SUPREME COURT OF QUEENSLAND

CITATION:	*Calvert v Mayne Nickless Ltd* [2004] QSC 449
PARTIES:	**CELIA CALVERT** (plaintiff) v **MAYNE NICKLESS LIMITED** (defendant)
FILE NO:	154/02
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	13 December 2004
DELIVERED AT:	Brisbane
HEARING DATES:	2, 3, 4, 5, 6, 10 August 2004
JUDGE:	Wilson J
ORDER:	**Judgment is awarded for the plaintiff against the defendant in the sum of $489 657.05.**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where plaintiff was a nurse employed by the defendant hospital – where plaintiff injured her back while lifting a patient – where defendant hospital did not provide a lifting hoist – whether defendant hospital breached its duty of care, its contract with the plaintiff and/or its statutory duty under the *Workplace Health and Safety Act* 1995 - consideration of whether "the actual and direct event giving rise to the [plaintiff's] injury was reasonably readily foreseeable by the [defendant] within s 312(1)(b) of the *Workcover Queensland Act* 1996 – consideration of defendant's obligation under s 28(1) of *Workplace Health and Safety Act* 1995 – existence of advisory standard – onus of proof that obligation discharged under s 26 or of defence under s 37 WORKERS COMPENSATION – ASSESSMENT AND AMOUNT OF COMPENSATION – AMOUNT OF COMPENSATION DURING INCAPACITY – LUMP SUM PAYMENTS FOR SPECIFIC INJURIES AND LOSSES – GENERALLY – where plaintiff had suffered previous injuries to her spine – where plaintiff has had continuous pain since the incident - where plaintiff no longer able to work as a

nurse – effect of s 317 of *Workcover Queensland Act* 1996 in assessment of future economic loss – effect of s 315(b) of *Workcover Queensland Act* 1996 on availability of damages for gratuitous services where plaintiff lives alone

Workplace Health and Safety Act 1995 (Qld), ss 7, 26, 28, 37
Workcover Queensland Act 1996 (Qld), ss 311, 312, 314, 315, 317, 318

Brkovic v JO Clough & Son Pty Ltd (1983) 57 ALJR 834, followed
Chapman v Hearse (1961) 106 CLR 112 at 121, cited
Hopkins v Workcover Queensland [2003] 257, cited
Joynson v State of Queensland [2004] QSC 154 at paras [114] – [116], cited
Karanfilov v Inghams Enterprises Pty Ltd [2003] QCA 242 at para [52], not followed
Nagel v Queensland Rail [2004] QDC 358 at para [56], followed
Plumb v State of Queensland [2000] QCA 258 at paras [17] – [18], cited
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518 at 533, followed
Slivack v Lurghi (Australia) Pty Ltd (2001) 205 CLR 304, referred to
Smith v Topp [2002] QSC 341, cited
Wyong Shire Council v Shirt (1979-80) 146 CLR 40 at 47, cited

COUNSEL: GW Diehm for the Plaintiff
KN Wilson SC and KF Holyoak for the defendant

SOLICITORS: Gall Standfield & Smith for the plaintiff
Hopgood Ganim Lawyers for the defendant

[1] **WILSON J**: The plaintiff Celia Calvert claims damages for personal injuries allegedly sustained in an incident in the course of her employment at the John Flynn Hospital on the Gold Coast on 7 March 1998. The defendant operated the hospital and was her employer.

[2] The plaintiff was born on 20 October 1965. She was a registered nurse with qualifications and experience in general nursing and midwifery. In April 1997 she commenced work at the John Flynn Hospital on a casual basis through a nursing agency. In time she came to be employed by the defendant on a part-time basis, progressing to permanent part-time status.

The alleged incident

[3] On Saturday 7 March 1998 the plaintiff was working the afternoon/evening shift in the orthopaedic ward. One of the patients was an 85 year old man who had been admitted with a suspected fractured left humerus after a fall in a nursing home. (The arm was indeed fractured, and was pinned on 16 March.). He had previously had a

hip replacement and other surgical and medical treatment. When he was admitted to the John Flynn Hospital it was noted in the Nursing Assessment that he had dementia and could become agitated. It was noted in the Care Plan on the day of his admission (4 March 1998) that he required assistance with activities of daily living, and for the first 3 days his bed rails were put up. On 5 March it was noted that 2 staff were necessary to assist him. By 7 March he was sat out of bed.

[4] In her amended statement of claim the plaintiff alleged –

> "2. On or about 7 March 1998 at or about 4.30 pm, the Plaintiff was assisting a wardsman to transfer a patient, who suffered from dementia and had a fractured left humerus, from his bed to a chair.
>
> 3. During the course of the said transfer, the patient struggled, causing the Plaintiff to lose her balance and move awkwardly.
>
> 4. As a result of the said awkward movement, the Plaintiff sustained injury to her lower back."

[5] In her evidence the plaintiff described coming on duty and receiving a verbal handover report about this patient as well as reading his nursing care plan and notes. She described him as totally reliant on the staff for mobility. His left arm was in a collar and cuff sling, and he needed assistance even to move within his bed. She saw in the records that he was a "2 person transfer". He had very few verbal communication skills. He needed to be got out of bed and sat in a chair both to prevent his developing pressure sores and to take his meals.

[6] With a view to moving the patient into a chair so that he could have his evening meal, the plaintiff telephoned for the assistance of wardsmen. She asked for 2 wardsmen, but was told that only 1 was available. Before the wardsman arrived, the plaintiff positioned a chair at a slight angle towards the top of the bed: the chair was facing the bed with the front of the chair closer to the bed. The wardsman, Simon Vamplew, arrived. The plaintiff as the registered nurse assessed how they should move the patient from the bed to the chair, and she instructed the wardsman accordingly. They took up positions one on either side of the bed, both facing in the direction of the bedhead, the plaintiff being on the side where the chair was. That was the patient's left side, ie the side of his fractured humerus. She explained to the patient what they were going to do: it was standard procedure to do so, and because of his dementia she broke down the explanations making things as simple as possible. However, she found it hard to determine how much he understood of what she said. She and the wardsman reached behind the patient's shoulders and brought him to a more upright sitting position within the bed, supporting him with their hands behind his back. (The plaintiff used her right hand to support him, being careful not to put any pressure on his injured arm.) The wardsman then came around to the plaintiff's side of the bed. She continued to support the patient in an upright position while the wardsman held him underneath his knees, and they rotated him so that his legs were sitting over the edge of the bed, his feet not quite touching the floor. The plaintiff and the wardsman stood on either side of the patient. The plaintiff was on the patient's left side; she put her left foot in front of the patient's feet so that his legs would not slide out from under him, and to give her a wider stance and more stable base from which to manoeuvre the patient. The wardsman put his right foot in front of the patient's feet. In this way they assisted the patient to a standing position and encouraged him to take

very small steps, shuffling round until he had his back to the chair. When the back of the patient's legs were touching the chair, the plaintiff explained to him that they were going to lower him into the chair. They commenced to do so. They were holding the patient around his torso. The plaintiff said she was endeavouring to keep her back as straight as possible, bending at the knees. When the patient was almost seated, he suddenly became anxious and started grasping or plucking at the air, and taking short, sharp breaths. The patient grabbed at the plaintiff's right upper arm and shoulder, pulling her down as he sat completely in the chair. She felt a sharp pain in her lower back, and was stuck in that position for a while. It seemed like a very long time, but it was probably only a couple of minutes. She tried to straighten up, but her back locked up and a few moments passed before she straightened up.

[7] The plaintiff was not sure whether the patient grabbed her with his left arm or his right arm, although she thought it was the left arm. This seems unlikely given that it was in a sling (albeit a soft sling), and given that the left humerus was fractured. She was not sure whether the wardsman had hold of the patient's right arm. She said in cross-examination that the plaintiff's behaviour had been completely unexpected – that she had not seen anything in his file to indicate he might reach out and grab her, and that until that point he had been calm and co-operative. She described the patient as pulling her towards him; although it was only a matter of inches, it "would have included his weight" as he sat down fully. Later she described her own movement as "basically a rotation almost on the spot".

[8] Although the patient's records indicate he had an indwelling catheter, the plaintiff could not remember this or the presence of a urine collection bag at the time he was being got out of bed.

[9] The plaintiff continued working to the end of her shift some hours later without making any note of the incident in the patient's chart, reporting it to any other staff member, or completing an incident report form. She apparently returned to this patient several times to administer medication and ensure he was taking fluids. She said her back became "progressively a bit more sore" over the rest of the shift.

