SUPREME COURT OF QUEENSLAND

CITATION:	*Calvert v Mayne Nickless Ltd (No 1)* [2005] QCA 263
PARTIES:	**CELIA CALVERT** (plaintiff/respondent) **v** **MAYNE NICKLESS LIMITED** ACN 004 073 410 (defendant/appellant)
FILE NO/S:	Appeal No 11244 of 2004 SC No 154 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2005
JUDGES:	McPherson and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with the appellant to pay the respondent's costs of the appeal assessed on the standard basis** **2. Cross-appeal dismissed with the respondent to pay the appellant's costs of the cross-appeal assessed on the standard basis**
CATCHWORDS:	APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE CONFLICT OF EVIDENCE – plaintiff respondent sued defendant appellant for damages for personal injury allegedly sustained in the course of her employment by the appellant – appellant denied that any incident had occurred – appellant submitted that even if it was found to have breached its duty to the respondent this breach did not cause the injury – judge found that an incident had occurred in the manner alleged by the respondent and that the appellant's breach of duty did cause the injury – whether on the evidence it was open to the judge to make findings consistent with an incident occurring – whether a breach of statutory duty was proved which caused the injury APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR

INADEQUATE DAMAGES – GENERAL PRINCIPLES – PERSONAL INJURY OR DEATH CASES – judge reduced damages quantum for past economic loss by 25 per cent to take contingencies into account – judge reduced damages quantum for future economic loss by 20 per cent on the same basis – whether the discounts applied were excessive – whether judge erred in applying the relevant provisions of the *WorkCover Queensland Act* 1996 (Qld) to future economic loss and past *Griffiths v Kerkemeyer* damages

WorkCover Queensland Act 1996 (Qld), s 312, s 315, s 317
Workplace Health & Safety Act 1995 (Qld), s 24, s 26, s 28, s 37

Brkovic v JO Clough & Son Pty Ltd (1983) 57 ALJR 834, distinguished
Hosking v Pacific Partner Pty Ltd [1999] QCA 484; [2001] 1 Qd R 378, considered
Joynson v State of Queensland [2004] QSC 154; SC No 5850 of 2002, 3 June 2004, considered
Kingshott v Goodyear Tyre & Rubber Co Aust Ltd (No 2) (1987) 8 NSWLR 707, considered
Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107, considered
Rogers v Brambles Australian Limited [1996] QCA 437; [1998] 1 Qd R 212, considered
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2000] QCA 18; [2001] 1 Qd R 518, considered
Slivak v Lurgi (Australia) Pty Ltd (2001) 205 CLR 304, considered
Transport Industries Insurance Co Ltd v Longmuir [1997] 1 VR 125, distinguished

COUNSEL: K N Wilson SC, with K Holyoak, for the appellant
G W Diehm, with A Luchich, for the respondent

SOLICITORS: Hopgood Ganim Lawyers for the appellant
Gall Standfield & Smith for the respondent

[1] **McPHERSON JA:** I have read and agree with the careful and very thorough reasons of Jerrard JA for dismissing this appeal and the cross-appeal. The orders should be in the form stated by his Honour.

[2] **JERRARD JA:** This is an appeal from a judgment given in this Court in December 2004 for the respondent in the sum of $489,657.05 as damages for personal injuries sustained in an incident in the course of her employment at the John Flynn Hospital on the Gold Coast on 7 March 1998. The appellant operated that hospital and was her employer. The respondent succeeded at trial on her case that, as a result of the incident, which itself resulted from the appellant's negligence, breach of contract and breach of statutory duty, she had sustained a serious back injury at the L5-S1 level. The appellant challenged her evidence that any incident had occurred at all, and whether, if it did, any injury had been suffered as a result of that. It also challenged her case that if the incident occurred as she had described in

evidence, it could be found liable to her for the consequences of any injury suffered. The learned trial judge found for the respondent on all those issues, and the appellant repeats those challenges on appeal.

