether the defendant had been negligent in requiring or permitting the applicant to perform this task remained in issue. Whether the incident had any effect upon the applicant's earning capacity was also in issue.

[13] In oral evidence the applicant was asked for the reason for her resignation in early 2013. She said:

> "Travelodge had just got new doonas and doona covers. They are very nice, but they're terribly heavy. The covers are heavier than the doona itself, and because they have to be changed every day, it was just – I tried for a good few months, but I just – I just couldn't do it. It was too heavy. That was it."

[14] Later she said:

> "I just couldn't do it [anymore]. It was too heavy and – they were just too heavy. I just couldn't do it, so I just thought I'll have a rest."

[15] She then explained:

> "I went and seen [sic] my daughter and stayed with her for a little while, enjoyed the grandchildren. In this time, my mum had her third stroke, so we – my sister was moving my mum to Newcastle, and, at that time, even though mum was good, she couldn't speak and just needed someone to be there every day for a little while, so I went with mum to Newcastle."

[16] The applicant did not work from October 2013 until February 2015. She received Centrelink benefits and looked for work.

[17] Because negligence was in issue at the trial, understandably the respondent's cross-examination of the applicant was largely concerned with the incident itself. Some questions were asked of the applicant concerning her staying with her daughter on the Gold Coast and her living with her mother. Her decision to resign because of the pain she suffered was not challenged in cross-examination. She was questioned about whether she had ever told her supervisor, Mr Barford, about the problems that she had been having at work. She admitted that she had not told him. In re-examination she explained that she had not been on good terms with him.

[18] Significantly, no part of the cross-examination challenged the applicant's evidence about the immediate and long term consequences of the incident. The evidence which she gave by means of her Quantum Statement and also in oral evidence concerning the pain that she had suffered immediately upon attempting to lift the ice bucket and the continued pain that she suffered afterwards and which she continues to suffer was not challenged. No questions at all were asked about these matters. Her inability to work was not challenged. Her reasons for leaving the defendant's employment were not touched upon. Her continued physical limitations when employed at the Centrepoint Motel were not mentioned. The truth of her statements about her pain to Dr Davey and a specialist orthopaedic surgeon to whom he had referred her were not disputed. Although the applicant was asked whether she had told her supervisor about her reasons for leaving her employment with the respondent, and although she admitted that she had not told him that the reason was the pain she was suffering, it was not put to her expressly or even by implication that any of her evidence in that respect, or indeed in any respect at all, was untrue.

[19] Dr Davey was not the only medical practitioner who examined the applicant before these proceedings were commenced. Dr Davey had referred her to an orthopaedic surgeon, Dr Pretorius, who examined the applicant on 28 July 2011. He found that she was in "quite severe pain" and found that her "forward elevation [was] only from 0-120 [degrees] and external rotation from 0-45 [degrees]". He found that she was very tender over the biceps and that there was pain with biceps stress, pain with external rotation and infraspinatus stress. He prescribed Celebrex.

[20] The applicant was examined by Dr Allan Cook, an orthopaedic consultant for the purpose of these proceedings. He recorded that, upon examination:

> "… she did report localised tenderness that was marked over the anterior, lateral and posterior aspects of the right shoulder but only mild tenderness over the right acromioclavicular joint but no pain on stressing the acromioclavicular joint. Flexion of the right shoulder was to 110 degrees, extension was to 30 degrees, abduction was to 75 degrees, adduction was to 20 degrees, internal rotation movement

> was to 60 degrees and internal rotation movement was to 50 degrees. All these movements were associated with a complaint of increased right shoulder pain that was worst at the end range of these movements."

[21] Dr Cook diagnosed the applicant as suffering from a soft tissue injury to both shoulders with the right side being worse than the left. She was also suffering from mild secondary subacromial/subdeltoid bursitis in the right shoulder and aggravation to the mild early degenerative changes of osteoarthritis in the right acromioclavicular joint. In his opinion her condition had stabilised and would not get any better. He concluded that her earlier shoulder dislocations (it emerged that there had been two of these) were not involved because she had suffered no further or recurring dislocations. These had occurred 17 years ago and 16 years ago respectively and she appeared to have been asymptomatic thereafter.