The days following the alleged incident

[10] The plaintiff said she went home, and had a restless night. Her back was still sore the next morning, but she thought the problem was a muscular one and hoped it would settle. She worked the next 2 days (8 and 9 March), but was not required to do any particularly heavy work. On 9 March she kept an appointment she had with a gynaecologist to whom she had been referred the previous month for pain in her pelvic region. She did not tell the gynaecologist about the incident at work 2 days previously or about the pain she was experiencing in her lower back. She had a rostered day off on 10 March.

[11] A few days after the incident the plaintiff resolved to consult a general practitioner, Dr Keys, about her back, but she could not obtain an appointment until Friday 13 March. In the meantime she received acupuncture from her sister and osteopathy from Dr Kovacs (a friend's husband). On 12 March she telephoned her employer and orally reported the incident; she signed an incident report form on 14 March. On 17 March she completed a WorkCover claim form, and she supplied additional information to WorkCover on 5 April.

[12] According to Dr Keys' notes, when the plaintiff saw him on 13 March she told him that she had suffered acute lower back pain in an incident lifting at work 6 days previously. She still had lower back pain, and had had pins and needles in her feet for a few minutes that morning. Straight leg raising was 40 degrees on the right and 80 degrees on the left. She was tender over the sacro-iliac joint, more on the right than the left. He prescribed pain killing, anti-inflammatory and sedative medication.

[13] The plaintiff returned to her general practitioner on 14, 15, 17, 18, 19 and 26 March, and on 9 and 24 April, and again on 1 May. (Most of the consultations were with Dr Keys, but some were with other doctors in the practice.) He arranged an Xray and a CT scan of her lumbo sacral spine on 22 and 23 March. The plain Xray revealed a mild curvature concave to the left and mild degenerative changes. At the L3-4 level there were minor degenerative changes affecting the interfacet joints; at L4-5 there was degenerative disc bulging and there were mild to moderate degenerative changes affecting the interfacet joints; at L5-S1 there was degenerative disc bulging and there were moderate degenerative changes affecting the interfacet joints. There was no significant foraminal stenosis at any level. Dr Keys referred the plaintiff to Dr Rudy Hoffmann (presumably an orthopaedic specialist) for an opinion.

Motor vehicle accident – 1 May 1998

[14] As she was driving home from her appointment with Dr Keys on 1 May 1998, the plaintiff was involved in a motor vehicle accident. She was following a vehicle which indicated to turn right, commenced to do so, and then stopped. The right front corner of the plaintiff's vehicle collided with the left rear corner of the other vehicle. At the time of impact the plaintiff may have been travelling at 30 – 40 kph. She was taken by ambulance to the Gold Coast Hospital, where she was seen in the Emergency Department. On admission she told staff that she had sustained a work injury 8 weeks previously leading to disc prolapse at the L4-5 and L5-S1 levels, which had been slow to settle. She was given Panadol, told to rest, and sent home. The discharge diagnosis was exacerbation of a pre-existing back problem.

[15] The plaintiff returned to Dr Keys on 7 May 1998. She told him about the motor vehicle accident: her back pain had increased as a result, but was then settling although it was still worse than when she had last seen Dr Keys. The pins and needles in her right foot had returned.

[16] In evidence the plaintiff said that after a few days the pain in her back subsided to where it had been before the motor vehicle accident. She said that since the incident at work on 7 March 1998 she has had continuous back and leg pain. The symptoms fluctuate, but essentially they have remained unchanged. The leg pain occurs in both legs, but more so in the right leg. She has dealt with her symptoms by rest and non-invasive and natural therapies. She has taken Panadol and anti-inflammatory medication at times, and wears a lumbosacral corset from time to time. She has not returned to work.

Degenerative changes

[17] The plain Xray and CT scan performed in late March 1998 revealed degenerative changes in the plaintiff's spine of a type quite commonly seen in a person of the plaintiff's age. However, such degeneration is not always accompanied by symptoms in a person of her age. At trial there was conflicting evidence about its significance and the extent to which it was symptomatic before 7 March 1998. This question bears

on the plaintiff's credibility, causation and the assessment of quantum. There was no suggestion that the defendant was aware of it before the incident.

[18] On 25 June 1990 the plaintiff's chest, cervical spine and lumbar spine were Xrayed. There was no evidence why this was done. The Xray of the lumbar spine showed a mild scoliosis concave to the left and a minor defect of the S1 neural arch. The radiologist commented that it was a common finding and of no clinical significance.

[19] Then the plaintiff was involved in 2 motor vehicle accidents - on 17 April 1991 and 27 June 1992. The accidents were of similar type, and on each occasion the plaintiff sustained principally a whiplash injury, but also some injury to her lower back.

[20] After the first accident she was off work for a week. As well as complaining of problems in her neck, she complained of pain throughout her spine. Six months later, when she was seen by Dr Peter Dodd, an orthopaedic surgeon, she was still complaining principally of problems with her neck; she also complained of occasional sciatica and pressure in her sacroiliac joints bilaterally. She was examined by another orthopaedic surgeon, Dr John Pentis, in late May 1992. Again her main complaints related to her neck; Dr Pentis recorded that while she had also complained in the past of some pain in the hip and some sciatic pain in the legs, those had basically improved with time; on examination there was tenderness in the lower lumbar region and tenderness over the sacro-iliac joints, normal motor and sensory function in the lower limbs and normal jerks, and straight leg raising to 90 degrees on both sides.

[21] The second accident was apparently more forceful. The plaintiff was hospitalised for 3 days and kept under observation. She was considered to have sustained a soft tissue injury and bruising only, and discharged with a soft collar and physiotherapy. Dr Pentis re-examined the plaintiff in August 1995. His clinical findings with respect to the lumbar spine were similar to his earlier findings. He considered that the second accident had caused further soft tissue damage to the cervical and lumbo-sacral region, and aggravated whatever problems she had from the first accident, and that she had a residual incapacity in the spine approximating a 10% loss of efficient function of the spine as a whole. Dr Ian Maxwell, a neurologist, examined the plaintiff in November 1993 and October 1994 principally in relation to her neck, but he recorded on each occasion complaints of back pain. In his second report he recorded her complaints of occasional sciatica with low back pain radiating into both buttocks worse on the right, which might radiate down the back of her thighs to her knees, but with no associated weakness.

[22] There is other evidence that the plaintiff's problems persisted at least until her second examination by Dr Pentis (in August 1995). In November 1993 she made a claim on an income protection policy, but the emphasis was clearly on her cervical spine. The insurer required her to complete a questionnaire about "Neck - Back Trouble" in January 1994; she described the nature of her back disorder as a soft tissue injury (whiplash) to the cervical spine; in response to a question whether the disorder was limited to one area of the back, she said usually the neck.

[23] In early January 1994 the plaintiff was working in the labour ward at the Gold Coast Hospital assisting a woman in labour when she experienced what she described as a sprain or strain causing her back, ribs and hips to ache and be uncomfortable; she had 5 days off work following this.

[24] Between January and May 1995 the plaintiff consulted the West Burleigh Chiropractic Clinic on 7 occasions - principally, it seems, for problems with her neck but also for occasional right leg sciatica.

[25] Thereafter there is no evidence of any specific complaint of back pain or sciatica before the incident on 7 March 1998. Whether or not she had episodic back pain and or sciatica, the plaintiff was apparently able to get on with her activities of daily living and her work as a registered nurse without being incapacitated.

The plaintiff's credibility

[26] Counsel for the defendant submitted that the plaintiff was a demonstrably unreliable witness and that her evidence should not be accepted unless corroborated. They relied on the following circumstances in support of that submission:

(a) *the absence of an allegation in the pleading that the incident occurred in the manner described by the plaintiff in evidence;*

The allegations in paragraphs 2, 3 and 4 of the statement of claim were sufficiently general to capture an incident as described by the plaintiff in evidence. Apparently the defendant did not seek particulars. In these circumstances there is no warrant for drawing an adverse inference as to the plaintiff's credibility from the disparity between the pleading and her evidence.

(b) *that the incident was not noted in the patient's chart;*

The plaintiff was certainly remiss in not noting the incident in the patient's chart. She should have done so both as part of the record of the patient's progress and in the interests of other staff who would have to tend to his needs.

(c) *that the plaintiff did not report the incident orally until 12 March 1998 or in writing until 14 March 1998;*

It is pertinent to bear in mind that for the first few days the plaintiff thought she had sustained no more than a muscular strain; she completed the shift in which the incident occurred and went to work on the next 2 days; the third day was a rostered day off. In the meantime her symptoms intensified (which is fairly common with lower back injuries). In these circumstances her delay in reporting the incident was explicable.

When she completed the written incident report form she described the incident and the mechanism of injury in these terms –

> "I was transferring a patient from his bed to a chair with a wardsman.
>
> After transferring the patient to the chair, I felt sharp pain in my lower back and it took a while for me to 'straighten up'. This happened after being caught off balance when lowering the patient to the chair."