[3] Mr Wilson SC made five principal arguments in his oral submissions for the appellant:

- That the learned trial judge ought not to have found that an incident occurred as Ms Calvert claimed;
- If that finding stands, the learned trial judge still ought not to have found that Mayne Nickless was liable to Ms Calvert;
- That Ms Calvert did not prove any breach of statutory duty against Mayne Nickless;
- That Ms Calvert did not establish that the injury for which the learned trial judge compensated her was caused by the incident found to have happened, or by a breach of duty owed to her;
- That the learned trial judge erred in calculating both the damages for future economic loss and those for past care.

[4] Ms Calvert cross-appealed, claiming that the damages for past economic loss had been excessively discounted when the learned judge reduced the amount awarded by 25 per cent when taking contingencies into account; Mr Diehm, who led Mr Luchich for the respondent, contended that the fact that the quantum assessed for future economic loss had been reduced by 20 per cent demonstrated that 25 per cent for past economic loss was unsupportable. Mr Diehm submitted further that the 20 per cent reduction of calculated damages for future economic loss was an excessive discounting in any event.

Critical findings made by the learned judge

[5] It is convenient to set out the significant findings made by the learned trial judge in the course of a lengthy judgment. These were that:

(as to the incident)

[6] The learned judge accepted the plaintiff's evidence of how the incident occurred [30].

(as to the injury)

[7] The incident caused a small right paracentral disc protrusion at L5-S1, impinging on the anteromedial aspect of the emerging right S1 nerve root [34].

[8] Ms Calvert had pre-existing degeneration in her spine, quite common in persons of her age but not necessarily symptomatic, and had been able to undertake activities of daily living and her work as a registered nurse without being incapacitated or seeking treatment for nearly three years until 7 March 1998 [25] and [31].

[9] Ms Calvert has been in constant pain in the lumbar region since 7 March 1998, and tender at the lumbo-sacral junction, with pain radiating to her hips, calves and

knees, with worse pain in her right leg and with a marked reduction of movement in the spine. Her pain and discomfort are aggravated by prolonged standing or sitting, bending, lifting and carrying [32].

[10] There was no evidence of any specific complaint of back pain or sciatica by Ms Calvert between May 1995 and 7 March 1998, irrespective of whether she had episodic back pain and sciatica before May 1995 [25].

[11] The progressive degeneration in Ms Calvert's spine, which would have occurred even if she had not sustained an injury to her lumbo-sacral spine on 7 March 1998, has probably accelerated as a result of the lesion at L5-S1; her pain and disability since the incident of 7 March 1998 are attributable in part to the effects of the injury she sustained then and in part to the degenerative process [36].

[12] The plaintiff will never be able to return to general ward nursing of the type she was doing on 7 March 1998, but may have some capacity to do light sedentary work; 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 of 60-65 years [38].

(as to the risk to her of injury)

[13] Ms Calvert was at particular risk of back injury because of the degenerative condition of her spine, a matter of which the defendant was unaware [42].

[14] Mayne Nickless knew (it was hardly ignorant of the matter) that there is a relatively high incidence of back injuries among nurses involved in moving patients [43].

(as to the risk of injury to a person of normal health)

[15] It was reasonably foreseeable by someone in the defendant's position that if a nurse with a spine without degenerative changes that were present in the plaintiff's spine was 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, the nurse might sustain injury to the lower back [43].

(as to the ways of avoiding that injury)

[16] Ms Calvert had not nursed the patient before and had been on duty a few hours when the incident occurred. She had seen in his chart that two people were required to move him, and that instruction had been the product of a team approach involving initial assessment by the admitting doctors and the admitting nurses, and ongoing assessment as and when the patient's needs changed. Ms Calvert had also received a verbal handover report when she was told about the patient's basic needs, he being elderly with dementia and a suspected fracture of the left humerus [3] and [45]; with his left arm in a collar and cuff sling and with very few verbal communication skills [5].

[17] Provision of a mechanical lifting aid would have minimised the risk of Ms Calvert sustaining injury in the way she did, with that patient being lifted and moved by two people with that aid [50].

[18] A two sling device was available in the market at the time, and would provide a fair degree of protection for nurses using it because they would not have to be close to

the patient during the transfer of the patient from a bed to a chair, and the release of the patient from the sling would take place only once he was in a stationary position in a chair or bed [50].