[22] Dr Cook recommended that the applicant undergo an arthroscopy of her right shoulder. If that examination showed that surgery was desirable, in his opinion the cost of such surgery would be between $12,000 to $15,000.

[23] Dr Cook also concluded that the applicant was fit only for part time work of a very light to light nature provided that the work did not involve constant or repetitive lifting, carrying, working above the head or shoulder height or working in awkward or confined spaces. She was unfit for any form of work that was of a heavy, moderately heavy or even light moderate nature.

[24] The respondent engaged Dr John Walters, also an orthopaedic specialist, to examine the applicant. The applicant complained to him about "pinching" pain over the deltoid region of both shoulders which was worse on the right hand side. She said that pain in the region of her right shoulder was constant and aggravated by activity. It was often actually worse when she was relaxed.

[25] Dr Walters found that the applicant had a full range of movement in her left shoulder and a mild restriction of movements of her right shoulder. There was a slight restriction of extension of both shoulders which he thought was symmetrical and probably normal. He found "generalised tenderness over all areas of the shoulder". He was unable to find any significant structural pathology upon examination of the available x-rays. He observed that the MRI scan reported changes in the bone and soft tissues of the right acromioclavicular joint but "steroid injections into the joint did not provide symptomatic relief, and clinically there was not specific tenderness localised to this joint". He concluded, relevantly, that there was no "clear or definite diagnosis" that was possible relating to the event in question. He thought that one "would consider there has been soft injury to both shoulders". He was of the opinion that lifting the ice bucket "would be consistent with causing a soft tissue injury to both shoulders". He observed that the applicant "has persisting vague symptoms in both shoulders".

[26] He was also of the view that the applicant had "some symptoms of instability on the right side which relate to a prior injury". This was undoubtedly a reference to the earlier shoulder dislocations. He also thought that there "may have been some aggravation of acromioclavicular arthritis, which is pre-existing and any aggravation has ceased". He was of the view that there was "some quite mild irritability of the right shoulder and minor loss of full movements into an overhead position, the reasons for which are not clear".

[27] He considered that there was a "slight restriction of movement in the right shoulder" which equated to a two per cent upper limb impairment. He attributed this to the soft tissue injury which occurred on 30 January 2011.

[28] In concluding his report, Dr Walters thought that it was "noteworthy that despite having to cease employment because of her symptoms Mrs McGrory has apparently not sought Specialist medical advice regarding her shoulders during 2012 and 2013 years".

[29] In a second report, Dr Walters commented upon Dr Cook's report. He observed that there was a major discrepancy between his own and Dr Cook's observations about the applicant's limitation of movements. He was unable to determine that there was any structural abnormality which would explain Dr Cook's findings.

[30] In his first report, Dr Walters had recorded that the applicant had told him that:

> "… she could undertake the household chores. She said that these 'took longer'. She was independent with the activities of daily living, but she said she did not wash her hair as frequently as previously. She said she avoided any heavy lifting. She had difficulty lifting one of her grandchildren who weighed 10kgs.
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> [Ms] McGrory said that there was nothing that she really could not do, but she worked at her own pace. She said it took her 25 minutes to clean a room. She said she could not work at the 'required speed' with her previous employer."

[31] Based partly upon these matters, Dr Walters concluded that he was unable to identify any pathology clinically or on imaging which would, in a physical sense, preclude the applicant from her former work. He thought retail work would be "within her capabilities".

[32] The two orthopaedic experts were in agreement about a number of things. They both knew that the applicant had previously suffered two successive dislocations of her right shoulder. They both agreed that the applicant had suffered a soft tissue injury to both shoulders as a consequence of the incident with the ice bucket. They both agreed that she was continuing to experience symptoms in both shoulders.