As counsel for the defendant pointed out, there was no mention of the patient reaching forward and grabbing the plaintiff. The point was validly taken, but

I think the plaintiff adequately answered it when she was asked in cross-examination what she meant by being caught off balance, and she replied –

> "That when the patient grabbed at me, it pulled me off my centre of gravity."

(d) the plaintiff's failure to report the incident to the sister in charge;

The plaintiff was remiss in not doing so, but given that at that stage she thought she had sustained no more than a muscular strain and that it was only over the ensuing days that her symptoms intensified, I do not regard her omission as reflecting adversely on her credibility.

(e) that the wardsman had no recollection of the incident;

The wardsman Simon Vamplew gave a statement to the defendant's solicitors in February 2001 in which he said that he did not recall the plaintiff sustaining an injury when he was assisting her to move a patient from a bed to a chair on 7 March 1998. At the time of the alleged incident the hospital had 225 beds, and Mr Vamplew's position required him to respond to calls for assistance from nursing staff all over the hospital. The plaintiff's description of the incident is such that it may not have made an impression on him: she said that her back locked, but it was only for a short time, she did not cry out (to do so would have been against her nature), and she was able to finish her shift. Presumably Mr Vamplew went back to his work station and attended to other calls. He left the defendant's employ in September 2000 to become a security officer at the Versace Hotel; at about the beginning of 2003 he left that employment to become a backyard manufacturer of surfboards; and he was not able to be located to give evidence at the trial. In the circumstances I attach little weight to his evidence.

(f) that the plaintiff did not mention the incident to the gynaecologist whom she consulted on 9 March 1998;

This struck me as somewhat odd. However, when considered in the overall context, it was perhaps explicable. The symptomatology in the plaintiff's back was intensifying, but had apparently not reached the point where she had tried to see Dr Keys about it. Her then general practitioner had referred her to the gynaecologist the preceding month, and by the time she saw him, the particular problem had resolved. I detected a certain shyness or reserve in the plaintiff's manner when she was questioned about this problem at the trial, but of course I have no way of knowing how she related to the gynaecologist at the consultation.

(g) the plaintiff's unreliability in relation to the extent of her symptomatology prior to 7 March 1998;

The defendant's counsel made much of the plaintiff's failure to tell the numerous doctors who examined her between the incident on 7 March 1998 and the trial about her pre-existing back problem. However, I am prepared to accept her explanation for not having done so. She described her back symptoms after the 2 motor vehicle accidents as very generalised and short

term, and the collateral evidence is that her principal injuries and her main ongoing problems related to her neck. She described what she has experienced since 7 March 1998 as being of a quite different nature from anything she had experienced before, namely persistent and unrelenting back pain primarily focussed in the central lumbar region.

(h) the plaintiff's failure to mention the accident on 1 May 1998 to the various doctors who examined her subsequently;

After the motor vehicle accident on 1 May 1998, the plaintiff returned to her general practitioner Dr Keys on 7 May 1998, and she told him what had happened. Otherwise, she did not tell the doctors who examined her subsequently about that accident. Clearly she ought to have done so. However, I accept her explanation that she thought the subsequent accident was insignificant, because although immediately following it her back pain increased, it settled within a couple of days to the level it had been just before the accident.

(i) that the plaintiff's description of the incident defies credibility;

I found the plaintiff's evidence of how the incident occurred quite plausible in all respects but one, and that was her evidence that she thought the patient grabbed her with his left arm. As I have already observed, this seems unlikely given that his left humerus was fractured and his left arm was in a sling. She was not dogmatic that it was the left arm, and it is understandable that in the agony of the moment she did not take note of which arm it was. Further, there was no clear evidence that the wardsman had hold of the patient's right arm. They had been holding him around his torso, and so it is unlikely that his right arm was restrained by the wardsman.

(j) that the plaintiff has given multiple versions, with variations within those versions, of the precise circumstances of the incident;

The general practitioner Dr Keys' notes about the incident itself, made at the first consultation on 13 March 1998, are cryptic - "injury 6/7 ago lifting at work". There is no mention of lifting in the pleading or in the patient's oral evidence; rather the relevant manoeuvre was that of assisting the patient down on to a chair when he grabbed her.

The next recorded version is that given by the plaintiff in the written incident report form (set out in para (c) above).

Dr Matthew Scott-Young, orthopaedic surgeon, first saw the plaintiff on 11 June 1998, on referral from Dr Keys. In his report of 7 August 2001 he recorded the version of the incident the plaintiff gave him. Relevantly this included -

> "The patient was brought to the edge of his bed in a sitting position. As he was lifted from the bed, Ms Calvert reports that the patient became distressed, took hold of her, and pulled her over while she was lowering the patient into the chair. Ms Calvert reported experiencing a sharp pain in her lower back."

This is not dissimilar from the plaintiff's version in oral evidence. What is significant is the statement that the patient became distressed, took hold of her and pulled her over while he was being lowered into the chair.

Dr Roger Parkington, orthopaedic surgeon, examined the plaintiff on 20 May 1998. He recorded being told that the patient resisted all attempts to move him and that after the plaintiff had been bent over lifting him she experienced right side low back pain when she attempted to straighten up. Dr Parkington gave evidence by telephone. His terse responses and somewhat irritable tone did not leave me with confidence that he had necessarily questioned the plaintiff closely about her history or the precise mechanism of the injury. For example, he noted in his first report that the plaintiff attended his rooms with her husband, but the plaintiff has never been married, and it was apparently a mere assumption on the doctor's part that the man accompanying her was her husband. In the circumstances I am not satisfied that the version the plaintiff gave Dr Parkington was inconsistent with her version in oral evidence.

Dr John Corbett, neurologist, first saw the plaintiff on 6 October 1998 on referral from Dr Keys. In his report he referred to the plaintiff having developed acute low back pain while lifting a patient. Otherwise the version he recorded is consistent with the plaintiff's oral evidence: that the patient struggled somewhat during transfer, at which time the plaintiff developed an acute pain in the right para-lumbar region of her low back and she was unable to straighten her spine for some minutes. Because the whole transfer is not described in any detail in his report, I do not regard the reference to "lifting" as being of particular significance. If it were, I would have expected the doctor to have recorded an estimate of the patient's weight and how the lift was being effected.

Dr Keys referred the plaintiff to Dr John Wainwright, psychiatrist, and she saw Dr Wainwright on 6 occasions between 15 October 1998 and 3 February 1999. In his report dated 4 July 2000 Dr Wainwright recorded the plaintiff telling him that her injury had occurred when she was transferring a patient from a bed to a chair; she said the patient had struggled, and that she had noticed an intense sharp pain in her lumbar region; she had “got stuck”, and it had taken her quite a few minutes to straighten up. This is consistent with her oral evidence (although there is no mention of the wardsman).

Dr GM Boyce, neurologist, first examined the plaintiff on 15 May 2000. He recorded the plaintiff telling him that as the patient was being sat in a chair he grabbed her, that she felt a sudden sharp pain in her back, more slightly to the right side, and that it took a couple of minutes to straighten up. This is consistent with the plaintiff's oral evidence.

Dr Noel Langley, orthopaedic surgeon, examined the plaintiff on 22 May 2000. He did not obtain a full account of the incident, and recorded merely that the plaintiff was trying, with the help of a wardsman, to sit a patient in a chair when she felt a sharp pain in her lower back.

Dr Peter Boys, orthopaedic surgeon, examined the plaintiff on 25 May 2001. He recorded -

> "Ms Calvert describes a lifting incident in the orthopaedic ward on the 07.03.98. She states that on that day she was transferring a patient from bed to chair and lifting with a wardsman. She describes moving the patient to the edge of the bed and standing him upright. She states the patient had his arm in a sling due to a fractured left humerus. She describes an awkward lift in a bent position whilst supporting this patient. She describes the development of acute right sided low back pain at that point."

Dr Boys was not cross-examined about this. He did not record the plaintiff's actual description of the mechanism of the injury, but rather set out an interpretation of what she apparently said (an awkward lift in a bent position whilst supporting this patient). This does not afford any basis for finding inconsistency between what the plaintiff told him and what she said in oral evidence.

Dr Andrew Byth, psychiatrist, examined the plaintiff on 11 April 2002. She told Dr Byth that she had been transferring an elderly demented male patient from his bed to a chair with the help of a wardsman; that as they had stood the patient and helped him rotate down to the chair, he had struggled and grabbed her, and that as she and the wardsman had lowered him into the chair she had felt her "back go": she had felt an intense and sharp pain in her lower back, both centrally and to the right side, and she had grabbed at her back, which had seemed "locked" for a short while. This is consistent with her oral evidence.