(as to the defendant's liability in tort and in contract for the injury)

[19] The plaintiff relied on the defendant's failure to provide adequate manual assistance and on the failure to provide lifting or transfer devices. That failure to provide equipment was a breach of the defendant's obligation to provide safe plant for its employees; Ms Calvert's claim was not exclusively a "system of work" case [53].[1]

[20] The actual and direct event giving rise to Ms Calvert's injury was Ms Calvert being grabbed and pulled by the patient [55].

[21] Mayne Nickless, as an employer, 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* 1992 ("the Code"), which was approved by subordinate legislation under the *Workplace Health and Safety Act* 1989, and adopted as an advisory standard under the *Workplace Health and Safety Act* 1995[2] ("the 1995 Act") [56] and [66].

[22] That Code outlined practical ways of meeting the requirements of the 1995 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, and it 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 [66] (citing from cl 1.3 and cl 1.4 of the Code).

[23] The Code provisions identify specific risks of injury to persons involved in the manual handling of people such as the elderly dementia patient Ms Calvert was moving, and ways of avoiding those risks, particularly in cl 4.1(2), cl 4.1(4), cl 4.3, cl 4.4(4), and cl 4.8(1)(b) [56]. (I observe that the Code advises in cl 4.1(2)(b) and (c) that people with disabilities may have sudden, uncontrolled movements, and that non-cooperative persons require additional assistive or restraining forces to hold or move them; in cl 4.1(4) that the need for an individual to lift another person without assistance should always be questioned, and that the handling of people may also include equipment and materials); in cl 4.4(4) that working postures and positions which may lead to injuries to employees, when handling people, include transferring a person from a bed to a chair (when requiring an employee to bend or twist sideways); and in cl 4.8(1)(b) that a work organisation factor that may influence risk includes the availability of mechanical equipment to assist lifts and transfers of people, and a clear direction or policy on its use.)

---

1 The learned judge had cited from Glass, McHugh and Douglas *The Liability of Employers in Damages for Personal Injury*, (2nd ed., 1979), Law Book, at p 4 thereof for the observation that an employer's duty is usually subdivided into the obligations to provide safe plant, safe premises, and a safe system of work; and the learned judge remarked that failure to provide equipment was really a breach of the obligation to provide safe plant, although sometimes cast as a failure to provide a safe system of work, referring to that text at pp 49 and 60

2 It was adopted as an advisory standard in the *Workplace Health and Safety (Advisory Standards) Notice* 1998, SL No. 177 of 1998

[24] 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 the learned judge's assessment, "reasonably readily foreseeable" [56].

(as to contributory negligence)

[25] Ms Calvert had no actual knowledge that the patient might grab and pull her. Whether she had constructive knowledge turned on an objective assessment of the likelihood or possibility of its occurring in the circumstances of the particular transfer. She had not nursed that patient before that 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 charts; and up to the point where he grabbed her, he had been cooperative. She had described his action as totally unexpected, and the judge was satisfied that the plaintiff had no reasonable means of knowing that the actual and direct event giving rise to her injury might happen [57].

(as to breach of statutory duty)

[26] The objective of the 1995 Act, 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)), is achieved by preventing or minimising a person's exposure to such risk (s 7(2)). The Act establishes a framework for doing so by 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)) [61].

[27] Section 28(1) of that Act imposes on an employer an obligation to ensure the workplace health and safety of each of the employer's workers at work. Breach of that 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), and 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 [62] and [64].

[28] Mayne Nickless did not meet its onus of showing that it discharged its obligations under s 26 or that it had a defence under s 37; and the learned judge found that it had breached its duty pursuant to s 28(1) of ensuring the workplace health and safety of the plaintiff at work [68].

(as to conclusions on liability)

[29] The plaintiff had established that Mayne Nickless breached its duty of care and its contract with her, as well as that it breached its statutory duty under s 28(1), and those breaches caused her damage, namely a disc protrusion at the L5-S1 level and acceleration of degeneration of her spine [69].

[30] The basis of the finding of liability was the failure to provide a mechanical transfer device, and accordingly it was unnecessary (for the judge) to consider the availability of contributory negligence as a defence to reduce damages; the

defendant had argued there should be such a finding if it were found liable based on its failure to provide a third person to assist [70].