[33] The experts disagreed about the range of movements of which the applicant was capable. They also appear to disagree about the extent of the pain that the applicant suffers. Dr Walters concluded merely that she "has persisting vague symptoms in both shoulders". Dr Cook understood the applicant's history to involve continued pain in both of her shoulders, the right side being worse than the left and that the pain was present virtually all the time and that it varied in severity. When her shoulders have been "aggravated", both of them were painful and very tender to press on. This aggravation occurs when she uses her arms and as a consequence she has to avoid handling anything that is "a bit heavy, difficult or a bit strenuous". She was unable to sleep on either side because the pain would wake her up.

[34] Also, both doctors disagreed about the extent of movement of which the applicant was capable before suffering from pain.

[35] No doubt the differences in understanding that the doctors exhibited about the applicant's persisting symptoms can be explained by varied histories given by her. This is not remarkable. The actual facts of the matter would be for a trial judge to find as a consequence of the evidence given at the trial by the plaintiff considered with any supporting or conflicting evidence.

[36] In this case the applicant gave a lengthy description of her early symptoms and her continuing symptoms.

[37] The applicant also called supporting evidence from Ms Moira Black, who had been the applicant's supervisor at the Travelodge. In evidence that was referred to expressly by the learned trial judge, Ms Black said that:

> "Well, I could see that, often, she wasn't as flexible as she used to be. She would tense up. Her face would sometimes have a pinched look to it, like she was in pain."

[38] Ms Black gave other evidence about the need for her to arrange assistance for the applicant in doing some of the work which her condition prevented her from doing herself.

[39] Although Ms Black was asked questions in cross-examination about whether or not she had reported these matters to Mr Barford, who supervised both Ms Black and the applicant, it was not put to her that any part of her evidence was inaccurate.

[40] Ms Leanne Tucker, who had later engaged the applicant to work for the Centrepoint Motor Inn, was also called in the applicant's case. She gave evidence that the applicant had informed her about her physical limitations before she commenced work. As a consequence, Ms Tucker said that the applicant was given no heavy lifting to do. She said:

> "We did all the heavy lifting of the furniture. She sort of just directed us of – what glass was in boxes and stuff. We did everything for her."

[41] All of this evidence was unchallenged and uncontradicted.

[42] The learned trial judge in his reasons identified no basis upon which any of that evidence could have been rejected and, indeed, appears to have accepted it all.

[43] The effect of that evidence was that the applicant had been severely limited in her ability to work. She was simply unable to do the work that she had done before. It would be fair to say that the evidence proves that the applicant was a willing and determined employee. She was certainly no shirker. Her attitude towards supporting herself was demonstrated by her unchallenged evidence that, despite the pain from which she was suffering, she continued to work for the defendant for two years before a change in circumstances made the work unbearably painful.

[44] In his oral evidence, Dr Walters emphasised the significance of his clinical finding that the applicant's loss of movement was minor. He also emphasised that he had been unable to identify clinically or otherwise anything which would "in a physical sense preclude [Ms] McGrory from her former work".

[45] It was put to Dr Walters that the restrictions in movement from which the applicant suffered meant that she would be unable to do heavy work, was suited only for light work and could not do any constant or repetitive lifting, could not carry things above her head or shoulder height and could not work in awkward or confined spaces or use any tools or equipment that caused vibration or jarring. He did not agree with that proposition.

[46] In order to reconcile the evidence of the applicant, Ms Black, Ms Tucker and Dr Cook on the one hand and the evidence of Dr Walters on the other hand it was necessary for the learned trial judge to consider issues of credibility in relation to the lay witnesses and issues concerning the basis in fact for Dr Cook's and Dr Walters' ultimate opinions. It was also necessary to consider whether there was any real conflict in the opinions of the two doctors or whether they were addressing different questions. In the event that the learned trial judge accepted as truthful and reliable the evidence of the applicant, Ms Black and Ms Tucker, the resulting findings of fact could bear upon the evidence of the two orthopaedic specialists because such findings could affect the factual assumptions contained in their respective medical reports.

[47] Because the evidence of the applicant, Ms Black and Ms Tucker was, in all material respects, not challenged in cross-examination and was not contradicted by any other evidence, then, absent any extraordinary features in the case, the learned trial judge would have had to accept them as witnesses of truth. Indeed, that is what his Honour did.