Dr John Pentis, orthopaedic surgeon, re-examined the plaintiff on 21 August 2003. The description of the accident in his report of 25 September 2003 is cryptic, and he was not cross-examined about it. He recorded merely that the plaintiff was lifting an elderly man out of bed and placing him in a chair, and that she developed pain on the right side of her back during that activity.

Dr Johnn Olsen, a consultant physician in occupational and environmental medicine, examined the plaintiff on 12 September 2003. He recorded a very full account of the actions of the plaintiff and the wardsman to the point where the patient was stood up and had been rotated so that he could be sat in the chair. Then he recorded –

> "The patient evidently still had a degree of anxiety and as this patient was lowered towards the armchair, the patient began to resist, Ms Calvert felt a jarring to her spine and immediate onset of low back pain…"

When cross-examined, Dr Olsen was unable to say whether the plaintiff had told him that she was taking the patient's weight, or partially taking it, or that as a result of the patient resisting her, her body was moved in some way. When asked to explain what he meant by "jarring", Dr Olsen replied that it did not necessarily indicate some forcible movement of the body: it could be either a movement or a stopping of a movement, and that it was his understanding that the plaintiff had her right hand behind the patient. Later in cross-examination Dr Olsen said the plaintiff had not told him that as the patient was almost seated he started thrashing his arms around and grabbed at her pulling her forward some inches. He confirmed that his understanding was that the patient somehow resisted movement. I do not regard Dr Olsen's

evidence of what the plaintiff told him as necessarily inconsistent with her oral evidence, although it is not as full as her oral evidence.

(k) that the plaintiff swore to the truth of the history given to the various doctors, when what she told them was demonstrably untrue.

As the plaintiff conceded, it was important that she give the examining doctors a truthful and accurate account of her symptoms and history. Yet she minimised and on occasion did not mention the back pain and sciatica she experienced before 7 March 1998, and she did not tell the doctors about the motor vehicle accident on 1 May 1998. I have already dealt with these issues.

Conclusion on credibility

[27] I observed the plaintiff in the witness box over 3 days. She was an honest witness, who did not dissemble, and who made genuine endeavours to answer all the questions put to her to the best of her recollection. Sitting in the witness box for extended periods clearly caused her pain and discomfort; there were times when she needed to stand up and move about, and on occasions the Court adjourned briefly to accommodate her.

[28] The pre-existing degeneration in her spine is quite common in persons of her age, but not necessarily symptomatic. It can become so because of trauma or for no obvious reason. While she minimised and sometimes did not mention the back pain and sciatica she had experienced before 7 March 1998, this should be seen in the context of her having had 2 compensable whiplash injures before that date and her having been able to get on with her daily life and work as a nurse in the meantime, and in the context of the pain she experienced after 7 September 1998 being of far greater intensity and persistence than any she had previously experienced. I do not accept that she deliberately minimised or failed to mention her previous back pain and sciatica in order to enhance her prospects in the present litigation, or that her doing so detracts from her credibility to any significant extent.

[29] The plaintiff's version of intensifying symptomatology in the days and weeks following the incident is consistent with a well known pattern of injuries to the lower back. Her preoccupation was with her symptoms and trying to get relief from them. The meticulous recall of events expected in litigation is at odds with her preoccupation when she filled in forms and consulted the various doctors. And the doctors often did not condescend to that degree of detail when questioning her about the incident or recording what she told them about it. In my view the criticism by counsel for the defendant that she has given multiple versions, with variations within those versions, of the precise circumstances of the incident is unduly harsh and not substantiated.

[30] In short, I find the plaintiff's evidence of how the incident occurred credible, and I accept it.

The injury sustained

[31] There was clearly a degenerative process at work in the plaintiff's spine before the incident on 7 March 1998. But, as I have already found, the symptomatology was episodic only, and she had been able to undertake activities of daily living and her work as a registered nurse over nearly 3 years without being incapacitated or seeking

treatment. In the days following 7 March 1998 she experienced increasing symptomatology. By the time she had the motor vehicle accident on 1 May 1998 (6 weeks after the incident), she had seen her general practitioner about it 10 times, been prescribed pain killing, anti-inflammatory and sedative medication, had plain X-rays and a CT scan performed, and been referred to an orthopaedic surgeon (Dr Rudy Hoffmann). Then she had the motor vehicle accident on 1 May 1998. Her back pain increased; she was seen in the Emergency Department of the Gold Coast Hospital, given Panadol, told to rest and sent home. A week later, the level of pain had settled to where it had been immediately before the motor vehicle accident.

[32] The plaintiff has been in constant pain in the lumbar region since 7 March 1998. She has been tender at the lumbo-sacral junction. The pain radiates to her hips, calves and knees, sometimes causing paraesthesia in both feet and toes. Her leg pain has been worse in her right leg; it can be sharp, shooting and burning, and it follows the distribution of the sciatic nerve. She has had marked reduction in movement of the spine. Her pain and discomfort are aggravated by prolonged standing or sitting, bending, lifting and carrying.

[33] The various doctors who examined the plaintiff recorded similar accounts of her symptoms. Dr Peter Boys, who examined her on behalf of the defendant in May 2001, considered that she exhibited magnified illness behaviours. I accept the psychiatric evidence that she has a vulnerable personality. There is probably some functional overlay present, but this does not detract from her credibility, and it is an aspect of her loss consequent upon the incident on 7 March 1998.

[34] The various doctors had regard to radiological evidence to assist them to interpret their clinical findings. I have already referred to the plain Xrays and CT scan performed in late March 1998. An MRI was performed on 26 June 1998. There were 2 new findings on the MRI scan - a focal annular tear at L4-5 and a small right paracentral disc protrusion at L5-S1 impinging on the anteromedial aspect of the emerging right S1 nerve root. Annular tears can be acute, but they are frequently part of the degenerative process, and would not be expected to be apparent on a CT scan. If the protrusion had been present when the CT scan was taken in March, it may or may not have shown up on the scan.

[35] The preponderance of evidence was that the plaintiff's problems emanate from the L5-S1 level. There is an issue as to when the protrusion occurred, and in particular whether it may have occurred in the motor vehicle accident on 1 May 1998. Because the plaintiff was relatively asymptomatic before 7 March 1998, and because the increased pain experienced after the motor vehicle accident on 1 May 1998 soon subsided to the level it was before that accident, I am satisfied on the balance of probabilities that the protrusion occurred in the incident on 7 March 1998.

[36] The degeneration in the plaintiff's spine is progressive, as is apparent from a further MRI performed in July 2000 and plain Xrays taken in May 2001. Progression of the degeneration would have occurred even if the plaintiff had not sustained an injury to her lumbo-sacral spine in the incident on 7 March 1998. It has probably been accelerated as a result of the lesion at L5-S1, which would have caused greater forces to be transmitted to the L4-5 disc. (My finding on acceleration is based on Dr Boys' explanation of the degenerative process during his cross-examination.) Her pain and disability since that incident are attributable in part to the effects of the injury she

sustained, and in part to the degenerative process. The contribution of any injury sustained in the motor vehicle accident on 1 May 1998 is minimal.

[37] Dr Pentis was the only one of the doctors who had examined the plaintiff before and after 7 March 1998, and so he was in the best position to assess the comparative effects of the 2 causes. He said that she has a 25% loss of function of the spine - 10% due to the incident on 7 March 1998 and 15 % due to pre-existing factors. Dr Peter Boys was aware of a past history of back and sciatic pain following the motor vehicle accidents in 1991 and 1992, and that the plaintiff had had no lower back symptoms of significance in the period immediately prior to the incident on 7 March 1998. When he examined her in July 2001, he considered that she had a 15% impairment of bodily function referable to the lower back, of which he apportioned 7.5% to the effects of the discal injury sustained in the incident and 7.5% to the effects of pre-existing degenerative change. Dr Scott-Young's assessment of the extent of her impairment and its respective causes was similar to that of Dr Boys.

[38] The plaintiff has not returned to work since the incident on 7 March 1998, and it is clear that she will never be able to return to general ward nursing of the type she was doing. She may have some capacity to do light sedentary work, a matter to which I shall return. Dr Boys expressed the opinion that because of her degeneration she would not have been able to do general ward nursing within about 5 years had the incident not occurred, and that her capacity to perform even light nursing duties would have been curtailed by about the age of 50. He conceded in cross-examination that his time estimates were no more than informed speculation. I am not satisfied on the balance of probabilities that, absent the injury she sustained on 7 March 1998, the plaintiff would have reached her present level of disability by a particular age, but I am satisfied that there was a real risk that her degeneration would have progressed and become symptomatic to the point where she had to cease general ward nursing at some indeterminate time before the usual retirement age of 60 - 65 years.