(as to the quantum)

[31] The plaintiff's continuous back and leg pain since 7 March 1998 had interfered with most aspects of her life, and she had had to accept help with household chores and shopping, and has not been able to return to work. She also had to give up pastimes such as gardening, walking and travel [71].

(as to *Griffiths v Kerkemeyer* damages)

[32] After 7 March 1998, friends of hers helped the plaintiff with cleaning, cooking, shopping and transport to medical appointments; then when she left her rented residence in November 1998 and stayed with friends named Tomlinson, Mrs Tomlinson did the daily chores, and the Tomlinsons helped Ms Calvert clean the residence she had vacated. Then, when she lived for a period with a boyfriend, and subsequently with her sister, the boyfriend and sister respectively provided Ms Calvert with domestic assistance. When the plaintiff returned to live in a house she owned at Helensvale in late March 1999, a friend visited regularly to give domestic assistance and a neighbour provided gardening and mowing services. When her father came to live with her in January 2002, he assisted with heavy cleaning and gardening until his health deteriorated, and as at the date of the trial the plaintiff had been receiving assistance through a government-funded home help service [72], [73].

(as to past economic loss)

[33] There is a reasonable prospect the plaintiff might undertake some part-time, sedentary work in the future, but this would not be easy to find [74]; the plaintiff had a good work history and her past economic loss in the 6.75 years that had passed since 7 March 1998 should be calculated at $600 net per week over the whole of that period, and then discounted for contingencies by 25 per cent.

(as to future economic loss)

[34] Section 317 of the *WorkCover Queensland Act* 1996 (“the 1996 Act”) applied as amended by s 39 of the *WorkCover Queensland Amendment Act* 1999, commencing on 1 July 1999, and therefore as if the words "because of the percentage of WRI resulting from the injury sustained" were omitted from it. The amendment deleting that phrase was a technical one enacted to remove any confusion as to the evidence to be considered by courts determining the likelihood of future economic loss, and there were no applicable transitional provisions; the learned judge therefore agreed with McGill DCJ in *Nagel v Queensland Rail* [2004] QDC 358 at [55]-[56] therein [81].

[35] The plaintiff would have continued general ward nursing had it not been for the injuries she sustained on 7 March 1998 but 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. Her future economic loss should be assessed on the basis of $450 per week over 15 years, and then discounted from a present value of $249,750 to $200,000 [83]-[84].

[36] There was at least a 51 per cent likelihood that Ms Calvert would sustain loss of that magnitude and accordingly the learned judge awarded damages for future economic loss of $200,000 [85].

(as to past *Griffiths v Kerkemeyer* damages)

[37] The plaintiff could recover damages for the value of the services provided by the neighbour who mowed the lawn and other services (household cleaning, cooking, shopping, etc) provided by her friends – none of those service providers being people with whom she then lived – because the services they had provided for the plaintiff did not fall within the description in s 315(b) of the 1996 Act. That description is of services "of any kind … 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". At the time those services were provided, the plaintiff was living by herself; 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. 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. It is also inappropriate to direct attention to the usual arrangements prevailing in that particular plaintiff's household or family *prior* to the injury; in that regard the learned trial judge respectfully disagreed with the remarks of White J in *Karanfilov v Inghams Enterprises Pty Ltd* [2004] 2 Qd R 139 at 151-152; at [52]; [92]- [93].

The appellant's arguments about the finding on how the incident occurred

Ms Calvert's version

[38] The account the judge accepted was that Ms Calvert was working the afternoon/evening shift in the orthopaedic ward of the hospital, where one of the patients was an 85 year old man admitted with a suspected fracture of the left humerus. The Nursing Assessment on his admission noted that he had dementia and could become agitated; he had previously had a hip replacement and other surgical and medical treatment. The Care Plan on the day of his admission (4 March 1998) advised that he needed assistance with activities of daily living. On 5 March it was noted that two staff were necessary to assist him. On 7 March Ms Calvert was assisting a wardsman to transfer the patient from his bed to a chair, which happened after she had come on duty and received a verbal handover report about the patient, and had read his nursing care plan and notes. He needed assistance even to move within his bed and was totally reliant on nursing staff for mobility.

