

DISTRICT COURT OF QUEENSLAND

CITATION: *Healy v Logan City Council* [2020] QDC 54

PARTIES: **MICHELLE MAREE HEALY**
(plaintiff)

v

LOGAN CITY COUNCIL
(defendant)

FILE NO/S: 143/16

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court, Queensland

DELIVERED ON: 16 April 2020

DELIVERED AT: Brisbane

HEARING DATE: 18, 19 and 20 March 2019

JUDGE: Sheridan DCJ

- ORDER:
1. **The claim by the plaintiff is dismissed.**
 2. **If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Thursday, 30 April 2020.**
 3. **If the parties cannot reach agreement as to costs:**
 - (i) **the plaintiff file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 7 May 2020;**
 - (ii) **the defendant file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 14 May 2020; and**
 - (iii) **the plaintiff file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Monday, 18 May 2020.**

CATCHWORDS: TORTS – NEGLIGENCE – GENERALLY – where plaintiff employed by defendant as cleaner at indoor sports centre – where plaintiff fell off row of seating in grandstand and suffered injury to left shoulder – where allegations by plaintiff included unsafe system of work, failure to give adequate instructions or training and failure to undertake risk assessment – where quantum in issue – whether defendant breached its duty of care – whether injury the cause of

plaintiff ceasing work

Work Health and Safety Act 2011 (Qld), s 19, s 21
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305C

Workers' Compensation and Rehabilitation Regulation 2003 (Qld), s 130, sch 8, 9, 12

Kondis v State Transport Authority (1984) 154 CLR 672, cited

Mendarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319, cited

Vozza v Tooth & Co Ltd (1964) 112 CLR 316, cited

Wyong Shire Council v Shirt (1980) 146 CLR 40, cited

COUNSEL: G.J Cross for the plaintiff
 W.D.P Campbell for the defendant
 SOLICITORS: Patinos Lawyers for the plaintiff
 Jensen McConaghy Lawyers for the defendant

- [1] The plaintiff, Ms Healy, was employed by the defendant, Logan City Council (the **Council**), as a casual cleaner to work at Logan Metro Indoor Sports Centre (the **Centre**).
- [2] Ms Healy says that on 9 June 2013, in the course of her employment, she was performing cleaning duties of a grandstand at the Centre and that in the course of her duties she slipped off the row of seating in the grandstand, thereby suffering personal injuries, loss and other damage.
- [3] Both the Council's liability and, if it is liable, the quantum of any damages recoverable, are in issue. Questions of contributory negligence also arise.
- [4] The relevant legislative regime is the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* (**WCRA**).

The plaintiff's pleaded case

- [5] By the further amended statement of claim, the incident and consequent loss is alleged to have been caused by the negligence and/or breach of contract, which is particularised as:
 - (a) failing to take any adequate precautions for the safety of the plaintiff whilst cleaning;
 - (b) exposing the plaintiff to risk of damage of which it knew or ought to have known;
 - (c) failing to ensure place of work was safe by providing bins or containers in which patrons could deposit rubbish;
 - (d) failing to provide a safe or proper system of work such that the plaintiff was not required to stand on the rows of seating to clean the aisles;
 - (e) failing to give any proper or adequate or timely instructions in the safe performance of the cleaning duties including not to stand on the seats;

- (f) failing to give any proper or adequate warning of the dangers associated with her employment, in particular warning of the dangers of standing on the seats;
 - (g) failing to give any adequate assistance such that the plaintiff would not be unduly rushed in the performance of her cleaning duties;
 - (h) failing to adequately supervise the plaintiff and/or inspect the premises to ensure the safe performance of the cleaning duties so that the plaintiff did not stand on the seats;
 - (i) exposing the plaintiff to a risk of damage which could have been avoided by the exercise of reasonable care;
 - (j) failing to undertake any or any adequate risk assessment;
 - (k) failing to comply with s 19 of the *Work Health and Safety Act 2011* (Qld) and the *How to Manage Work Health and Safety Risk Code of Practice 2011* and the *Hazardous Manual Tasks Code of Practice 2011*; and
 - (l) requiring and/or permitting the plaintiff to stand on the rows of seating to perform the cleaning duties when it was unsafe to do so.
- [6] The pleading draws no distinction between the duties alleged to be imposed under negligence or contract or statute and no submissions otherwise are made about the contractual claim.

LIABILITY

The Witnesses

- [7] Ms Healy gave evidence and called Mr Troy Barrett, a past employee of the Council who had worked at the Centre as part of the “front of house” team and who said he had observed Ms Healy cleaning by standing on the seats.
- [8] The Council called three witnesses; Mr Matthew McKee who worked and still works for the Council as a Venue Operations Co-ordinator, Ms Diana Barnes who worked and still works as the “front of house” team leader and Ms Sanda Dittrich, a cleaner who worked and still works at the Centre.
- [9] Mr McKee was the person responsible for supervising the cleaners, was the supervisor working on the night of the incident and was the person who witnessed the fall. Ms Barnes was the person at the Centre responsible for conducting the on-site induction including completing the Staff Information Package with Ms Healy as part of her two day compulsory induction training with the Council. Ms Dittrich was the cleaner responsible for showing Ms Healy around as part of her on-site induction on the second day of her induction training and was the person who worked with Ms Healy on her two buddy shifts.
- [10] Extensive evidence was led by both Ms Healy and the Council in examination and cross-examination as to the procedure to be used in cleaning the grandstand including whether the grandstands were to be cleaned from top to bottom or bottom to top, whether the equipment to be used was a broom, a squeegee or a flop mop and the procedure to be used in collecting the larger items of rubbish.
- [11] None of those matters are featured in the pleadings as giving rise to an allegation of negligence or breach of contract nor were any submissions made about them, even

as to whether or not the differences in the evidence would support a view that I might take as to credit.

- [12] In these circumstances, in considering the evidence, it is unnecessary to deal with the evidence as to those issues.

Credibility

- [13] There is a conflict in the evidence given by Ms Healy and the evidence given on behalf of the Council as to the instruction and training given to Ms Healy, the system of work to be adopted in cleaning the grandstand and the circumstances of the fall. The primary focus of the conflict was in relation to the instruction given as to standing on the rows of seating in the grandstand and whether in fact Ms Healy cleaned by or was cleaning by standing on the seats at the moment of the fall.
- [14] Ms Healy and Mr McKee were the only witnesses to give evidence in relation to the incident; Mr McKee being the only person to witness the fall. Their accounts differ as to what Ms Healy was doing at the moment of the fall. Ms Healy says she was standing on a row of seating cleaning and was walking along the row calling to Mr McKee. She says she slipped off the row of seating on which she was walking. Mr McKee says that Ms Healy was traversing down the grandstand whilst calling to Mr McKee and tripped on the edge of a row of seating.
- [15] Ms Dittrich gave evidence as to the instructions she had given to Ms Healy as to the system of cleaning, and in particular, the instruction given not to stand on the grandstand seats. Ms Healy's evidence as to the instructions that she was given is in direct conflict with the evidence of Ms Dittrich.
- [16] In assessing the evidence given, I found the evidence of both Mr McKee and Ms Dittrich more persuasive than the evidence of Ms Healy. Although both Ms Dittrich and Mr McKee are still employed by the Council, there was nothing in their evidence which suggested that they were trying to either protect the Council or themselves from any criticism. They both gave their evidence frankly, coherently and in a forthright manner. They did not attempt to exaggerate it and made concessions where appropriate.
- [17] The evidence of Ms Dittrich as to the method of cleaning to be adopted was more consistent with what would be expected. It is hardly credible that anyone would have advised another worker to stand on seats in order to clean the stands, particularly in circumstances where the evidence is that the seats were slippery. Both Ms Dittrich and Mr McKee were firm in their view that the seats were not suitable to be stood upon, and indeed, slippery; and therefore dangerous.
- [18] It was clear that in the course of giving her evidence, Ms Healy was doing her best to paint the Council in a bad light. Her evidence was that she had to request to be allowed to work with a more experienced cleaner on her first shift, not that it was part of any training offered to her. Contrary to this evidence was the evidence of Mr McKee, Ms Barnes and Ms Dittrich that the Centre had a system whereby new cleaners were accompanied and trained by Ms Dittrich. Their evidence was credible and probable, and I accept them as credible witnesses.
- [19] Ms Healy also gave evidence of always being rushed in the performance of her duties because the Council did not want to pay penalty rates. That evidence was

inconsistent with the documentary evidence and the evidence of Mr McKee that suggested penalty rates were simply part of the system. It does not appear, in any event, that the cleaning was rushed.