[48] Between paragraphs 2 and 9 of his judgment the learned trial judge set out the applicant's evidence concerning the incident itself. He concluded:

> "I have no difficulty being satisfied on the balance of probabilities that the events occurred as described by the plaintiff and I accept her evidence on these matters."[1]

[49] After dealing with the issues concerning duty and breach of duty, the learned trial judge turned to quantum. The learned trial judge's statement of the primary evidence concerning the physical injury suffered by the applicant was succinct. His Honour said:

> "[40] The plaintiff suffered immediate symptoms following the lift. She stated she felt immediate "hurt", so put the bin down. She took no time off work or consulted a medical practitioner until May 2011. She stated she thought she had pulled a muscle and just expected it would work itself out. She took Ibuprofen and Panadol to address her symptoms but the pain continued and she complains, got worse.
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> [41] In early May 2011 the manager asked her to move a sign. She told him she could not lift it because she had earlier hurt herself. He immediately arranged an appointment for her with a local GP, Dr Davey and matters progressed from there."

[50] Later, in connection with the medical treatment administered to the applicant, his Honour said:

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1 *McGrory v Medina Property Inc Services Pty Limited* [2016] QDC 280 at [10].

> "[50] The plaintiff complained her right shoulder did not get better and pain continued to increase. She says she developed a dependency on pain killing medication and lost confidence in the medical advice that she was receiving. She said she continued working for another two years, by which time the Travelodge had introduced new, heavier doona [sic] and she simply could not continue with her work, so she resigned from her employment."

[51] Later, under the subheading "Economic loss – Generally", his Honour said:

> "[67] The plaintiff continued working with the defendant after the event until she ceased employment in October 2013. In her evidence she stated that after working for more than two years post incident the level and frequency of the pain gradually got worse but matters were brought to a head when the Travelodge introduced new doona covers into its bedrooms. She complained that the weight of these covers was such that she could no longer comfortably attend to her duties and she in turn resolved to resign. She stated she felt that the job was making her shoulders worse and she needed a break from it. Accordingly she decided to leave the job so she could get some "complete rest".
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> [68] Her supervisor at the Travelodge, Ms Black gave evidence that she was a good worker and that she was aware that the plaintiff had injured her shoulders on the occasion in question and was concerned about her after that time. She noted that after the incident the plaintiff was not as flexible as she used to be and that she would tense up and sometimes have a pinched look in her face like she was in pain. She also observed that there was some minor adjustments to her duties following this incident.
>
> [69] Notwithstanding that evidence, which I accept, the fact remains as was outlined by Dr Walters, that the plaintiff, after initial treatment ending towards the end of 2011, continued to work for a further two years without the need for medical presentation."

[52] This description of the evidence about the plaintiff's injury does not adequately comprehend the evidence given by the applicant, by Ms Black and by Ms Tucker. That evidence, as set out earlier, dealt in detail with the lack of symptomology after the shoulder dislocations which had occurred more than a decade previously. The applicant, Ms Black and Ms Tucker gave clear and comprehensive evidence about the signs of pain that the applicant exhibited. There was detailed evidence about the applicant's inability, because of pain, to do important parts of the work in which she was engaged at the Travelodge and the work she was doing at Centrepoint Motel. This evidence bore directly upon her earning capacity. The unchallenged and uncontradicted evidence given by these three witnesses constituted proof of a real, significant and continuing disability which caused a loss in the applicant's earning capacity. The trial judge accepted the applicant, Ms Black and Ms Tucker as credible witnesses.

[53] No evidence given by Dr Walters was capable of falsifying any of that evidence; nor could it possibly have done so having regard to the way the defendant conducted its case.

[54] Dr Walters' opinion about the extent of the applicant's injuries could only be accepted if the factual basis for that opinion was first established to the satisfaction of the trial judge. Dr Walters' evaluation of her disability as a minor matter depended entirely upon his clinical assessment about the applicant's range of movement. Yet the evidence of the applicant and her lay witnesses conflicted with the factual assumptions upon which Dr Walters' evidence was based. Having accepted the evidence of the applicant and Ms Black, as his Honour did in paragraph [69] of his reasons, it was not open to accept the opinion of Dr Walters, which was based upon facts that could not stand with such evidence.