Liability

[39] The plaintiff alleged that the incident was caused by the defendant's negligence, breach of contract and or breach of statutory duty pursuant to s 28 of the *Workplace Health and Safety Act* 1995. In paragraphs 8 and 9 of her statement of claim she pleaded -

> "8. The Plaintiff's injury was caused by the Defendant's negligence and/or breach of contract in that it:
>
> (a) failed to provide her with adequate assistance for the performance of the said lifting task;
>
> (b) required the Plaintiff to assist a wardsman with lifting a patient;
>
> (c) failed to provide adequate wardsmen to enable patients to be lifted or transferred without requiring assistance of the nurses;
>
> (d) failed to provide any or any adequate lifting equipment;

(e) failed to have a system of work which included a no lifting policy pursuant to which nurses would not be required to partake in the manual lifting of patients.

9. Further and/or in the alternative, and in the premises, the Plaintiff's injury was a breach of the Defendant's aforesaid statutory duty."

[40] The defendant pleaded –

"5. The Defendant denies the allegations in paragraphs 8 and 9 of the Statement of Claim, and believes those allegations to be untrue, because:-

(a) it denies the 'Plaintiff's injury', as aforesaid;

(b) it denies the incident, as aforesaid;

(c) it denies that the incident (which is denied) caused 'the Plaintiff's injury', as aforesaid and, further because the Defendant denies that any of the injuries particularised by the Plaintiff were caused by its negligence, breach of contract or breach of statutory duty on the grounds pleaded in this Further Amended Defence;

(d) the Plaintiff was an experienced, and adequately and properly trained, registered nurse;

(e) the Plaintiff, as the registered nurse in control of the transfer, was able to assess her needs for manual assistance and the method by which the patient could be transferred without the need to lift;

(f) the Plaintiff decided what her needs were for adequate assistance for the performance of the said lifting task and the method by which the patient could be transferred without the need to lift;

(g) there was no reasonably readily foreseeable risk of injury to the Plaintiff in undertaking the transfer which caused the Plaintiff to lose her balance and move awkwardly;

(h) the Plaintiff's alleged loss of balance and awkward movement, which is alleged to have caused the Plaintiff to sustain her lower back injury, was the result of the sudden and unexpected movement of the patient being transferred;

(i) the exercise of reasonable care did not require the provision of lifting equipment or the implementation of a 'no lift' policy for that transfer which could be carried out with reasonable safety by an experienced registered nurse without lifting or, with adequate manual assistance (if needed), as occurred;

(j) the wardsman assisting the Plaintiff was adequate, and provided adequate assistance;

(k) the Plaintiff cannot prove that matters in subparagraphs 312(1)(a), (1)(b), 1(c), 1(d) and 1(e) of the WorkCover Queensland Act 1996 ('the 1996 Act').

6. Further, as to paragraph 9 of the Statement of Claim, the Defendant says that:-

(a) , as at the time of the incident, there was not:-

(i) a compliance standard prescribing the way to prevent or minimise exposure to the risk; or

(ii) an advisory standard stating a way to identify and manage the risk

within the meaning of the *Workplace Health and Safety Act* 1995 ('the WHSA');

(b) by reason of subsection 27(3) of the WHSA, discharge of the statutory duty imposed by subsection 28(1) of the WHSA required the Defendant to take reasonable precautions and exercise proper diligence to ensure the Plaintiff was not exposed to risk;

(c) further, by reason of subsection 31(1)(c) of the WHSA, the statutory duty imposed by subsection 28(1) of the WHSA was not contravened if the Defendant chose an appropriate way, took reasonable precautions and exercised proper diligence to prevent a contravention;

(d) in the premises pleaded in paragraph 5 hereof, the Defendant chose an appropriate way, took reasonable precautions and exercised proper diligence to prevent a contravention of the WHSA."

[41] The plaintiff pleaded in reply –

"5. As to paragraph 5 of the Further Amended Defence, the Plaintiff repeats and relies upon paragraphs 8 and 9 of the Amended Statement of Claim in denying the said paragraph 5

and further, the movement of the patient as referred to in paragraph 3 of the Amended Statement of Claim was a movement of the kind that was and ought to have been anticipated by the Defendant, and was therefore foreseeable, and was one of the reasons why the exercise of reasonable care did require the provision of lifting equipment, the implementation of a '*no lift'* policy, and the assistance of two wardsmen for the transfer, in the event that lifting equipment could not be used.

5A. The Plaintiff denies paragraph 6 of the Further Amended Defence and is unable to admit same because:

(a) whilst there was no compliance standard, there were advisory standards being the Code of Practice for Manual Handling (1991) and the Code of Practice for Manual Handling – The Handling of People (1992);

(b) in the alternative to (a), by virtue of the matters set out in paragraphs 8 and 9 of the Amended Statement of Claim, the Defence under s.27(3) of the *Workplace Health & Safety Act* 1995 is not available by virtue of the operation of s.27(1);

(c) in the alternative to (a) and (b), by virtue of the matters set out in paragraphs 8 and 9 of the Amended Statement of Claim, the Defence under s.31(1)(c) is not available by virtue of the operation of s.27(1)."

Negligence/Breach of Contract

[42] An employer's duty under the common law to take reasonable care to avoid exposing employees to unnecessary risks of injury does not require him or her to account for an employee who, unbeknown to the employer, is outside the normal range of health and strength: *Brkovic v JO Clough & Son Pty Ltd* (1983) 57 ALJR 834. Here the plaintiff was at particular risk of back injury because of the degenerative condition of her spine, a matter of which the defendant was unaware. Counsel for the defendant submitted that the plaintiff had not established breach of the common law duty of care because she had not demonstrated by evidence that the particular event to which she was exposed, as described by her evidence before the Court, was an event which placed a person who had a spine without her particular degenerative changes at risk.

[43] The defendant conducted a hospital and employed the plaintiff as a nurse in an orthopaedic ward where she was required to be involved in the moving of patients. There is a relatively high incidence of back injuries among nurses involved in moving patients, a matter of which it was hardly ignorant. As Fleming said in *The Law of Torts* 9th ed at 120 -

"Perception of risk is the correlation of past experience with the specific facts in a situation, which depends to a large extent on knowledge as the basis for judging the harmful potentialities of contemplated conduct. The defendant is credited with such

> perception of the surrounding circumstances and such knowledge of other pertinent matters as a reasonable person with the actor's own superior perception and knowledge, if any, would possess. Thus an individual's standard experience or knowledge is not generally considered an excuse save in the exceptional case of children, but if the defendant has more extensive knowledge, the propriety of his judgment as to the risk involved is determined by what a man with such knowledge would regard as probable. An employer, therefore, with greater than average experience of a particular risk may have to respond with more than average precautions, while a father who permits his child to go to school despite symptoms which a competent doctor would diagnose as scarlet fever, will be judged by whether he is a layman or a medic."

I am satisfied that it was reasonably foreseeable by someone in the defendant's position that if a nurse with a spine without the degenerative changes that were present in the plaintiff's spine were transferring a patient from a bed to a chair and in the course of that transfer the nurse's lower spine were subjected to a sudden force imposing an unexpected load on her spine, she might sustain injury to her lower back. Accordingly I reject the submission of counsel for the defendant.

[44] That the degenerative changes in the plaintiff's spine were of a type quite commonly seen in a person of her age raises the question of what is a spine of normal health and strength for someone of her age. However, I do not find it necessary to pursue this question.

[45] The plaintiff had not nursed this patient before, and she had been on duty only a few hours when the incident occurred. The patient was elderly, he had dementia, and he had a fractured humerus. She saw in his chart that 2 people were required to move him. She said that that instruction would have been the product of a team approach involving initial assessment by the admitting doctors and the admitting nurses, and ongoing assessment as and when his needs changed. That there was reassessment is borne out by the Care Plan: it was on the second day of his admission (5 March 1998) that the notation "Assist x 2 staff" appeared. In addition to reading his chart, she received a verbal handover report when she was told about his basic needs. She could not recall being told anything other than what was in the chart.

[46] There were no mechanical or physical devices available to the plaintiff to use in transferring the patient. She was not aware of any, and there was no evidence that any was available. A letter written by the hospital's rehabilitation coordinator, Ms Margaret Deacon, to Dr Keys on 19 May 1998 referring to the hospital's having a Manual Handling Education Program in place and the proposed implementation of a No Lift System is corroborative of the absence of such devices at the relevant time.

[47] In other hospitals where the plaintiff had worked, lifting hoists had been available for patient transfers. The whole hoist would be wheeled to the required position and the patient would be placed on a specialised canvas sheet which would then be looped on to a frame. The whole hoist would be wheeled to the required position and the patient mechanically lowered. She thought that 2 people could have managed the transfer of this patient with a hoist.