- [20] Finally, Ms Healy gave evidence of no-one having come to assist her after she fell; suggestive of a culture that no-one cared. That no-one attended would be a surprising outcome given the noise Ms Healy says she made as she fell, and it is not logical, given the fact that Mr McKee saw it happening. Mr McKee gave evidence, which I accept, that he came to her aid.
- [21] The impact of the exaggeration, by Ms Healy of the circumstances, on her credibility was reinforced by two additional aspects of her evidence. Originally Ms Healy said that she was given no instructions in relation to standing on the seats but found cleaning by standing on the seats better. Later, she said she was told by Ms Dittrich to do so. The evidence of Ms Healy of having been told by Ms Dittrich to stand on the seats marked a significant change in her evidence. I also find Ms Healy's denial that the seats were not slippery unbelievable.
- [22] The second aspect of her evidence which affects her credibility is the manner in which Ms Healy gave her evidence in relation to her economic loss claim and in particular her evidence as to the reasons for her resignation. Ms Healy only reluctantly in cross-examination admitted to having made statements suggesting her resignation was the result of a myriad of reasons and certainly not just the injury to her left shoulder.
- [23] In support of her evidence, Ms Healy relied on the evidence of Mr Barrett, who said that he had seen her on numerous occasions cleaning the grandstands by standing on the seats. He also said he saw another cleaner, probably Ms Sanda Dittrich, cleaning by standing on the seats.
- [24] Mr Barrett worked for the Council at the Centre from March 2011 to September 2012. He was part of the "front of house" team. He said he worked in a supervisory capacity as well. In that role, he was responsible for looking after the front of house operations, which he described as entailing: "...talking to other service providers, making sure that people were doing the right thing - conducting themselves in the right way, setting up courts, packing down courts for sporting events."¹
- [25] Mr Barrett was never a cleaner and, in his role, he was not involved in supervising the cleaners.
- [26] Mr Barrett left the employ of the Council when he was accepted into the Academy for the Queensland Police Service, though he did not remain there and now works in the disability sector. Mr Barrett left the employ of the Council more than 12 months before Ms Healy suffered her injury.
- [27] He was clearly mistaken about his assertion that Ms Dittrich also cleaned by standing on the seats. I simply do not accept that evidence, not only in view of her evidence (which I accept), but also because of his own doubts about his memory.

¹ T1-84 ll 25-27.

[28] In addition, by reference to records held at the Centre, Ms Barnes says that Mr Barrett and Ms Healy only worked the same shifts about ten times. She confirmed that the shifts they had were event shifts where a grandstand was potentially in use for the event. Even on those occasions, however, Ms Barnes could not guarantee that the shifts worked together were actually pack down shifts where cleaning the grandstand was required.

[29] I do not find that Ms Healy's evidence is assisted by the evidence of Mr Barrett.

Factual Context of the Fall

[30] Ms Healy was born on 4 January 1964. She was 55 years of age at the time of the hearing. Ms Healy had worked for the Council as a casual cleaner since 11 November 2011.

[31] Ms Healy had achieved a Grade 9 education and subsequently completed Business Certificates II and III from TAFE.

[32] Her past employment was predominantly of a manual nature. She accepted that she had spent most time working as a cleaner, having worked previously in such a role for Ingham's Chicken and Spotless Cleaning.

[33] Prior to commencing with the Council in November 2011, Ms Healy had a three-year period off work as a result of health issues. Her employment with the Council was obtained through Catalyst Injury Management, an organisation she was sent to by Centrelink.

[34] Ms Healy's underlying medical condition was made known to the Council at the time of obtaining her employment.

[35] Upon obtaining employment with the Council, Ms Healy worked three nights a week at the Centre, usually Monday, Wednesday and Thursdays because there were sporting events in the building on those nights, and generally worked the major weekend events.

[36] The Centre had a main arena where various sports could be played and had two retracting grandstands that came out from the wall. The grandstands were used for major events. When the grandstands were used, they had to be cleaned and put away so that the Centre could be utilised the next day for its usual sporting activities. Each grandstand contained bench seating with a capacity to seat up to 775 people. The bench seats of the grandstand were 305 millimetres wide and 450 millimetres high.

[37] The total capacity of the Centre was 2100, with permanent seating of 500 in the viewing gallery. Annually there were between 15 and 20 major events at the Centre and, at such events, there was at least one grandstand in use.

[38] The Centre had a cafeteria which sold food and drinks. Patrons were allowed to take both food and drinks into the grandstands.

[39] There were no bins or containers located in the grandstands, but for major events wheelie bins were located at the base of each set of stairs leading down to the arena from the grandstands.

- [40] After a major event, there was usually a lot of rubbish in the grandstands; food rubbish, wet rubbish, cans, plastic bottles and cardboard.

The Incident

- [41] On 9 June 2013, at approximately 8:45 pm, Ms Healy was performing her cleaning duties in one of the grandstands (**Grandstand 1**), on the final night of a three day World Cup Cheerleading event. The incident occurred “pretty much” at the start of the shift. The “FOH End of Shift Report” records that the Café pack down commenced at 8:30pm.
- [42] Ms Healy said that, prior to the injury, she was cleaning in the first of the three main sections of the grandstand and was about halfway up the grandstand, having already cleaned the rows of seating below. Ms Healy says that she always worked from the bottom of the grandstand to the top of the grandstand.
- [43] Ms Healy said that she was standing on the seats of the grandstand and dragging the rubbish with a squeegee from left to right to the stairway. Ms Healy said something distracted her and she looked to the left and over to the viewing gallery. She said she saw Matt and Jason in the gallery.² She recalls that she was “almost eye level with Matt”.³ She said he may have been a little bit higher than her, so maybe she was six rows up from the bottom. She said that her recollection was that Jason worked in the cafeteria.
- [44] Ms Healy said she noticed “Matt bending down and pulling all the rubbish from underneath the viewing gallery seats and Jason was picking it up”.⁴ She saw the rubbish being put into the rubbish bags. She said she yelled out to Matt but he did not hear her. She said she then took a step closer towards him and yelled a second time. She said, as he turned around and looked directly at her, her left foot slipped off the seat and she fell forward and slammed her shoulder into the plastic seat below.
- [45] She said, at the time, she was just shouting, “Matt”.⁵ She said that was all she had said.
- [46] When asked why she was shouting Mr McKee’s name, she said she wanted to let him know that there was a second squeegee broom up in the top cleaning room which would make pulling the rubbish out a lot easier because “it’s hard on your back.”⁶
- [47] Mr McKee confirmed that he heard Ms Healy talking to him at a time when he was actually collecting the rubbish from underneath the seating in the viewing gallery. He said as he heard her calling him, he had turned to look at her.

² Matt is a reference to Mr Matthew McKee and Jason is a reference to Mr Jason Zantis, a café team member.

³ T1-61 l 18.

⁴ T1-27 ll 39-41.

⁵ T1-30 l 9.

⁶ T1-30 l 14.

- [48] Mr McKee said that at the time he heard Ms Healy calling him, she was located in the second bank of the grandstand. He said that initially that night he had noticed her in the section of the grandstand one further away from the viewing gallery and higher up the grandstand. He said, “I’d observed Michelle standing there, having a conversation with another staff member.”⁷ He said he could not recall who it was.
- [49] Later in evidence in chief, he said it was one or two staff members and they had black plastic bags for the collection of the bulk rubbish. He said he believed they were café staff members who were helping clean. When asked as to why he was looking in that direction at that time, Mr McKee said,
“So because I’m responsible for the operation of the entire team, I was inspecting the arena just to make sure that everyone was undertaking activities that were supposed to be undertaken.”⁸
- [50] He said he did not see her coming down the stairwell of the grandstand to the position he saw her in when she was calling to him. He said she was instructing him as to how to complete the task he was currently undertaking.
- [51] He said that, as she was talking to him, “...it looked as if her toe clipped the underside of the seat, and then the same foot slipped off the top. Her leg went down into the foot well below, and she fell down ...”⁹
- [52] Mr McKee said that in order for Ms Healy to have attracted his attention, she would have had to raise her voice. He said that it was usually a noisy environment during the pack down.
- [53] He said that when she fell forward she fell into another bench seat. He said,
“She appeared to – her knees went over the seat that was immediately in front of her, and then her upper body was over the top of the next seat below, and then her shoulder seemed to interact and collide with the row one down from that ...”¹⁰
- [54] In cross-examination, it was put to Mr McKee that the mechanism of the injury was that Ms Healy was walking along the seat. Mr McKee did not accept that she was walking on the seat directly towards him, and he did not accept that Ms Healy had been walking on the seat for a number of steps prior to her slipping. Mr McKee said,
“To the best of my recollection, she had come off the stairs by the time I saw her, but she looked as if she’d come from the stairs, and her route of travel was across the foot well, diagonally across the foot well, not perpendicular to the seats.”¹¹
- [55] In cross-examination, Mr McKee was asked as to why there was no mention of the ‘trip’ in the Incident Form. Mr McKee said that, on her account, the nature of the injury was that her foot slipped. Mr McKee said, “The nature of the slipping, to my own eye, was that her toe caught the edge of the seat, then it landed on top of the seat and slipped after that.”¹² Mr McKee did not accept that Ms Healy told him on the night that she was walking on the bench and slipped and not tripped.