[55] The learned trial judge's reasons do not engage in any such analysis.

[56] At trial the applicant's counsel submitted in writing that the opinion of Dr Cook was consistent with the evidence of the applicant and with the restrictions in her movements that had been observed and described in evidence by Ms Black and Ms Tucker. He submitted that that evidence had not been seriously challenged; in fact that is an understatement because the evidence to that effect was not challenged at all and in fact the learned trial judge did accept that evidence.

[57] Accordingly, the applicant's counsel submitted at trial in his written submissions that the evidence of Dr Cook was consistent with the evidence of the plaintiff and her lay witnesses but that of Dr Walters was not.

[58] This was correct.

[59] Upon the subject of the injury suffered by the applicant, the respondent's counsel dealt at length with the medical evidence and the respects in which he submitted that that evidence was conflicting. The submissions concluded:

> "[96] The defendant submits that having regard to all of that evidence, the opinions and/or assessments of Dr Walters, Dr Pretorius and Dr Conaghan should be preferred to that of Dr Cook. The plaintiff's injury is appropriately classified within item 97, being a minor shoulder injury, which has a ISV of 0 to 5."

[60] As to the applicant's resignation from her employment with the respondent, the respondent's counsel submitted:

> "[106] The Plaintiff resigned from her employment on 13 October 2013 and resided with her family down the coast, before relocating to Newcastle. The Plaintiff's evidence is that she was assisting her mother who had suffered her 3rd stroke. She wanted to stay close to home to assist with her mother's care and did not make any written job applications, but door knocked businesses in the area."

[61] That submission is literally accurate. The matters in that paragraph were accepted by the applicant when giving evidence. However, the applicant did not accept that her resignation from employment had been prompted by factors other than the effect

of the injuries upon her. No such proposition was put to the applicant in cross-examination and indeed the submission quoted above does not actually seek to make such an argument.

[62] The learned trial judge found that the applicant resigned from her employment for reasons other than the effect of the injury. His Honour found:

> "[70] At the time the plaintiff resigned there were other pressures upon her including the need to assist and care for her mother who had suffered a stroke and the presence of her family at the Gold Coast. I am satisfied that those factors, when coupled with some discomfort in her shoulder which was unrelated to the effects of her injury which by then had passed, motivated her decision to resign."

[63] Conflicts in expert opinions can raise difficult problems for judges. Areas of specialised knowledge can raise issues about which it may be difficult to make judgments. Medical evidence given in personal injuries cases can sometimes be of this character. Particularly when two experts base their ultimate conflicting opinions upon exactly the same assumptions of fact, it may be a difficult task for a trial judge to determine which of the two conflicting views to accept.

[64] This was not such a case.

[65] The respective medical practitioners were confronted, it seems, with differing presentations by the applicant upon examination. However, the problems presented to such experts had to be distinguished from the issues which the trial judge had to determine. The learned trial judge in this case was not limited by the same constraints as the medical experts. Unlike those experts, the trial judge had the benefit of comprehensive evidence of symptomology given by the applicant which had been supported in material respects by Ms Black and Ms Tucker. Having accepted that evidence the learned trial judge was obliged, as a matter of legal reasoning, to take those findings into account when assessing which of the experts' opinions he should accept.

[66] His Honour explained that he preferred the evidence of Dr Walters to that of Dr Cook because:

> "In particular, I note his observations that three different doctors examined the plaintiff at times more proximate to her initial injury and each observed significantly greater, if not a full range of movement in the plaintiff's shoulders. Dr Walters' view was reinforced by both the plaintiff's failure to seek medical attention, a fact which of itself would suggest any difficulties were not overly troubling, and the absence of supporting evidence of significant injury in the x-rays/MRI scans and MR arthrogram."[2]

[67] This is an insufficient basis upon which to prefer the opinion of Dr Walters to that of Dr Cook. It fails to take into account at all the findings which his Honour made, and which his Honour had correctly made, about the applicant's evidence and that of Ms Black and Ms Tucker. Indeed, apart from being directly germane to the

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2 *McGrory*, *supra* at [63].

question of the symptoms caused immediately after the incident, that evidence was also relevant to the issue of "the plaintiff's failure to seek medical attention" and the reasons for that failure. His Honour's observation to that effect echoes the evidence of Dr Walters referred to earlier. As I have said, he concluded his first report with the sentence:

> "I think it is noteworthy that despite having to cease employment because of her symptoms [Ms] McGrory has apparently not sought Specialist medical advice regarding her shoulders during 2012 and 2013 years."