[48] Dr Olsen considered that the transfer should have been effected by 3 persons or by 2 persons with a mechanical aid.

[49] Dr Olsen said that while not all geriatric patients would need 3 people, this one did: he may not have been a heavy man but he had a new fracture, and a new fracture is very difficult to deal with. The third person could be expected to be behind the patient supporting his back. Dr Olsen agreed that this could be awkward.

[50] Dr Olsen's other alternative (2 people with a mechanical aid) was more practicable, and I am satisfied that it would have minimised the risk of the plaintiff sustaining injury in the way she did. He described a 2 sling device (which I took him to say was available at the time) - one sling for the upper back and the other for the buttocks. The slings would not be removed until the patient was sitting in the chair: the patient would be moved forward slightly to remove the sling from his back, and the bottom one would be slid away from under his buttocks. Dr Olsen agreed that the patient might find this frightening, but seemed to say this could be overcome by proper preparation of the patient. It was put to Dr Olsen that the patient still might reach out and grab the person assisting him. He agreed this was a possibility, but went on to explain that there would be a fair degree of protection for the nurses using such a device because they would not have to be close to the patient during the transfer, and the release of the patient would take place only once he was in a stationary position in a chair or a bed. He considered that if the patient were prone to agitation, that was all the more reason to use the mechanical lifter.

[51] The defendant did implement a No Lift Policy at the hospital some time after 7 March 1998. However, there was no evidence of the content of that policy. The defendant's counsel said in his opening that he would be calling Ms Deacon on the issue of the plaintiff's failure to mitigate her loss by taking up alternative positions offered to her. However, after another witness had given evidence for the defendant on that topic, the defendant elected not to pursue it and so did not call Ms Deacon. I infer from its failure to call Ms Deacon no more than that her evidence would not have assisted the defendant. In the absence of evidence about the content of the new policy, the plaintiff failed to establish that had it been in place at the time of the incident it would have eliminated or minimised the risk of her sustaining injury in the way she did.

[52] The onus and standard of proof in actions by injured workers against their employers were materially altered by provisions of the *WorkCover Queensland Act* 1996. Sections 311, 312 and 314 provide -

> "**Absolute defences not reintroduced**
>
> 311. This Act does not reintroduce the absolute defence of contributory negligence or common employment.
>
> **Liability of employers and workers**
>
> 312.(1) In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim –

(a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;

(b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;

(c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;

(d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;

(e) that the worker did everything reasonably possible to avoid sustaining the injury;

(f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part;

(g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided for, by the employer and in the way instructed by the employer;

(h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discovery and relevant knowledge of the unsafe nature of the plant or equipment;

(i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

(2) If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.

(3) If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.

(4) If the claimant fails to prove any of the matters mentioned in subsection 1(c) to (i), the court must –

(a) dismiss the claim; or

(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.

(5) In deciding whether a worker has been guilty of completely causative or contributory negligence, the court is not confined to a consideration of the reliance on the matters mentioned in subsection (1)(c) to (i).

…

Reduction of damages because of contributory negligence

314.(1) A court must make a finding of contributory negligence if the worker –

(a) relevantly failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

(b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

(c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

(d) inappropriately interfered with or misused something provided that was designed to reduce the worker's exposure to risk of injury; or

(e) was at the relevant time adversely affected by the intentional consumption of a substance that induces impairment unless the claimant can prove that the adverse affect did not cause or contribute to the worker's injury; or

(f) has failed without reasonable excuse to attend on more than 1 occasion any safety training course organised by the worker's employer that is conducted during normal working hours at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event giving rise to the worker's injury.

> **(2)** If an injury sustained by a worker was caused or contributed to by 1 or more of the circumstances mentioned in subsection (1), the court must reduce the damages for the worker's injury under subsection (3).
>
> **(3)** For subsection (2), the court must reduce the award of damages by at least 25% for each of the circumstances causing or contributing to the injury."

[53] I shall consider first para (a) of subsec (1) of s 312. The Court must dismiss the claim of a plaintiff who relies exclusively on the employer's failure to provide a safe system of work if he or she fails to prove that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard against injury arising out of events that were reasonably readily foreseeable: see subsec (2). An employer's duty is usually subdivided into obligations to provide safe plant, safe premises and a safe system of work: see Glass and McHugh *The Liability of Employers* 2nd ed (1979) at 4. Here the plaintiff relies on failure to provide adequate manual assistance and on failure to provide lifting devices (an expression which I consider extends to transfer devices). Failure to provide equipment is really a breach of the obligation to provide safe plant, although it is sometimes cast as a failure to provide a safe system of work: see Glass & McHugh *op cit* at 60 and 49. Therefore, I do not regard this as exclusively a "system of work" case.

[54] Unless the plaintiff has proved that "the actual and direct event' giving rise to her injury was actually foreseen or "reasonably readily foreseeable" by the defendant, the Court must dismiss her claim: para (b) of subsec (1) and subsec (3) of s 312. At common law, in a claim in negligence, it is not necessary for a plaintiff to prove that the defendant should have envisaged the precise circumstances in which injury occurred (*Chapman v Hearse* (1961) 106 CLR 112 at 121), but under this legislation there is greater focus on the precise circumstances of the injury - "the actual and direct event giving rise to the injury". Further, at common law it is enough that the chance of a risk manifesting itself in an actual occurrence was not far fetched or fanciful (*Wyong Shire Council v Shirt* (1979-80) 146 CLR 40 at 47), but under this legislation a greater degree of probability is required - that it was "reasonably readily foreseeable". See generally the discussion by Davies JA in *Plumb v State of Queensland* [2000] QCA 258 at [17] - [18].

[55] What was the "actual and direct event" which gave rise to the plaintiff's injury? The plaintiff's counsel submitted it was the patient's action in "panicking" during the course of the transfer, while the defendant's counsel submitted it was the plaintiff being grabbed and pulled by the patient. I adopt the formulation of counsel for the defendant.

[56] Para (b) of subsec (1) of s 312 is concerned with the foresight or foreseeability of the defendant. As employer, it had an obligation to plan for contingencies, to devise and maintain a safe system of work, safe plant and a safe place of work. It was, or should have been, aware of the *Code of Practice for Manual Handling - The Handling of People* approved by subordinate legislation under the *Workplace Health and Safety Act* 1989 which identified the risk of injury to persons involved in manual handling of people such as this patient and ways of avoiding it: see clauses 4.1 (2) and (4), 4.3, 4.4 (4) and 4.8 (1)(b). The risk that this elderly, demented patient who had a recent fracture would grab the plaintiff and pull her towards him as he was sat in the chair

was a good deal more than far fetched or fanciful; it was, in my assessment, "reasonably readily foreseeable."

[57] Para (c) of subsec (1) of s 312 is concerned with the plaintiff's actual or constructive knowledge that the "actual and direct event" giving rise to the injury might happen; unless she has proved that she had no such knowledge, the Court must dismiss her claim or reduce it on the basis that she substantially contributed to her injury: subsec (4). I am satisfied that the plaintiff had no actual knowledge that the patient might grab her and pull her. Whether she had constructive knowledge turns on an objective assessment of the likelihood/possibility of its occurring in the circumstances of the particular transfer. She had not nursed this patient before this shift. She knew that he had dementia and could become agitated. She had no evidence of his agitation being accompanied by uncontrolled physical movements. There was no evidence of similar behaviour recorded in his chart. Up to the point where he grabbed her, he had been co-operative. She described his action as totally unexpected. I am satisfied that the plaintiff had no reasonable means of knowing that the actual and direct event giving rise to her injury might happen.

[58] Para (d) of subsec (1) of s 312 refers to failure by the plaintiff to inform the employer of "the possibility of the event giving rise to the injury happening" where the employer did not know or reasonably have means of knowing of the possibility. However, the plaintiff cannot be found to have failed to so inform the defendant in circumstances where she herself had no actual or constructive knowledge of the possibility.

[59] Para (e) of subsec (1) of s 312 refers to the plaintiff's failure to do everything reasonably possible to avoid sustaining the injury. Given the circumstances in which the plaintiff was injured, I am satisfied that this provision has been satisfied.

[60] There is an issue of contributory negligence, which I shall address below. I note at this point that the defendant does not rely on s. 314.

Breach of Statutory Duty

[61] The objective of the *Workplace Health and Safety Act* 1995 "is to prevent a person's death, injury or illness being caused by a workplace, by workplace activities or by specified high risk plant" (s 7(1)). The objective is achieved by preventing or minimising a person's exposure to such risk (s 7(2)), and the Act establishes a framework for doing so by (inter alia) imposing workplace health and safety obligations on certain persons who may affect the health and safety of others by their acts or omissions (s 7(3)(a)) and by establishing benchmarks for industry through the making of regulations and advisory standards (s 7(3)(b)).