⁷ T2-35 l 6.

⁸ T2-35 ll 14-16.

⁹ T2-35 ll 6-8.

¹⁰ T2-37 ll 29-31.

¹¹ T2-55 ll 6-9.

¹² T2-48 ll 31-33.

- [56] Ms Healy did not accept that her foot clipped the top of the seat and that she then fell forward. She insisted she was walking along the bench seat she was standing on to clean and had moved along it to speak to Matt.
- [57] No one else saw the incident; though Ms Dittrich says she heard someone falling down and calling out, and saw Ms Healy on her bottom, and went to assist. She says she does not recall anyone else coming to assist. That is inconsistent with the evidence of Ms Healy who said no one came to assist. Mr McKee says that he came down to the arena from the viewing gallery as quickly as he could, and went to assist. He says he thought Ms Dittrich also came to assist.
- [58] I do not accept Ms Healy's evidence that no-one came to assist. On the basis of her own evidence of the noise created by her fall, it is difficult to believe that no-one would have checked on her.
- [59] As to how she fell, the evidence of Mr McKee was that, when he saw her, her route of travel was diagonally across the footwell and she clipped her toe on the edge of the seat with her foot landing on the seat, and then she fell. I find that Mr McKee was doing his best to describe the moment of the fall. I accept that, not long before hearing Ms Healy call to him, Mr McKee had observed Ms Healy further up the grandstand and in the third section of the grandstand, talking to other staff.
- [60] With the direction of travel that Mr McKee observed, in my view, the most likely cause of the fall was that Ms Healy was crossing over the seat in her traverse down the grandstand towards Mr McKee and she tripped by her toe clipping the edge of the row of seating. I do not accept that the fall occurred as a result of Ms Healy simply slipping from the row of seating whilst she was cleaning and yelling out to Mr McKee.

Relevant System of Work

Induction

- [61] In giving evidence, Ms Healy accepted that when she commenced work she went through an induction program. She accepted it was her signature on the Staff Information Package completed as part of her on-site induction
- [62] Ms Healy's evidence was that as part of the staff induction program, Ms Barnes did not give any training or instruction about whether a cleaner should stand on the rows of seating whilst cleaning. That is not contested by Ms Barnes.
- [63] Ms Barnes also accepted that there was no documented procedure as to cleaning of the Centre or the grandstand. She also stated that it was not her role to perform any risk assessment. Ms Barnes made it clear that the training in the method and system of cleaning was performed, not by her, but by Ms Dittrich. Similar evidence was given by Mr McKee.
- [64] Mr McKee agreed that there was nothing in the particular induction documentation referencing any prohibition or directive for staff members not to walk on the seats in the grandstand. He confirmed that whilst Ms Dittrich had a process which she

undertook, at the time there was no documented procedure. Mr McKee said that he had observed the procedure undertaken, but “hadn’t been put through it [him]self.”¹³

[65] In cross-examination, he agreed that he did not know what new staff were being told in regard to the procedure. In terms of whether he had taken any steps or measures to determine himself whether the procedures in place were safe and satisfactory, he said that he had done so through observation. He further confirmed that Ms Barnes was not a cleaner and that the induction that she undertook was more of a safety to venue induction. He described the procedure as “we take new staff and assign them a buddy for their first few shifts in an effort to transfer that knowledge.”¹⁴

[66] Mr McKee was then asked:

“Would it surprise you if Ms Dittrich had said or given - provided evidence to the effect or statements to the effect that she didn’t consider it necessary for her to instruct Ms Healy as to the method to adopt when she was undertaking cleaning as she was an experienced cleaner?...

No. That wouldn’t surprise me in the sense that I don’t give specific instructions about how to undertake a particular task, as long as it’s conducted within a reasonable timeframe and safely.”¹⁵

[67] Mr McKee said, “...the process of basic cleaning skills are anticipated to be covered off by a qualification or previous experience”¹⁶ and when asked if “Ms Dittrich hasn’t provided the instruction, training or direction, then no one else at the Centre would have provided that instruction, direction or training?”, Mr McKee responded, “...I’d be surprised if Sanda hadn’t provided the instruction.”¹⁷

[68] In cross-examination, in answer to the suggestion that Ms Healy was never instructed in a system of work of cleaning the grandstand and that no set system was ever provided to her, he said that he understood that Ms Dittrich had taken Ms Healy through that process. It was put to him that there was no document establishing that and that he was just relying on something that may have happened, to which he responded that Ms Dittrich had told him that it had happened.

[69] As part of the site induction, both Ms Dittrich and Ms Barnes gave evidence of Ms Healy being shown around by Ms Dittrich as to where all the cleaning substances were located and the various rooms where the mops and equipment were kept. In cross-examination, Ms Healy said she couldn’t recall being shown around by Ms Dittrich, but in answer to the suggestion, she simply said, “But okay.”¹⁸

Buddy Training

[70] Ms Healy said that on her first day of cleaning, Ms Dittrich was present. Ms Healy said that she had asked if she could spend some time with her “just to see how she did the cleaning”.¹⁹

¹³ T2-46 1 4.

¹⁴ T2-46 11 22-23.

¹⁵ T2-46 11 25-30.

¹⁶ T2-46 11 37-38.

¹⁷ T2-46 1 3.

¹⁸ T1-59 1 43.

¹⁹ T1-22 1 15.

- [71] In cross-examination, Ms Healy accepted that the first day spent with Ms Dittrich was buddy training, though wished to describe the next day as working an event together.
- [72] Ms Healy denied that, in the course of the buddy training, she was told by Ms Dittrich that you never stand on the seats. In cross-examination, she said quite forcefully, “She’s never said that to me at all, ever.”²⁰
- [73] Ms Healy accepted that Ms Dittrich had told her to stand on the floor below the level and to use the squeegee broom to drag the rubbish from left to right. Ms Healy originally said that she explained to Ms Dittrich that she was too short to clean that way. She said that she stood on the seating and said to Ms Dittrich, “This is better”.²¹
- [74] Ms Healy said that as she was not as tall as Ms Dittrich, she found there was a lot of leaning over and a lot of extra strain on her back.
- [75] In marked distinction to this evidence, however, later in her evidence, Ms Healy said it was Ms Dittrich who suggested she should stand on the seats and that it was in fact Ms Dittrich who had said that Ms Healy was too short to do it from the floor. That is not what Ms Dittrich says occurred.
- [76] Ms Dittrich had been employed as a cleaner with the Council for a period of almost ten years, as at the date of hearing. She had been a cleaner at the Centre since it first opened.
- [77] Ms Dittrich said, “I would never have told [Ms Healy] to stand on seats.”²² Ms Dittrich said, “...one of the first things I mention to any new cleaners – that when cleaning the grandstand, you’re never to stand on the red seats. Because they are really, really slippery.”²³
- [78] Ms Dittrich said, “You stand on the floor... if you stand on the seats, it’s like vertigo ... you’ll fall straight down. It’s like the feeling of – there’s no safety.”²⁴ Further, when asked if there was any advantage for a cleaner to stand on the seats, she said “None at all, no.”²⁵
- [79] In cross-examination, when it was put to Ms Dittrich that Ms Healy told her she couldn’t stand on the aisle below because of her height and would have to stand on the seats, Ms Dittrich said that if Ms Healy had said that, she would have said to her to just push the rubbish in front of her. She said she would have never told her to stand on the seats and move the rubbish.
- [80] I accept the evidence of Ms Dittrich. As I have already stated, she gave her evidence in a frank and forthright manner. Ms Healy was prone to exaggeration and clearly only gave evidence which she thought would assist her case. I accept the evidence of Ms Dittrich that Ms Healy was told not to stand on the seats when cleaning the grandstand and Ms Healy was told that the seats were slippery.