[68] That observation was not one which it was relevant for Dr Walters to make as a medical practitioner. It was an argumentative observation that, if relevant, was one which the respondent's counsel could make. It was not a medical opinion. It was also an observation that could be given no weight unless it appeared that Dr Walters was aware of the evidence which the applicant had given at paragraphs 18 to 25 of her Quantum Statement.

[69] Undoubtedly, in making that statement, Dr Walters was making the point that an inference could be drawn that the applicant had not suffered very much from the date of the incident until her resignation from the fact that she did not feel the need to seek medical attention. However, the applicant's evidence, about which Dr Walters was ignorant, would not have allowed such an inference to be drawn. Her evidence about why she did not seek medical help was not challenged in cross-examination. No point as raised by Dr Walters was put on behalf of the respondent at trial and neither the inference drawn by Dr Walters nor his Honour's subsequent finding were open.

[70] In a case such as the present, in which the evidence as a whole contains ample material upon which findings of fact can be made about the post-incident symptoms of a plaintiff and in which a submission is expressly made about the significance of that evidence to the ultimate issues of injury caused by negligence, a trial judge who is performing the function of finding facts is obliged to consider that evidence comprehensively. Evidence of the kind given in this case cannot be put to one side so that a conflict between the evidence of medical experts is decided upon a narrow, and possibly mistaken, ground limited to their respective observations.

[71] The discretion conferred upon the Court of Appeal by s 118 of the *District Court of Queensland Act* 1967 is, in its terms, unfettered. However, it has been held by this Court that leave would usually be granted when there is a reasonable argument that there is an error to be corrected and when it is also necessary to correct a substantial injustice to the applicant.[3] The applicant has demonstrated that there is a reasonable argument that his Honour erred in preferring the evidence of Dr Walters and, as a consequence, erred in concluding as he did in relation to the economic loss suffered by the applicant. In addition, the nature of the errors made by his Honour mean that the applicant's real case has not yet been considered.

[72] For those reasons, leave to appeal should be granted.

[73] The issues in the appeal concern only past economic loss and future economic loss. For past economic loss the applicant claimed $60,000, being loss of income from

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3 *Pickering v McArthur* [2005] QCA 294 at [3] per Keane JA with whom McMurdo P and Dutney J agreed.

the accident to the date of trial (being the difference between projected earnings of $175,733.38, calculated with reference to an agreed weekly amount of $585.79 net after tax per week, with a one per cent increase per year, and the applicant's actual earnings of $107,633.39), with the resulting figure of $68,099.99 discounted to $60,000 to take into account the contingency that the applicant might in any case have moved to the Gold Coast to care for her mother and thereupon obtained employment relatively quickly. The trial judge rejected that claim and instead allowed for past economic loss $1,500 as compensation only for the applicant's loss of income during the period of her medical treatment for her injury.

[74] For future economic loss the applicant claimed $85,491, being future loss of income of $230 per week (the difference between what the applicant claimed she would have earned but for the accident - $621.85, her wage at the time of accident of $586.79, indexed by one per cent per annum - and her average earnings at the time of trial of $391 per week) for ten years (when the applicant would be about 64 years of age), with the resulting figure of $94,990 being discounted by 10 per cent for contingencies to yield the claimed amount of $85,491. The trial judge made no allowance for future economic loss.