[62] By s 28(1) of that Act -

> "**Obligations of employers**
>
> 28.(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work."

Breach of this provision gives rise to a civil cause of action: *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518 at 533.

[63] It may well be, as counsel for the defendant submitted, that the obligation in s 28 relates only to reasonably foreseeable risks (see *Joynson v State of Queensland* [2004] QSC 154 at para [114] - [116]). They went further, and submitted that as this is a claim by an injured worker against her employer -

(a) the provisions of the *WorkCover Queensland Act* 1996 (a later statute) prevail over those of the *Workplace Health and Safety Act 1995* to the extent of any inconsistency;

(b) under s 312 (1)(b) and (3) of the *WorkCover* legislation, the plaintiff's claim must be dismissed unless she proves that the actual and direct event giving rise to her injury was actually foreseen or reasonably readily foreseeable by the defendant;

(c) therefore, in the circumstances of this case, the defendant's obligation under s 28 of the *Workplace Health and Safety Act* 1995 related only to the risk that the actual and direct event giving rise to the plaintiff's injury was reasonably readily foreseeable by the defendant.

It is not necessary for me to determine these issues as I am satisfied that the risk of the plaintiff's being grabbed and pulled by the patient was reasonably readily foreseeable by the defendant.

[64] An employer sued under s 28(1) may defend the claim by showing that the obligation was discharged under s 26 or s 27, or by showing a defence under s 37. The employer bears the onus of establishing the matters relied on: *Schiliro* at 538. The Court of Appeal's decision on who bears the onus of proof is binding on me. Counsel for the defendant submitted that in the light of a more recent decision of the High Court *Slivak v Lurghi (Australia) Pty Ltd* (2001) 205 CLR 304, the plaintiff bears the onus of proving the matters in ss 26 and 27. That case concerned different legislation of another State. If the question of who bears the onus of proving the matters in ss 26 and 27 is to be reconsidered, that is a matter for the Court of Appeal.

[65] Section 26 is concerned with the discharge of a person's obligation under s 28 where there is a regulation or ministerial notice prescribing a way of preventing or minimising exposure to a risk, or an advisory standard or industry code of practice stating a way of managing exposure to a risk. Subsection (3) of s 26 provides –

> "(3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by –
>
> (a) adopting and following a stated way that manages exposure to the risk; or
>
> (b) adopting and following another way that gives the same level of protection against the risk."

[66] The *Code of Practice for Manual Handling - The Handling of People* was at all material times an "advisory standard" for the purposes of the Act. (Although initially prescribed under former legislation, it was adopted as an "advisory standard" under the 1995 legislation.) It outlined practical ways of meeting the requirements of the Act with respect to the identification, assessment and control of risks to the health and safety of persons engaged in the handling of people in the workplace (clause 1.4),

a "risk" meaning the likelihood of the hazard resulting in an injury or disease together with the seriousness of the injury or disease (clause 1.5). The Code applied to "any activity requiring the use of force by a person to lift, lower, push, pull, support, carry, move, hold or restrain another person at a workplace", including -

> "transferring or assisting people, for example, the care of patients, children, aged persons, deceased persons or people with disabilities".

See clause 1.3.

[67] Section 37 provides -

> "**Defences for div 2 or 3**
>
> **37.(1)** It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2[1] or 3[2] for the person to prove –
>
> (a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk - that the person followed the way prescribed in the regulation or notice to prevent the contravention; or
>
> (b) if an advisory standard or industry code of practice has been made stating a way or ways to manage exposure to a risk –
>
> (i) that the person adopted and followed a stated way to prevent the contravention; or
>
> (ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or
>
> (c) if no regulation, ministerial notice, advisory standard or industry code of practice has been made about exposure to a risk—that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.
>
> **(2)** Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control.
>
> **(3)** In this section, a reference to a regulation, ministerial notice, advisory standard or industry code of practice is a reference to the

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1 Division 2 (Obligations of employers and others)

2 Division 3 (Obligations of workers and other persons)

> regulation, notice, standard or code of practice in force at the time of the contravention."

[68] The defendant did not meet its onus of showing that it discharged its obligation under s 26 or that it has a defence under s 37. Accordingly I find that the defendant breached its duty pursuant to s 28(1) to ensure the workplace health and safety of the plaintiff at work.

Conclusion on Liability

[69] The plaintiff has established that the defendant breached its duty of care and its contract with her, as well as that it breached its statutory duty under s 28(1) of the *Workplace Health and Safety Act* 1995. Those breaches caused the plaintiff damage, namely a disc protrusion at the L5-S1 level and acceleration of degeneration of her spine.

[70] Counsel for the defendant submitted that if there were a finding of liability based on the defendant's failure to provide a third person to assist in the transfer of the patient, then there should be a finding of contributory negligence on the basis that the plaintiff as the person in charge of the transfer should have called for the extra assistance. However, the basis of my finding of liability is the failure to provide a mechanical transfer device. Accordingly, it is not necessary for me to consider the availability of contributory negligence as a defence to reduce damages in the respective claims for negligence, breach of contract and breach of statutory duty.

Quantum

[71] The plaintiff has had continuous back and leg pain since the incident on 7 March 1998. This has interfered with most aspects of her life. She has had to accept help with household chores and shopping. She has not been able to return to work. She commenced a university nursing course, but soon dropped out because of the discomfort she experienced driving to and from the campus and in sitting at lectures. She has had to give up pastimes such as gardening, walking and travel. She had to relinquish one of her dogs (a border collie) because she was no longer able to exercise it.

[72] At the time of the incident on 7 March 1998 the plaintiff owned a house at Helensvale, which she had let to tenants. She was living in a rented house at Burleigh Waters with another nurse. When the lease on the house at Burleigh Waters expired in about November 1998, she stayed with friends (the Tomlinsons) for about 6 weeks, and then went to live with her boyfriend in his flat for about 2 - 3 months. Their relationship ended in about March 1999. She stayed with her sister in the Samford district for a short time until the tenants moved out of her house at Helensvale. Then she moved back into the Helensvale house in late March 1999, where she lived alone until her elderly father came to live with her in about January 2002.

[73] Before the incident on 7 March 1998 the plaintiff and her housemate shared the household chores, but the plaintiff was unable to do her share after the incident on 7 March 1998. The housemate moved out, and friends of the plaintiff (Alison Kovacs, Deborah Noon and the plaintiff's boyfriend) helped her with cleaning, cooking, shopping and transport to medical appointments. While she stayed with the Tomlinsons, Mrs Tomlinson attended to daily chores, and she and her husband helped the plaintiff clean the Burleigh Waters house she had just vacated. While she stayed

with her boyfriend and then with her sister, they provided domestic assistance. On her return to Helensvale, Alison Kovacs visited on a regular basis to provide domestic assistance, and a neighbour Peter De Jong provided gardening and mowing services. After her father went to live with her, he assisted with heavy cleaning and gardening, but his health deteriorated and he had to curtail his activities. The plaintiff has more recently been receiving assistance through a Government funded home help service.

[74] Ultimately the defendant abandoned its plea that the plaintiff had failed to mitigate her loss by not accepting alternative employment it had offered her. Nevertheless, having regard to the medical evidence, I think there is a reasonable prospect that she may undertake some part-time, sedentary work in the future. This may not be easy to find, as her fluctuating symptoms will necessitate considerable flexibility. Further, she is a 39 year old woman who has been out of the workforce for well over 6 years.

Pain and suffering

[75] In final submissions by counsel, the plaintiff claimed $60,000-00 damages for pain and suffering and loss of the amenities of life. Counsel for the defendant submitted that damages under this head should be in the range of $10,000-00 to $30,000-00. I have had regard to comparable cases such as *Hopkins v Workcover Queensland* [2003] 257 and *Smith v Topp* [2002] QSC 341. In my view, the proper amount to award is $40,000-00.

[76] No interest may be awarded on damages under this head: *WorkCover Queensland Act* 1996 s 318.

Past economic loss

[77] The plaintiff had a good work history. She had qualifications in general and midwifery nursing, and also in remedial and Swedish massage. From 1988 to late 1996 she was employed full time at the Gold Coast Hospital. Then she went to work for a nursing agency working in various hospitals in Brisbane and on the Gold Coast. She commenced work at the John Flynn Hospital in April 1997, initially on a casual basis through the agency, and subsequently on the defendant's staff doing as many as 64 hours a fortnight. By the time of the incident on 7 March 1998, she was hopeful of obtaining permanent full-time work with the defendant.