²⁰ T1-60 l 14.

²¹ T1-22 l 27.

²² T2-75 l 29.

²³ T2-75 ll 32-34.

²⁴ T2-75 ll 37-39.

²⁵ T2-75 l 44.

Evidence as to Method of Cleaning in fact

- [81] Irrelevant of any instruction given, Ms Healy's evidence was that in cleaning the grandstands she would stand on the rows of seats, facing the back wall of the Centre, with her back to the arena.
- [82] Ms Healy said that by standing on the seat she was able to use her upper body strength. Ms Healy was asked as to why she didn't just walk along the aisle. Ms Healy said that in standing on the floor, you are "actually walking in all the previous liquids and excess on the floor, because it hasn't been mopped as yet."²⁶ Further, she said, "...you're actually knocking the drinks over, so any excess is spilling on the ground."²⁷
- [83] Ms Healy did not accept that the seats were slippery. When asked whether it was a sort of hard plastic, Ms Healy said she couldn't recall. She also responded, "Can't be slippery if I didn't fall. Not for ages."²⁸ In cross-examination, it was also said to her that the seats were only 30 centimetres wide with curved edges, to which Ms Healy responded, "And I did that for a year and a half before I slipped and fell."²⁹ When asked wouldn't it be obviously inherently dangerous to stand on the seats, Ms Healy again responded, "Well, I never slipped and fell for a year and a half."³⁰
- [84] She accepted that it would be necessary for her to walk along the seat sideways, in a crab-like manner and she said that when she got to the end of the seat, she would then walk along the next seat before starting to clean again.
- [85] She said that standing on the seats was the quickest and easiest way. She repeated, "[Sanda] told me that I could stand on the seats and do it."³¹
- [86] Ms Healy said she was never criticised for cleaning in that way. Ms Healy said that there were supervisors present and that they had never criticised her. She referred to Mr McKee and Mr Gary Campbell often being in the arena; Mr Campbell was now deceased. Ms Healy also referred to Mr Barrett, who was one of the "front of house" supervisors, and said he was often in the arena when she was on duty as they often did events together.
- [87] Ms Healy said that she and Ms Dittrich nearly did every major event together as they were the event cleaners.
- [88] The evidence of Ms Healy as to the system of work adopted by her is supported by Mr Barrett.
- [89] Mr Barrett said he had observed Ms Healy performing her work and said that he had seen her standing on the seats in performing that work. He said he believed he saw it multiple times. When asked if he saw her walking along the seats performing her cleaning duties, he responded, "yes".

²⁶ T1-50 ll 28-30.

²⁷ T1-50 ll 39-40.

²⁸ T1-59 l 7.

²⁹ T1-58 ll 25-26.

³⁰ T1-58 l 42.

³¹ T1-74 ll 41-42.

- [90] Mr Barrett said there were two primary cleaners employed at the time and he said he believed the way the other cleaner “conducted her cleaning was very similar to that of Michelle” and when asked, “Was she standing on the seats?”, he responded, “I believe so”.³²
- [91] He said he could not recall the last name of the second cleaner but her first name was Sanda. In cross-examination, when asked whether he could be wrong about the other cleaner working in a similar way by standing on the seats, he said, “potentially”.³³ He explained:
 “I could be wrong because the – when I worked there, it was between March of 2011 and September of 2012 and I could have been, at a lot of points, as close as five metres from the cleaners to then 50 metres. And – and I was obviously looking after my duties as well.”³⁴
- [92] When then asked as to why he had shown any interest in what was happening with the cleaning after the event, Mr Barrett responded that he was “very supportive of all our staff.”³⁵ He said, “I believe I’m a genuine person. I exhibit genuineness. So I always cared about all staff.”³⁶
- [93] Mr Barrett said that,
 “If we could help out Michelle in any way. So I would be the person on the court, getting all the rubbish if I could, put it in the bin for her. So it just would help her job, I guess, because I feel that they had a big duty, her and Sanda.”³⁷
- [94] Further, he said that he thought they were both good workers and worked very hard and tried to work very efficiently. He said, “So, even though I was concentrating on my job, I would still interact with ...staff members.”³⁸
- [95] He said that he had never heard her being reprimanded for cleaning in that manner. He confirmed that he had observed supervisors in the vicinity and he had not observed them telling Ms Healy to get off the seat. He said the supervisors would have been Mr Campbell and Mr McKee. He said at times there would have also been Ms Barnes present. Ms Barnes was his superior. He confirmed, however, that more usually it would have been Mr Campbell and Mr McKee who would have been in the vicinity on a major pack down.
- [96] In cross-examination, Mr Barrett was told that the seats were only 30 centimetres wide and were made of a hard plastic type substance. It was put to Mr Barrett that if he saw somebody working on a seat that was only 30 centimetres wide, he would have thought it was dangerous, Mr Barrett responded,
 “I never gave too much thought about it because, like I said, I was never given authority to instruct a cleaner on how they were to conduct themselves, and I always focused on what I was doing.”³⁹

³² T1-87 l 43.

³³ T1-88 l 37.

³⁴ T1-88 ll 41-44.

³⁵ T1-91 l 33.

³⁶ T1-91 ll 34-35.

³⁷ T1-91 ll 37-40.

³⁸ T1-91 ll 43-44.

³⁹ T1-90 ll 36-38.

- [97] Walking on the seat was described to Mr Barrett as being like walking along a plank. Mr Barrett said that he had never stood on the seats himself and never really frequented the grandstands but Mr Barrett did not agree there was a danger and said it would depend on the person.
- [98] Mr Barrett was asked as to why he was able to remember her actually working on the benches, not just working on the floor. He responded by saying that he could remember working on the floor as well.
- [99] None of this evidence is very persuasive. It is difficult to accept Mr Barrett's evidence that he did not give thought to the danger of walking along the seats, but did notice Ms Healy doing so. He evidently thought he could bolster this evidence by saying he saw another cleaner doing the same thing, but realised that this was challengeable and so retreated by saying he could have been mistaken.
- [100] This evidence is in any event quite different to the evidence of Ms Dittrich.
- [101] When told that Ms Healy had given evidence that she did the bulk cleaning job by standing on the seats, Ms Dittrich said she was never instructed to do that and said,
 "I never instructed her to stand on any red [seats]. That was the first thing, whenever we have a new cleaner, that is one of the first things that I tell them is never stand on the red [seats] cause it's like slippery like crayons. It's the only word I use to describe it."⁴⁰
- [102] When asked if she ever saw Ms Healy standing on these seats, Ms Dittrich said, "I can't remember if – that was a long time ago. No, but even if she did, I would have told her to get – not to do that..."⁴¹
- [103] In cross-examination, Ms Dittrich admitted that they did not always work shifts together, or they could be in different areas, but said that if she had seen her, she would have told her to get down.
- [104] Mr McKee confirmed that he had seen Ms Healy working at major events. When Mr McKee was asked whether he had seen Ms Healy standing on the seats, he responded, "No; not to say that that is the case."⁴² When asked, "Had you seen her standing on the seat would you had done anything?", Mr McKee responded, "I certainly would have. Definitely. They are not for standing on."⁴³ When Mr McKee was asked as to why he would have done anything, he said, "Essentially – they're quite slippery to stand on, and they are not intended for standing on. The patrons sit on them; so they're not intended for staff to walk on."⁴⁴ Mr McKee also mentioned that they are narrow as well, so not easy to walk on.
- [105] Mr McKee confirmed that he was responsible for the operation of the entire team so that he would inspect the arena from time to time to ensure that everyone was undertaking their activities that they were supposed to be undertaking. Mr McKee confirmed that, in his role, both Ms Barnes and all cleaners, including Ms Healy and Ms Dittrich, directly reported to him.

⁴⁰ T2-80 ll 12-15. The transcript uses the word "stairs" instead of "seats" but it was clear this is an error. It was clear Ms Dittrich was talking about the seats.

⁴¹ T2-80 ll 17-18.

⁴² T2-34 ll 24-25.

⁴³ T2-34 ll 27-28.

⁴⁴ T2-34 ll 30-32.