[75] The trial judge's decisions to make no award for past economic loss on account of the difference between what the applicant would have earned before trial if she had not resigned her employment and what she did earn in that period, and to make no award for future economic loss, resulted from the trial judge's conclusion that the applicant resigned from her employment for reasons that were not related to the effects of her injury. The trial judge found that her resignation was a consequence both of pressures upon the applicant, including the need to assist and care for her mother and the presence of her family at the Gold Coast, and discomfort in her shoulder which, upon the evidence of Dr Walters, was unrelated to the effects of her injury. For the reasons already given, those findings should be set aside.

[76] In this appeal the respondent did not challenge the applicant's methodologies or the validity of any of components of the claimed past and future economic losses (including the claim that, but for the applicant's injury, she would have continued to work for 10 years), otherwise than by its argument based upon Dr Walters' opinion that the "slight" restriction of movement in the applicant's right shoulder, assessed by Dr Walters as a two per cent upper limb impairment, did not preclude the applicant from her former work. The respondent argued that the applicant did not challenge the evidence of Dr Walters to the effect that any trauma caused by the work related injury had passed and his assessment of a two per cent impairment for the right shoulder was attributable only to some degree of uncertainty and a little restriction of movement. That is not a complete report of the submissions on behalf of the applicant. The applicant argued that the evidence of Dr Walters was consistent with the applicant having ongoing discomfort in her right shoulder related to her injury and that the trial judge's finding that the applicant suffered a two per cent permanent impairment of the right shoulder, as assessed by Dr Walters as a consequence of the injury, was inconsistent with the trial judge's finding that the discomfort in her shoulder was unrelated to the effects of the injury.

[77] Upon Dr Walters' evidence the trial judge was bound to conclude, as his Honour did conclude, that the applicant suffered a permanent upper limb impairment in the right shoulder attributable to the injury she suffered on 30 January 2011. As the applicant argued, regardless of whether that impairment should be assessed at two

per cent or at a higher percentage and whether that impairment "precluded" her from her employment or resulted only in a material restriction in carrying out employment otherwise available to her, the combination of the trial judge's acceptance of Dr Walters' opinion evidence and the evidence of the applicant's pain upon lifting the heavy doona covers and the persistence of that pain thereafter proved that the applicant's decision to resign her employment was a consequence of her injury. She thereby suffered past and future economic loss for which she was entitled to be compensated. The circumstance that Dr Walters could not identify the pathology which caused the permanent impairment does not justify disregard of his accepted evidence that the applicant sustained that impairment.

[78] Counsel for the respondent took the Court through Dr Walters' reports and his oral evidence and submitted that Dr Walters' opinion that the applicant suffered a slight permanent restriction of movement in her right shoulder did not amount to an acceptance that the persisting pain of which the applicant gave evidence was a consequence of the accident. At no point in his evidence did Dr Walters clearly express a view that the restriction was not attributable to such pain. If that were his opinion, it should be rejected in favour of the opinion of Dr Cook upon that topic for the reasons already given; in summary, unlike Dr Walters' opinion, Dr Cook's opinion is consistent with and supported by the accepted evidence given by the applicant and Ms Black of the applicant's persisting pain and the consequential effect of that pain of severe restrictions on the applicant's ability to do the work she had done before she was injured.

[79] At the hearing of the appeal the Court accepted a submission for the applicant that, in the event that the Court granted leave to appeal and allowed the appeal, the Court would assess the amounts for past and future economic loss and allow the parties an opportunity to agree upon the appropriate allowances for interest on past economic loss and loss of superannuation benefits with respect to past and future economic loss, and any consequential orders (which would include appropriate orders as to the costs in the District Court and on appeal). In the absence of any other challenge to the claimed past economic loss of $60,000 and the claimed future economic loss of $85,491, those amounts should be awarded, together with the appropriate amounts for interest and loss of superannuation benefit.

Proposed orders

[80] The appropriate orders are:

1. Grant leave to appeal.

2. Allow the appeal.

3. If the parties are unable to agree upon the orders, including orders as to costs, that should be made to give effect to these reasons, the parties are to lodge and serve written submissions about the appropriate orders within 14 days of these orders.

[81] **BROWN J:** I agree with the joint reasons given by Sofronoff P and Fraser JA, and the orders proposed by their Honours.