

# SUPREME COURT OF QUEENSLAND

CITATION: *Riley v Commonwealth of Australia* [2002] QSC 024

PARTIES: **RILEY, Tanya Jane**  
(plaintiff)  
v  
**COMMONWEALTH OF AUSTRALIA**  
(defendant)

FILE NO: No 4019 of 2001

DIVISION: Trial Division

PROCEEDING: Personal Injury – Assessment of Damages

ORIGINATING COURT: Supreme Court

DELIVERED ON: 13 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 3 December 2001

JUDGE: Byrne J

ORDER:

CATCHWORDS: NEGLIGENCE- plaintiff/cleaner injured in fall at work – plaintiff subsequently suffered from ankle, leg, and lower back pain – plaintiff required back surgery- plaintiff suffered from a long standing age related degeneration of the spine- assessment of damages- pain and suffering and loss of the enjoyment of the amenities of life – diminution in future earning capacity – future care – whether assessment of damages must reflect the loss of earning capacity resulting from the onset of the degeneration of the spine.

COUNSEL: Mr R J Lynch for the plaintiff  
Mr D J Campbell for the defendant

SOLICITORS: Joseph Lyons & Co for the plaintiff  
Australian Government Solicitor for the defendant

## **Assessment of compensation**

- [1] The plaintiff was born in November 1961. In mid-January 1999, she was working as a cleaner when she tripped and fell. Liability having been agreed, the assessment of damages remains.
- [2] The trial was conducted on both sides with commendable efficiency; and so many of the components of the award are agreed. The areas for determination concern

pain and suffering and loss of the enjoyment of the amenities of life, diminution in future earning capacity, and future care.

### **Condition**

- [3] Immediately after her fall, the plaintiff experienced pain in the right ankle, with some discomfort in the right calf. In the ensuing week, as lacerations and abrasions healed, she remained away from work. In that time, the ankle pain largely resolved, but pain in the right leg became progressively worse. By March 1999, the plaintiff was experiencing intense pain in the leg and some numbness in the right foot.
- [4] A CT scan showed a moderately large right-sided L5-S1 disc protrusion. Dr Weidman, a neurosurgeon, thought this to be the source of the discomfort. As bed rest failed to alleviate the severity of her pain, the plaintiff chose surgery.
- [5] In April, a right L5-S1 laminectomy was performed. The plaintiff was in hospital for 3 days or so afterwards.
- [6] The surgery relieved a deal of the pain, but some pain – especially lower back pain – has persisted.
- [7] After a time, the plaintiff commenced a graduated return to work programme on light duties. Unfortunately, she continued to experience pain and restrictions of movement. Her condition was aggravated when she overstretched her leg during exercise work at a gymnasium.
- [8] When the orthopaedic surgeon, Dr John Fraser, saw her in February 2000, the plaintiff was complaining of a burning pain in her right leg extending to the knee, and that her right leg had a tendency to give way. The range of motion of the back was also considerably restricted. Dr Fraser's prognosis was discouraging. He did not expect that the plaintiff would ever be suited to work that required repetitive bending, lifting or the prolonged maintenance of a single posture. He also thought it unlikely that a rehabilitation programme would succeed. This pessimistic forecast has proved to be correct.
- [9] Mr C M Fraser, an occupational therapist, assessed the plaintiff in May 2000. By this time, she had been away from work for a "significant period", and rehabilitation programmes had not succeeded in allowing her to return to full duties. The plaintiff had attended for physiotherapy on more than 20 occasions. She had also undergone about 20 sessions of occupational therapy aimed at decreasing her pain and increasing the range of motion in her lumbar spine and right leg. Even so, her "occupational restrictions", as Mr Fraser then described them, included "no prolonged sitting/standing for greater than one hour; no static or repetitive crouching, kneeling, stooping and forward or below waist reaching/bending; no repetitive lifting of loads greater than five kilograms from floor to waist, waist to waist and waist to overhead levels; no general lifting and carrying of loads greater than 10 kilograms; and the opportunity to vary her posture and/or complete stretches on a regular basis."
- [10] Dr Gillett, orthopaedic surgeon, first saw the plaintiff in August 2000. She was then experiencing back pain, sitting was restricted for about an hour, bending aggravated the back condition, and lifting and stair climbing posed difficulties.

- [11] Dr Gillett considered that there was radiological evidence of a long-standing, age-related degeneration of the lumbar sacral spine. In his opinion, the plaintiff has an 8% impairment of bodily function attributable to the accident. He assesses her overall impairment at 13%: of this 5% reflects pre-existing changes within the spine. He has also said that, had the fall not supervened, the plaintiff would have arrived at about a 10% impairment of body function in about five year's time. The injury will add another 8%.
- [12] Dr Gillett considers that, were it not for the accident, back pain would progressively have been experienced but that the plaintiff is now "worse" because of the fall and surgical intervention. In his view, the plaintiff would not have required surgery with progressive deterioration attributable to natural degeneration. The aging process alone would have left the plaintiff with some, but less, back pain that would have affected her in her activities. But, he thinks, it is very unlikely that she would have experienced any leg pain. Now she has, and will continue to experience, pain in the lower back and leg.
- [13] Had the accident not supervened, in Dr Gillett's opinion, the plaintiff would very likely not have been able to continue her, relatively demanding, work as a cleaner after about five years, although she may perhaps have been able to work in that capacity for as many as 10 years. Dr Gillett also believes that the fall has denied the plaintiff the opportunity to accommodate progressive deterioration in her condition and gradually to modify her movements and activities.
- [14] I accept Dr Gillett's opinions.
- [15] The sudden onset of symptoms and impairment of function has significance not only for compensation in respect of pain and suffering and loss of the enjoyment of the amenities of life. It also matters to diminution in future earning capacity. Had the change been progressive, the plaintiff might have secured less physically demanding employment readily: as, for example, in a supervisory capacity with her employer or, if she changed employers, in circumstances where she would have been seeking work as someone who had not undergone lower back surgery.