- [106] Mr McKee said that he was rarely up in the grandstand area but admitted that, if there was a significant puddle, on occasion, he had stood on the seats. He further admitted, that others may walk on the seats because of the mess in the wells or the stairs. But Mr McKee said that they would not do that for more than one or two steps. Mr McKee was asked whether he had taken any measures to stop people walking on the seats in those circumstances, to which he answered that he could not think of any measures that might stop them. Mr McKee agreed that occasionally it was inevitable that people would have to walk on the seats.
- [107] In answer to a question concerning standing on the seats, Mr McKee said that he would have thought that would have been an impediment to the process that was being described. When it was suggested to him that that was the way Ms Healy had done it from when she started up to and including the night of 9 June 2013, Mr McKee said that he had worked alongside Ms Healy a lot of the time and he had never seen her undertake that practice. When it was then suggested to Mr McKee that on the big nights that's how Ms Healy did it, Mr McKee responded, "That's not what – to my recall and my observation – that's not what happened."⁴⁵
- [108] In cross-examination, it was commented that the "Safety Problem Report" made no reference to Ms Healy having been chastised for walking on the seats or walking on the benches, to which Mr McKee responded "Because that wasn't something that I observed."⁴⁶
- [109] The evidence of Mr McKee was given in a careful way with appropriate concessions and without any attempt to justify his own position or that of the Council. I reject the evidence of Ms Healy that the system of work involved cleaning the grandstands by her standing on the seats.

Bins and/or containers

- [110] Mr McKee confirmed in evidence that there were no bins and/or containers in the grandstands for patrons and accepted that the grandstands could be full of rubbish at the end of major events. For major events, Mr McKee gave evidence of wheelie bins being placed at the bottom of the stairs leading into the main arena. That evidence was not challenged.
- [111] Mr McKee confirmed that this particular event in the past had been threatened with additional labour charges for cleaning after the event. He said that the client had instructed the compere for the event to make announcements to the groups coming through, telling people to take their rubbish with them. Given that there were multiple sessions per day, he said the message was repeated a number of times throughout the day. In cross-examination, Mr McKee was not challenged in relation to this evidence.
- [112] Mr McKee said that, whilst there would be some sort of clean-up going on between the various sessions there was limited time and the last one at the end of the day would be the biggest.
- [113] By reference to the "FOH End of Shift Report" for that night, Mr McKee agreed that it was noted that the café service levels were "extreme". Mr McKee accepted

⁴⁵ T2-54 ll 6-7.

⁴⁶ T2-53 l 22.

there would be a parallel between the café levels and the amount of rubbish in the grandstands.

[114] However, no evidence was led as to where bins and/or containers could have been placed in the grandstands. No-one suggested that they could have been placed in the aisles of the grandstands.

[115] Consistent with the evidence led and admissions made in the pleadings, I accept that there were no bins and/or containers in the grandstands. I accept that wheelie bins were placed at the bottom of the stairs leading into the arena from the grandstands and that announcements had been made requesting patrons to take their rubbish and place it in the bins provided.

Rushed

[116] Ms Healy's evidence was that they were always rushed on any nightshift because she said the Council did not wish to pay penalty rates. Her evidence in this respect supports the view that I have taken that Ms Healy was trying to paint the Council in a poor light. Her evidence was that, on any major event, staff would be rushed to ensure that they completed their tasks by midnight.

[117] Ms Healy's evidence is inconsistent with the evidence of staff being rostered to work until 1:00am and staff often in fact working until 1:00am or 2:00am, and it is inconsistent with the evidence of Mr McKee.

[118] Mr McKee's evidence was that there was a notation against the event order sheet for the World Cheer Leading event that as the Monday was a public holiday, penalty rates would apply. Mr McKee said that the reason for that notation was so that the client would be aware that penalty rates may apply and they may be charged accordingly. He said it did not mean that staff had to leave by midnight and would be expected to rush to complete their task by then.

[119] Mr McKee agreed that the staff would be working quickly and working hard to do as much as they could in the time allowed. Mr McKee said that was just normal practice.

[120] I do not accept the evidence of Ms Healy that the system of work imposed on them by the Council meant that they were unreasonably rushed in the performance of their work.

Risk Assessment and Managing Exposure to Risk

[121] On behalf of Ms Healy, it was pleaded that the Council had not undertaken a risk assessment or adequately undertaken an assessment in regard to the system of work that Ms Healy was required to perform. Ms Healy relies on the admission by the Council that no risk assessment was documented concerning the cleaning of the premises.

[122] In admitting that it had not documented its risk assessment, the Council nevertheless said that during the course of Ms Healy's induction and whilst working at the site, Ms Healy was adequately trained and instructed as to the system of work and as to her duties relating to the cleaning of the grandstands. Mr McKee's evidence was that, through observation, he had determined that the measures in place for cleaning were safe and satisfactory.

- [123] In her evidence, Ms Barnes said there was a health and safety representative and her evidence was that someone was assigned to each venue. Ms Barnes could not recall who that person was and nor did she give evidence as to what that person's responsibilities included. Ms Barnes accepted that she had not done any risk assessment as to whether it was safe to work on the rows of seating and said that she was not aware if anybody had done such an assessment; stating that that did not mean it had not been done. She said that was not her role.
- [124] Against that, there was no evidence led by Ms Healy as to what would or should have been the results of a risk assessment, if one had been documented.
- [125] Based on the evidence given, it is probable that a risk assessment would have concluded that the rows of seating were slippery and people (including cleaners) should avoid standing on the rows of seating. However, given the evidence accepted as to instruction already being given in relation to standing on the rows of seating in the grandstands, in my view a formal documented risk assessment would not have made any difference.
- [126] In terms of supervision and ensuring compliance by cleaning staff as to the system of work, the evidence of Mr McKee was that, as he was responsible for the operation of the entire team, he would inspect the arena to make sure that everyone was undertaking the activities that were supposed to be undertaken. He said that if he had observed Ms Healy standing on the seats, he would have told her to get down.
- [127] I accept on any pack down shift, where the grandstands had been in use, that there would have been a number of people working in the area, Mr McKee checked generally the activities of those in the area and the activities of those in the area would have been apparent to Mr McKee.
- [128] As admitted by Mr McKee, I accept that for the majority of the day typically cleaners were unsupervised. However, during a major event 'pack down' everyone worked together.
- [129] In terms of the placement of bins and/or containers in the grandstands for the disposal of rubbish, I do not accept that a risk assessment would have concluded that bins could be safely placed in the grandstands. It is apparent from the photos of the grandstands tendered in evidence that it would not be possible to safely place bins or containers in the aisles and allow free access to and from the grandstands.
- [130] In terms of the cleaners being 'rushed', based on the evidence I have accepted, I do not find that the cleaners were under undue pressure to complete their task within a restricted time frame. Based on the evidence of Mr McKee, which evidence I accept, there was flexibility as to when the cleaners would be required to work until and, if necessary, there was capacity for certain tasks to be left unfinished by the night shift and to be completed by the morning shift. I do not accept that there was undue pressure placed on the cleaners because the Council wished to avoid paying penalty rates.
- [131] Further, no evidence was led as to how staffing arrangements should have been changed. It was not suggested that additional cleaners should have been employed to work at the conclusion of major events. There was no suggestion that the

conduct of a risk assessment would have identified the need for changes to staffing arrangements.

Adequacy of Approach

- [132] Likewise, no evidence was led as to the Council’s non-compliance with the *How to Manage Work Health & Safety Risks Code of Practice 2011* and *Hazardous Manual Tasks Code of Practice 2011* and s 19 and s 21 of the *Work Health & Safety Act 2011* (Qld); other than the individual items already discussed. Nor was any evidence led as to how compliance with the Codes of Practice and s 19 and s 21 would have avoided the injury suffered by Ms Healy.

The Duty

- [133] At common law, an employer owes a duty to take reasonable care for the safety of its employees. The duty does not oblige the employer to safeguard employees completely from all perils. In *Vozza v Tooth & Co Ltd*, Windeyer J explained the duty:

“For a plaintiff to succeed it must appear, by direct evidence or by reasonable inference from the evidence, that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment.”⁴⁷

- [134] The duty has been described as an employer taking “reasonable care to avoid exposing employees to unnecessary risks of injury.”⁴⁸ Mason J in *Kondis v State Transport Authority*⁴⁹ referred to the employer being obliged “to take reasonable steps to provide a safe place of work and a safe system of work.”

- [135] The duty owed by an employer of a worker must be considered by reference to s 305B and s 305C of the WCRA.