[78] Having regard to relevant pay scales and the pattern of her work, counsel for the plaintiff submitted that her average weekly earnings at the time of the incident were $543-00 net; applying rates current at trial, her average weekly earnings would have risen to $672-00 net. He then calculated an average net weekly pay in the period between the incident and trial of $607-50, and submitted that given she was likely to have returned to fulltime employment sooner rather than later, a figure of $625-00 net per week should be used in the calculation of past economic loss. Counsel for the defendant calculated her weekly earnings at the time of the injury, based on a 32 hour week, at approximately $600-00 net per week.

[79] Approximately 6.75 years have passed since the incident on 7 March 1998. In all the circumstances, I consider that past economic loss should be calculated at $600-00 net per week over the whole of that period ($210,600-00) and then discounted for contingencies by 25%. In this way I have arrived at $157,950-00, which I round up to $158,000-00.

Interest on past economic loss

[80] Interest is allowable only on the balance of past economic loss after deducting worker's compensation, insurance and social security payments received up to judgment: see *WorkCover Queensland Act* 1996 s 318. I shall ask counsel to do the calculation.

Future economic loss

[81] Section 317 of the *WorkCover Queensland Act* 1996 provided -

> "**Future economic loss**
>
> 317. A court may award damages for future economic loss or damages for diminution of future earning capacity only if the claimant satisfies the court that, because of the percentage of WRI resulting from the injury sustained, there is at least a 51% likelihood that the claimant will sustain the future economic loss or diminution of future earning capacity."

This provision was amended by s 39 of the *WorkCover Queensland Amendment Act* 1999 which commenced on 1 July 1999. The words "because of the percentage of WRI resulting from the injury sustained" were omitted. According to the explanatory note, it was a technical amendment to remove any confusion as to the evidence to be considered by Courts in determining the likelihood of future economic loss. There was no applicable transitional provision. I respectfully agree with McGill DCJ in *Nagel v Queensland Rail* [2004] QDC 358 at para [55] that, given the nature of the amendment, the Act in its amended form applies to a claim such as this, which was not yet finalised when the amendment came into force.

[82] In *Nagel*, McGill DCJ said at para [56] –

> "56. The terms of this section are anything but clear, and I am not aware of any case where it has been previously discussed. There is one decision, *Testa v Collex Pty Ltd* [2002] QSC 178, where the section appears to have been applied, but without any real explanation. It seems to me however that the effect of the section is that no particular amount by way of future economic loss or damages for diminution of future earning capacity can be allowed unless there is at least a 51 percent likelihood that that loss will actually be sustained. For practical purposes this means that it is more likely than not that that loss will be sustained. Perhaps it was introduced in order to exclude a situation where it was more likely than not that the plaintiff would not suffer economic loss in the future, but where there was some risk of that occurring, so that some allowance ought to be made for that, applying the principle in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638. If that is the situation, it is not a restraint in the present case, as I am satisfied that it is more likely than not that the plaintiff will suffer economic loss in the future as a result of each of his injuries."

I respectfully concur with His Honour.

[83] As a result of injuries sustained in the incident on 7 March 1998, the plaintiff will never be able to return to general ward nursing. There is a reasonable prospect she will be able to undertake some part-time, sedentary work, although it will not be easy to secure. Had it not been for the injuries she sustained in the incident at work, she could have continued general ward nursing, but she would probably have had to cease such work at some time before the age of 60 - 65 because of the effects of degeneration in her spine. She is presently aged 39.

[84] Making allowance for her residual capacity to do some part-time, sedentary work, I consider that her loss should be assessed on the basis of $450-00 per week over 15 years. Using the 5% discount tables (and a multiplier of 555), a present value of $249,750-00 is obtained. That figure should be discounted for contingencies to $200,000-00.

[85] I am satisfied that there is at least a 51% likelihood that she will sustain loss of that magnitude, and accordingly award damages for future economic loss in that sum.

Loss of superannuation entitlements

[86] The plaintiff is entitled to be compensated for loss of employer contributions to superannuation. I have assessed these losses as $11,000-00 (7% of past economic loss with appropriate rounding) for the past, and $18,000-00 (9% of future economic loss) for the future.

Special damages

[87] I accept the plaintiff's calculation of special damages of $29,298-22.

[88] I allow interest up to judgment on $15,446-96 of that sum, and shall ask counsel to perform the appropriate calculation.

Future medical expenses

[89] I allow $5,000-00 for future medical expenses.

Past *Griffiths v Kerkemeyer*

[90] In final submissions of counsel, the plaintiff claimed $5,473-00 for gratuitous services provided by Alison Kovacs (100 hours), Deborah Noon (100 hours) and Peter De Jong (221 hours). She made no claim for the value of services provided by anyone with whom she lived (her housemate at Burleigh Waters, the Tomlinsons, her sister, her boyfriend or her father). Her claim was for 421 hours at the agreed rate of $13-00 per hour.

[91] Section 315 of the *WorkCover Queensland Act* 1996 provides –

> "**Gratuitous services**
>
> 315. A court can not award damages for the value of services of any kind –

> (a) that have been, or are to be, provided by another person to a worker; and
>
> (b) that are services of a kind that have been, or are to be, or ordinarily would be, provided to the worker by a member of the worker's family or household; and
>
> (c) for which the worker is not, and would ordinarily not be, liable to pay."

If all 3 of the conjunctive requirements in (a), (b) and (c) are met, then the plaintiff cannot recover damages for the value of the services provided.

[92] As counsel for the defendant all but conceded, the services provided by Mr De Jong were of a kind for which the plaintiff would ordinarily be liable to pay. Therefore, criterion (c) is not met in relation to those services, and the plaintiff may recover their value.

[93] Counsel for the defendant submitted that the plaintiff may not recover damages for the value of the other services (household cleaning, cooking, shopping, etc) because they were "services of a kind that…. ordinarily would be provided to the worker by a member of the worker's family or household". They submitted –

> "118. The Defendant submits that section 315 does not require there to be a finding that there was actually a family or a household but rather that the reference to a member of the workers family or household is simply a descriptor of the kind of services which have been abolished. The kind of services which have been abolished are, inter alia, those that ordinarily would be provided to the worker by a member of the workers family or household, whether or not the worker had such a family or household.
>
> 119. Otherwise the abolition is anomalous. A person that has a household or a family who actual [sic] provides the services has no entitlement to the damages. However for [sic] a person who is a single and does not have a household or a family but receives services from friends or neighbours is able to claim. This is hardly a fair interpretation of section 315 and really leads to an absurd result. Such an absurd result should be avoided if possible."

I do not accept this submission. Para (b) is concerned with services of a kind provided, or that ordinarily would be provided, by a member of the worker's family or household. In my view attention must be directed to the family or household arrangements of the particular plaintiff at the time the services were provided rather than to any notional objective family or household model. Insofar as White J considered that attention must be directed to the usual arrangements prevailing in the plaintiff's family prior to the injury in *Karanfilov v Inghams Enterprises Pty Ltd* [2003] QCA 242 at para [52], I respectfully disagree.

[94] That this approach may produce differing results according to whether a plaintiff lived alone, the result is not an absurdity, but simply an example of the principle that a defendant must take a plaintiff as it finds him or her.

[95] Thus the criterion in paragraph (b) of s 315 is not met in relation to any of the services for which the plaintiff claims. I allow damages under this head in the amount claimed ($5,473-00).

[96] No interest may be awarded on damages under this head: *WorkCover Queensland Act* 1996 s 318.

Future *Griffiths v Kerkemeyer*

[97] I find that the plaintiff will require 4 hours assistance per week for general domestic duties and mowing. The agreed rate is $15-00 per hour.

[98] Allowing this level of assistance over 15 years, and applying the 5% discount tables (a multiplier of 555), the present value of that loss is $33,300-00. I discount this further for contingencies to $25,000-00.

Fox v Wood

[99] The *Fox v Wood* component is $5,331.65.

Refund to WorkCover

[100] The amount to be refunded to WorkCover is $27,862-77.

Total Quantum

[101] My assessment of quantum can be summarised as follows –

	$
Pain and suffering	40,000.00
Past economic loss	158,000.00
Interest on past economic loss	15,203.60
Future economic loss	200,000.00
Superannuation	29,000.00
Special damages	29,298.22
Interest on special damages	5,213.35
Future medical expenses	5,000.00
Past *Griffiths v Kerkemeyer*	5,473.00
Future *Griffiths v Kerkemeyer*	25,000.00
Fox v Wood	5,331.65
Subtotal	517,519.82
Less refund to WorkCover	27,862.77
Total	489,657.05

Costs

[102] Counsel agreed that there should be no order as to costs.