### **Pain and suffering**

- [16] To cope with the frequent back pain, the plaintiff takes about 24 Nurofen tablets a week. Occasionally, she needs bed rest and heat packs. Her symptoms are aggravated by cold weather, "numerous activities performed in one day" (as the occupational therapist, Mrs Prodger, put it), and by such out of the ordinary labours as pruning trees.
- [17] The plaintiff used to enjoy ten-pin bowling. She can no longer do that. Nor does she attend the cinema these days, having found that sitting in one position for 1½ hours became too painful.
- [18] The plaintiff has, she said, to "pace" herself in attending to household tasks, otherwise she will suffer pain the next day. She must also lighten loads she carries: for example, to the clothesline, in carrying shopping bags, and when unloading shopping trolleys. She has trouble getting items from the lower shelves in supermarkets.

- [19] The plaintiff and her husband of many years separated in August last year. Her sex life became, as the plaintiff put it, “virtually non-existent” after the fall. Her husband was “understanding”. However, eventually he took up with another woman. This happened early last year after he left to go to Melbourne to earn more money, once it became clear that the plaintiff was unlikely to earn much in future. In short, the fall contributed to the marriage break-up.
- [20] The plaintiff’s life expectancy is another 43 years, during which she can expect to suffer pain and restrictions on movement appreciably greater than that which would have been produced by the natural progression of degeneration. But, of course, there is a chance, to be valued, that other trauma might have supervened and produced a somewhat similar condition.
- [21] \$45,000 seems fair compensation for this component of damages award. For the purpose of calculating interest, \$20,000 should be attributed to the pre-judgment period.

### **Economic loss**

- [22] The plaintiff completed her junior certificate at high school. She does not have a recognised trade or tertiary qualification. After leaving school, she worked for most of the time. Her jobs over the years have included shop assistant, factory worker, sales assistant and waitressing.
- [23] The plaintiff, it seems, was well regarded by her employer and co-workers in the cleaning company where she worked at the time of her fall. The benevolence of her employer extended to paying her wages in full until she finally left work in April last year.
- [24] The plaintiff is considerably disadvantaged on the labour market.
- [25] She can still work, part-time, in sedentary occupations and other light employments. Unfortunately, most of the jobs for which she is physically suited – as examples, receptionist, secretary, ticketing agent, tourist information assistant, and sales assistant in a fashion or jewellery store – are positions in which she has no experience. More importantly, prospective employers are likely to prefer younger, able-bodied women in an already competitive labour market for such positions as are within the plaintiff’s capacities.
- [26] The plaintiff has applied for work, with one exception, without success. She got a job as a telemarketer, on a commission only basis, but found that she was not suited: she is not “a pushy person”.
- [27] Mr Fraser, who has extensive experience in placing injured workers, considers that, in the current labour market, the plaintiff, in view of her age and functional restrictions, is “probably going to have extreme difficulty” in obtaining employment, or, if she obtains it, in retaining “employment for a long period”. I agree. The chances that she will get, and retain, a lot of part-time work are insubstantial. Economically, her future seems bleak. Still, allowance must be made for the prospect that she may yet get some, part-time, work. She prefers to work, she has worked most of her adult life, and her last employer regarded her highly.

- [28] Were it not for the accident, or the supervention of another traumatic event, the plaintiff might have continued in full-time employment until “55 or 60”, she said, although the progressive back condition would have seen her give up heavy manual labour, such as cleaning, well before then. She may well have experienced a decline in income as the range of jobs narrowed over time with the progressive spinal degeneration, but that was not inevitable. She might, for example, have moved to a supervisory position in the cleaning business in which she was employed. Nonetheless, allowance must be made for the contingency that in time her earnings may well have been substantially reduced through the degeneration of her spine in any event.
- [29] Making allowance for adverse vicissitudes of the usual kind, all considered, the assessment of diminution in future earning capacity may, I think, fairly be approached by assuming about a two-thirds loss until age 55 or thereabouts. On the 5% tables, rounding-off, future economic loss is assessed at \$140,000.

### **Future Care**

- [30] The hourly rate at which future care should be calculated is agreed. The contest concerns the number of hours to be allowed: the plaintiff claims three; the defendant contends for one.
- [31] The plaintiff needs help with gardening and mowing. She can attend to small quantities of shopping on her own. But she needs help to shop at the one time for a week’s groceries. She also requires assistance with housework: in particular, in using a heavier vacuum cleaner and in attending to larger loads of laundry.
- [32] The vacuuming takes about an hour weekly. Those tasks in the garden which must now be done by others take about half an hour a fortnight. Making allowance for other occasional assistance (for example, in relation to shopping), I allow two hours.

### **Orders**

- [33] I will hear submissions as to the form of order and costs.