- [136] Those provisions are as follows:

“305B General Principles

- (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
 - (a) the probability that the injury would occur if care were not taken;
 - (b) the likely seriousness of the injury;
 - (c) the burden of taking precautions to avoid the risk of injury.

⁴⁷ (1964) 112 CLR 316 at 318 per Windeyer J (with whom McTiernan, Kitto, Taylor and Owen JJ agreed).

⁴⁸ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48 per Mason J.

⁴⁹ (1984) 154 CLR 672 at 680, 687-688.

305C Other Principles

In a proceeding relating to liability for a breach of duty–

- (a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
- (b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.”

- [137] Whilst those provisions do not codify the common law, and there is some debate as to the extent, if any, that they modify the common law, they are relevant to be applied in all cases in which they are applicable and it is accepted that they apply here.
- [138] Each of the elements as detailed in those provisions must be judged from the viewpoint of the Council, in the circumstances of what was known or ought to have been known, and the analysis must be undertaken prospectively; not retrospectively with the wisdom of hindsight.⁵⁰
- [139] The risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. It is not confined to the precise set of circumstances in which the plaintiff was injured. The risk in this case is the risk that an employee will slip and injure themselves if allowed to clean the grandstand by standing on the rows of seating.
- [140] I am satisfied that, in terms of that risk, the first two of the pre-conditions set out in s 305B(1) are met: the risk of injury was plainly foreseeable and, it would appear from the instruction given, which instruction has been accepted to have been given, it was in fact foreseen. The risk of injury if an employee slipped was not insignificant. That much has been admitted by the Council.
- [141] The issue is what precautions a reasonable person in the position of the Council would have taken, apart from the precautions already found to have been taken, to avoid the risk. The onus is on Ms Healy to lead evidence to prove that, had the Council taken a certain precaution, Ms Healy’s injury would not have occurred.
- [142] On the basis of the evidence which I have accepted, the precautions I have found to have been taken were that:
1. Ms Healy was given a site induction in which she was shown where the cleaning equipment was and what equipment was available;
 2. Ms Healy was given on-the-job training in the form of two buddy shifts in which she worked with a very experienced cleaner;
 3. Ms Healy was told in cleaning the grandstands not to stand on the rows of seating as they were very slippery;

⁵⁰ *Mendarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [22] per Fraser JA.

4. Mr McKee as the supervisor on major event pack downs was generally present and observing the activities of the workers involved in completing the pack down;
5. On major event nights, wheelie bins were placed at the base of each set of stairs; and
6. Depending on the major event, and in particular at this event, regular announcements requesting patrons take their rubbish with them when they leave and place it in the bins provided was given.

- [143] The additional precautions which it is alleged ought to have been taken were:
1. Additional training, instruction and warning to Ms Healy not to stand on the seating to perform the cleaning of the aisles;
 2. The placement of bins and/or containers in the grandstands to reduce the quantity of rubbish in the grandstands;
 3. The undertaking of a risk assessment and such assessment which would have resulted in the provision of bins and/or containers and by which the Council would have implemented and maintained a system whereby Ms Healy was not required to or allowed to stand on the rows of seating;
 4. Giving to Ms Healy adequate assistance so that she was not required to unduly rush to complete her cleaning duties; and
 5. Adequate supervision of Ms Healy so that she did not stand on the rows of seating.

- [144] In considering the additional precautions which it is alleged ought to have been taken:
1. The training given was sufficient and reasonable. It was part of a formal structured on-the-job training and provided by an appropriately qualified person; a person who had been a cleaner at the Centre since it opened and someone who could be trusted to provide the necessary instruction. Further, I do not accept the critical messages in such training would have been better delivered in written form.
 2. It was impractical to place bins and/or containers in the grandstands.
 3. No formal risk assessment process would have made any difference to the systems being adopted.
 4. No additional assistance would have prevented the injury.
 5. I am satisfied that Ms Healy was adequately supervised and that, on a major pack down, if she had been standing on the rows of seating to clean, that method of cleaning would have been observed and she would have been told not to stand on the seats.

- [145] In the circumstances, I consider that the Council has taken all reasonable precautions. Ms Healy has not established that the Council failed in its duty of care and Ms Healy's claim should be dismissed.

Contributory Negligence

- [146] If I had found that Ms Healy was performing the cleaning duties by standing on the rows of seating and that she was not told not to do that by any person, I would have found nevertheless that Ms Healy contributed to her injury by undertaking what was clearly a dangerous activity.

- [147] However, on that scenario, I would have also found that the Council knew or ought to have known that she was doing that and should have stopped her. In those circumstances, I would have found that the extent of Ms Healy's responsibilities for her injuries would have been 30 percent.

DAMAGES

Ms Healy's Evidence

- [148] Ms Healy went home immediately following the incident. Ms Healy said she had difficulty sleeping that night because of the pain in her left shoulder and that pain continued to increase the next day and her shoulder became stiff. As the next day was a public holiday, Ms Healy first attended upon her general practitioner the following day. Ms Healy said that the initial injury also caused pain in her lumber spine.
- [149] Ms Healy had scans and x-rays taken of her left shoulder. In the radiologist report of 11 June 2013, Ms Healy had what was described as a small tear in the subscapularis tendon. A subsequent report performed on 24 July 2013 noted that the tear was slightly larger than on 11 June 2013. She was treated with medication and physiotherapy.
- [150] Ms Healy returned to work on 24 June 2013, it having been determined that she was fit for "suitable duties", though not "normal duties". On 9 September 2013, Ms Healy was cleared to return to normal duties and was assessed as not needing further review.
- [151] In the medical records, there is a record of an attendance on 17 September 2013 and a reference to Ms Healy raising issues of the fall having exacerbated her right sacral pain. In cross-examination, Ms Healy said she did not recall that. The records note that no tenderness was observed. A medical certificate was provided.
- [152] Ms Healy also started to complain of right shoulder pain which she says came on because she was taking all the strain on that arm to protect her left shoulder.
- [153] Subsequently, on 30 September 2013, Ms Healy developed a painful left wrist and made a separate WorkCover claim for that complaint. In relation to that injury she obtained a medical certificate stating that she was unable to work for the period from 8 October to 25 October 2013. Prior to that issue being resolved, or even a diagnosis confirmed, Ms Healy told Ms Barnes of her resignation on 25 October 2013. She confirmed that resignation in writing, stating it was effective from 25 October 2013. She has never returned to gainful employment.
- [154] In her letter of resignation, Ms Healy stated that she was unable to keep her position as a cleaner "due to continual health reasons". When pressed under cross-examination as to why she wanted to cease employment with the Council, Ms Healy ultimately responded:
- "It was actually due to the fact that I had this money from my father and my shoulder was hurting and I had this pain down my wrist that – and I was about to turn 50, that I needed – I believe that my body needed to rest. It was just – things were just going wrong since the incident, and I spoke to my husband, and I said to him 'I think I need to step away from this job. I need to allow my body to have a rest for a short period of time', which – I intended about six – three to six months, to let it recover and return to the

workforce, and my husband – I said to my husband that due to the fact that I had amount of money from my father, although I didn't have all that amount of money, I had probably a third of that – I said to him I had enough to cover the expenses that my wages covered, and he said as long as I had that, he was – it was fine, for me to step away.”⁵¹

- [155] This position is confirmed by a report dated 14 September 2014 prepared by Dr Ness, an orthopaedic surgeon, who following a consultation with Ms Healy during which they had discussed her continuing on suitable duties until her resignation in October 2013, he wrote:

“She said she decided to resign for other reasons. At that time she was experiencing intermittent pain in her left wrist and lower back and mild pain in her right shoulder. Because of her multiple pains and the fact that she had received some money through inheritance, she decided it was time to give her body a rest from work.”

- [156] After that passage was read by the barrister for the Council, the following exchange occurred between Ms Healy and the Council's barrister:

“See that? ---That's exactly what I've been saying.

Right. And so what he says is quite correct? ---Yes.

Yes. Okay. See: he actually doesn't mention there that you told him it was because of your left shoulder? ---It was mainly because of my left shoulder. The word “mainly” is the only thing missing. Dominantly my left shoulder.

It said:

“She said she decided to resign for other reasons”.

That suggests not your left shoulder but all these other things, which he then lists? ---I said about the left wrist, and I said it was a small problem. I had a small amount of lower back pain. I had pain in my right arm from continually excessively using it to protect my left.

Okay. So he's wrong in saying “for other reasons”. It's “for other reasons as well as her left shoulder”; is that right? ---For other reasons; yes.

Okay? ---But mainly my left shoulder.”⁵²

- [157] The report also made reference to Ms Healy having helped her husband trim a tree and that activity having exacerbated her right shoulder, which the report notes was “now more painful than the left.” In terms of that statement in the report, Ms Healy denied that she would ever be able to help her husband trim a tree.

- [158] In cross-examination, Ms Healy would not accept that giving up this job was giving up a job that might be very hard to get again with someone else. Ms Healy acknowledged, however, that she had only got the job with the Council with the assistance of Catalyst Injury Management, after having been out of the workforce for three years for medical reasons.

- [159] When asked in cross-examination as to why she had not applied for any jobs since, Ms Healy said that she had had another medical issue since she resigned. Later, in

⁵¹ T2-18 II 36-47.

⁵² T2-22 II 17-37.

her evidence, she added, that was not the main reason, “My main reason was always my shoulder. I didn’t believe I could pass the physical.”⁵³

- [160] In cross-examination, Ms Healy was referred to a Centrelink assessment conducted in June 2011, prior to getting the job with the Council. In that assessment, Ms Healy refers to a prior back condition. In the course of the assessment, the notes record that Ms Healy said the condition was well managed and would not prevent her maintaining 30 plus hours per week in a suitable role. When asked about the back condition in cross-examination, Ms Healy said it was an injury which occurred some 23 years ago.
- [161] Notwithstanding that statement, upon attending Centrelink on 2 December 2011, after getting the job with the Council, the Centrelink document records Ms Healy having said she had a disc compression. It noted Ms Healy was able to work and managed with analgesics but at times she suffered “right sciatica with paraesthesia to the knee”. When asked questions about that report in cross-examination, Ms Healy said she could not recall. When it was suggested to her, consistent with statements in the report, that she was getting low back pain in December 2011, Ms Healy said, “I do remember having some lower pain problems here and there...”. The report refers to a temporary reduction in work capacity of 15 to 22 hours a week to allow therapeutic interventions. The report concluded:
- “Client is managing her conditions but requires reduced capacity related to continued frequency and urgency. Client’s husband will require postsurgical care, and she may require time off work.”

- [162] Ms Healy did not accept her husband was due to have surgery and did not accept she was having difficulties at the Council doing her 30 plus hours per week. That evidence is in stark contrast to the Centrelink Report.
- [163] In giving her evidence, when asked how long she intended to work, Ms Healy said “Well, 65 like most people, but the law says actually for myself and my husband it’s 67 now because we were born in certain years.”⁵⁴ When asked what was her intention but for this accident, she added, “I would...have liked to have stayed to 67. I believe that in that job that the – I could have succeeded.”⁵⁵

Medical reports

- [164] In support of her claim, reports were tendered from Dr Gillett, an orthopaedic surgeon and Ms Scudamore, Occupational Therapist with Edge Rehabilitation.
- [165] Dr Gillett provided two reports dated 9 March 2015 and 13 July 2018. A file note of a conversation between Dr Gillett and the solicitor acting on behalf Ms Healy on 14 March 2019, the contents of which were confirmed by Dr Gillett on 15 March 2019 was tendered. Dr Gillett was not required for cross-examination and his reports and the file note were tendered by consent.
- [166] Ms Scudamore provided two reports dated 31 August 2015 and 21 August 2018. She was also not required for cross-examination and her reports were admitted into evidence by consent.

⁵³ T2-20 ll 4-5.

⁵⁴ T1-35 ll 23-24.

⁵⁵ T1-35 ll 26-28.

- [167] Dr Gillett confirmed the injury to Ms Healy's left shoulder, describing her diagnosis as left rotator cuff injury. In his March 2015 report, Dr Gillett stated that the lower back symptomatology and left wrist symptomatology, which had developed post the incident, had all resolved. This was confirmed in his July 2018 report.
- [168] Dr Gillett reported that Ms Healy continued to have some right shoulder impairment and in his July 2018 report, he said that he did not consider it would cause any incapacity issues. In the file note, it is recorded that Dr Gillett accepted that the problems with the right shoulder were associated with the problems with the left shoulder. Relevantly, no claim is made in respect of Ms Healy's right shoulder.
- [169] Dr Gillett reported that Ms Healy has ongoing issues with her left shoulder, in particular moving her left arm away from her body and above shoulder height and reaching and lifting and lying on it. He commented that Ms Healy noted issues with attending to certain domestic chores and dressing and that she required the assistance of family members. Dr Gillett considered that Ms Healy's description of difficulties in daily living were consistent with the pathology.
- [170] In his July 2018 report, Dr Gillett assessed her left shoulder impairment at three percent impairment of the upper extremity function which is a two percent loss of whole person function. That assessment had seen an improvement since his 9 March 2015 report where Dr Gillett assessed the upper extremity function at seven percent which equates to a loss of whole person function of four percent. Dr Gillett stated that the position had improved because largely Ms Healy had learnt not to aggravate her left shoulder.
- [171] Dr Gillett remained of the view that Ms Healy did not require any treatment other than self-management.
- [172] Dr Gillett confirmed that the left shoulder injury was permanent and would impact her work as a cleaner. He considered that sedentary work below shoulder height in a non-repetitious manner would be within her capacity. As a result of statements made by Ms Healy of a desire to look for work as a numeracy and literacy support person, Dr Gillett considered that such a role would be within Ms Healy's capabilities.
- [173] In his July 2018 report, in reporting on Ms Healy's progress since his March 2015 report, Dr Gillett commented that Ms Healy had improved and "...towards the end of 2016, possibly early 2017 she felt that she was ready to return to the workforceUnfortunately she was unable to progress that process at that time because of other health issues..." He also noted in his July 2018 report that she "is now looking at work in relation to numeracy and literacy."
- [174] In his March 2015 report, Dr Gillett stated, "[Ms Healy] doubted she would have worked until 60, but certainly would have worked into her mid-50s in that job she feels. She is not sure exactly."
- [175] Ms Scudamore, in her reports, agreed with Dr Gillett in terms of the restrictions placed on Ms Healy because of her left shoulder injury returning to work as a cleaner.
- [176] Unlike Dr Gillett, Ms Scudamore considered that obtaining work as a teacher's aide would be problematic because she considered there would be a need in such a role

to undertake some lifting duties. When asked for his response to this view, Dr Gillett agreed that if Ms Healy was required to lift and set up playground equipment and that sort of thing, then those tasks would give her problems. Dr Gillett confirmed that Ms Healy had reduced capacity for heavy pushing and pulling.

[177] Ms Scudamore also commented that the bulk of her work history has been in low skilled, manual occupations; although she noted Ms Healy had qualifications in business administration but had never worked in that field.

[178] Ms Scudamore noted that Ms Healy presents without qualifications, skills or experience in a teacher aide type role nor in other sedentary occupations for which she is now more physically suited. Ms Scudamore stated,

“In future quests for work, she will not only be required to seek roles which are physically suitable, but will be competing with other applicants without her physical restrictions, and with better qualifications, skills and more recent work experience.”

[179] Ms Scudamore considered that Ms Healy faced a number of barriers with regards to her ability to secure alternative employment, and that the pool of roles for which she is now suited is significantly restricted.

Analysis

[180] All of the reports and records were tendered by consent and, with the exception of the report of Dr Ness, no reservations as to their admissibility or use was made. The reports and records admitted subject to no reservations are accordingly to be treated as admitted for all purposes. (The report of Dr Ness was tendered for the more limited purpose as a record of the statements made to Dr Ness by Ms Healy; not for any conclusions reached by Dr Ness.)

[181] Prior to commencing with the Council in November 2011, Ms Healy had had a three year period off work as a result of health issues and, after her return to work, there were continuing issues. It would seem in December 2011, within one month of starting work, Ms Healy was having a discussion with Centrelink in terms of reducing her hours from 30 hours to between 15 and 22 hours.

[182] Within one month of being cleared for normal duties following this injury, Ms Healy was off work for her left wrist pain. Ms Healy made a WorkCover claim in relation to that issue. That pain was ultimately, some three months after her resignation, diagnosed as carpal tunnel. No claim is made in respect of her left wrist pain in these proceedings. However, while still off work for that issue, Ms Healy resigned.

[183] As to the driving force behind Ms Healy’s resignation, Ms Healy told Ms Barnes, Dr Ness and the cross-examiner, that she had decided she needed a break from work. It is difficult to conclude that the left shoulder injury was the over-riding cause.

[184] Following her resignation in October 2013, as referred to by Dr Gillett in his 2018 report, Ms Healy had further unrelated health issues in the period between at least the end of 2016 and July 2018 and, during that period she was unable to work in any role. By July 2018, Ms Healy reported to Dr Gillett that she was now ready to

work. Despite that, there was no evidence given by Ms Healy of any attempts to find alternative employment.

- [185] It is accepted, based on the evidence of Dr Gillett and Ms Scudamore, that Ms Healy's injury and ongoing symptoms prevent her returning to her pre-accident role as a cleaner, nor any of the other manual roles which she has undertaken in the past.
- [186] Nevertheless, in my view, Ms Healy does not really want to work and that is probably the reason for her failing to make any attempt to find alternative employment opportunities, rather than her left shoulder injury.

General damages

- [187] General damages for pain and suffering are to be assessed in accordance with s 306O of the WCRA and the general damages calculation provisions contained in s 129 and s 130 of the *Workers Compensation Rehabilitation Regulation (WCRR)* and Schedules 8 and 9 of the WCRR.
- [188] Counsel for Ms Healy says that pursuant to the WCRR the injury would be assessed as an "Item 96 Moderate Shoulder Injury" with an Injury Scale Value (ISV) range of 6 to 15. Counsel for Ms Healy says an ISV of 8 would be appropriate. The Council submitted that the injury should be assessed as an "Item 97 Mild Shoulder Injury" with an ISV range of 0 to 5. It was submitted an ISV at the top of that range would be appropriate. At the time of trial, counsel for Ms Healy and counsel for the council submitted that an ISV of 8 would give an assessment in an amount of \$11,040 and an ISV of 5 would give an assessment of \$7,050 respectively. In subsequent submissions, the amounts of those assessments were amended to being amounts of \$10,940 and \$6,350 respectively.
- [189] In considering any assessment, the position is made relatively easy because the claim relates only to Ms Healy's left shoulder injury and it is not disputed that the nature of the injury was a rotator cuff strain. In his report, Dr Gillett considered that the impacts of her injury on her daily activities as reported by Ms Healy were consistent with the pathology. Dr Gillett ultimately assessed the left shoulder injury as being a 3 per cent upper body impairment and a 2 per cent whole person impairment. In his March 2015 report, Dr Gillett had previously assessed Ms Healy as having a 7 per cent upper body impairment and 4 per cent whole person impairment. Dr Gillett said that the improvement was because Ms Healy had learnt to avoid activities that exacerbated her left shoulder.
- [190] Dr Gillett had noted the permanency of her injury, the continued impact on her daily living and impact on any type of employment which would involve repetitious use of the left arm, including employment as a cleaner. Dr Gillett had noted that Ms Healy was right-handed.
- [191] Accepting the conclusions of Dr Gillett, I consider an ISV of 6 would be appropriate. The damages are assessed at \$7,880.⁵⁶

Past economic loss

⁵⁶ See s 130 WCRR; Schedule 12 – Table 3: injury sustained post 1 July 2012.

- [192] For the two week period immediately following the incident, during which Ms Healy was absent from work, Ms Healy received from Local Government Workcare an amount of \$957.02. Counsel for Ms Healy says that, based on those earnings, Ms Healy was earning \$478.51 net per week at the time of the incident.
- [193] By reference to the Schedule of Income for the period from 1 July 2009 to 30 June 2014, tendered in evidence, Ms Healy's income in the 2013 financial year was \$19,731 net, which it was accepted equated to \$379.44 net per week. It was accepted by counsel for Ms Healy that that weekly income was more reflective of Ms Healy's income in the period leading up to the incident, rather than the amount of \$478.51.
- [194] The Council's barrister accepted that the amount of \$380 net per week is an appropriate starting point. That amount of \$380 equated to approximately 18 hours work per week.
- [195] Using those amounts, Ms Healy's claim for past economic loss, deducting the amount of \$8,778, being the amount of actual income received in the 2014 financial year up to the date of resignation, is said to give a total for past economic loss to the date of trial of \$103,916.28.
- [196] The Council submits that deductions have to be made from that amount to reflect the fact that the October 2013 resignation was primarily due to her unrelated low back/sacral pain, left wrist carpal tunnel symptoms, right shoulder symptoms, her receipt of inheritance and her desire to spend time with her new grandchild. It was submitted the amount also had to reflect the unlikelihood that Ms Healy would have continued to work in any event because of her continuing urological problems. It was submitted that a global figure of \$10,000 should be allowed for past economic loss.
- [197] Given the findings made in relation to the reasons for Ms Healy's failing to attempt to find work, it is not possible to make a calculation as to the extent of any loss during the period from the date of the injury to the date of this judgment. The most that could be awarded is a relatively small percentage (say 20%) of her normal weekly income of \$380 for the period from October 2014 to the end of 2016 and for the period from July 2018 to present.
- [198] In the circumstances, I will award a global sum of \$15,000 for past economic loss.
- [199] To that amount, I will add the amount of \$957.02 which Ms Healy was paid by Workcare for the two week period she was unable to work immediately following the incident, making the total \$15,957.02.
- [200] Compensation for loss of superannuation entitlements at the rate of 9.5% on the total allowed for past economic loss is \$1,515.92.
- [201] Interest on past economic loss, after deducting the amount of \$957.02 being the amount of the Workcare payment, at the rate of 1.96% for the period since the date of resignation on 25 October 2013 to the date of judgment (6 years and 173 days) is an amount of \$1902.97.

Future economic loss

- [202] Ms Healy's claim for future economic loss is based on the weekly income of \$379.44 for a period of 12 years, on the basis that it is said Ms Healy would have worked until she was 67 years. It is submitted that equates to an amount of \$179,816.62, discounted by 15% for exigencies, making the claim an amount of \$152,844.12.
- [203] The Council submits that the claim for future economic loss should be disallowed entirely on the basis that Ms Healy has taken no steps to obtain any employment and has failed to mitigate in the sense that all her various other conditions appear to have played a greater role in stopping Ms Healy looking for, let alone obtaining, further employment than her left shoulder, and she is now 55 years of age and despite her certificates II and III in business, she does not seem to accept that qualifies her for any employment.
- [204] Consistent with the approach taken in relation to past economic loss, it would be hard to calculate any award of damages for future economic loss.
- [205] However, circumstances can change and it might be that following this judgment, Ms Healy might make an effort to find work. Further, it might be that the income she may earn by that effort may be less than she would have earned as a cleaner; though there is no evidence in that regard.
- [206] In her evidence she says she intended to work until she was 67. I do not accept that evidence, particularly in view of her past work history, her other health issues and the statements she had made to Dr Gillett as to retiring at 60, or even perhaps mid-50's.
- [207] In the circumstances, making appropriate allowances for the various contingencies and accepting as I do that Ms Healy had little desire to return to work, I will assess her loss of earning capacity as a result of her left shoulder injury at \$20,000, which is an amount of \$75 weekly, using the 5% tables for six years, which represents 20% of her weekly income. A period of six years assumes a retirement age of 60.
- [208] Compensation for the loss of superannuation entitlements at the rate of 9.5% is \$2,200.

Summary

- [209] If I had found for Ms Healy, her damages would be calculated as follows:

Head of damage	Amount
General damages	\$ 7,880.00
Special damages (as agreed)	\$ 5,665.78
Interest on 'out-of-pocket' expenses agreed at \$284.40 ⁵⁷	\$ 38.17
Past economic loss	\$ 15,957.02

⁵⁷ At 1.96% from date of incident to date of judgment (6 years, 312 days).

Interest on past economic loss ⁵⁸	\$ 1,902.97
Past loss of superannuation ⁵⁹	\$ 1,515.92
Future Economic loss	\$ 20,000.00
Future loss of superannuation ⁶⁰	\$ 2,200.00
Gross assessment	\$ 55,159.86
Less agreed refund to WorkCover	\$ 5,713.20
Net assessment	\$ 49,446.66

Orders

[210] For these reasons, I make the following orders:

1. The claim by the plaintiff is dismissed.
2. If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Thursday, 30 April 2020.
3. If the parties cannot reach agreement as to costs:
 - (i) the plaintiff file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 7 May 2020;
 - (ii) the defendant file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 14 May 2020; and
 - (iii) the plaintiff file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Monday, 18 May 2020.

⁵⁸ At 1.96% from 25 October 2013 to date of judgment (6 years, 173 days).

⁵⁹ 9.5% of past economic loss.

⁶⁰ 11% of future economic loss.