[39] In the incident, he was being moved from his bed and placed in a seated position on a chair, both to prevent his developing pressure sores and to let him take his meals. Ms Calvert had telephoned for the assistance of two wardsmen, but had been told only one was available. She had prepared the chair into which the patient would be placed, prior to the wardsman's arrival, and when he arrived she instructed that wardsman on how the patient would be moved. In accordance with those instructions, the stage was reached at which she and the wardsman were standing on either side of the patient, supporting the patient's weight, with the latter's back to the chair into which Ms Calvert and the wardsman were endeavouring to lower him. She was on the patient's left side and the wardsman on the other. When the back of the patient's legs were touching the chair, Ms Calvert explained to him that they

were going to lower him into the chair, and they began to do so. At that stage the patient was being supported around his torso; Ms Calvert's evidence was that she was endeavouring to keep her back as straight as possible, bending at her knees and that when the patient was almost seated he suddenly became anxious and began grasping or plucking at the air and taking short, sharp breaths. He grabbed at her right upper arm and shoulder with, she thought, his left arm, pulling her down as he was being seated completely in the chair. She felt a sharp pain in her lower back and was stuck in that position for a couple of minutes, she was then able to straighten up.

[40] The learned trial judge thought it unlikely that the patient had grabbed Ms Calvert with his left arm, as she thought he had, because of the fractured left humerus and because the arm was in a (soft) sling. Ms Calvert's evidence was that she was not sure if the wardsman had hold of the patient's right arm, and said that the patient's behaviour had been completely unexpected – she had not seen anything in his file to indicate that he might reach out and grab her, and that until that point he had been calm and cooperative. She said that although she was only pulled towards him by a matter of inches, his weight was pulling her as he sat fully down. She described her own movement as basically a rotation, almost on the spot.

What she did thereafter

[41] She continued working until the end of her shift without making any note of the incident in the patient's chart or reporting it to any other staff member that evening, or completing an incident report form. She returned to that patient several times during the shift to administer medication and ensure he was taking fluids, and made two notes in his chart about medication she administered. She described her back becoming progressively sorer over the rest of the shift. She went home and after a restless night with a still sore back returned to work for the next two days, in which she was not required to do any particularly heavy work. On 9 March she kept an appointment she had previously arranged with a gynaecologist, to whom she had been referred the previous month for pain in her pelvic region. She did not tell that doctor about the incident two days previously or the lower back pain.

[42] She had a rostered day off on 10 March and received acupuncture from her sister and osteopathy from a friend's husband who was a doctor. On 12 March she telephoned her employer and orally reported the incident, and she signed an incident report form on 14 March. On 17 March she completed a WorkCover claim form and supplied additional information to WorkCover on 5 April. She first consulted her general practitioner about her back on Friday, 13 March, that being the first appointment she could get. Thereafter she saw him (about her back) on 14, 15, 17, 18, 19 and 26 March, and on 9 and 24 April, and again on 1 May. He arranged an x-ray and CT scan of her lumbo-sacral spine on 22 and 23 March. The x-ray revealed a mild curvature concave to the left and mild degenerative changes; at the L4-5 there was degenerative disc bulging and mild to moderate degenerative changes affecting the interfacet joints, and degenerative disc bulging at the L5-S1 level with moderate degenerative changes affecting those interfacet joints.

A subsequent traffic accident

[43] The plaintiff was involved in a traffic accident when driving home from her appointment with Dr Keys on 1 May 1998, in which the right front corner of her vehicle collided with the left rear corner of a stationary vehicle when she may have been travelling at 30-40 kph. She was taken to the Gold Coast Hospital by ambulance and told staff that she had sustained a work injury eight weeks previously leading to a disc prolapse at the L4-5 and L5-S1 levels, which had been slow to settle. She was given Panadol and sent home. She told Dr Keys about the accident when she returned to him on 7 May 1998, and said that her back pain had increased as a result, but was then settling, although it was still worse than when she had last seen the doctor (before the accident). Her evidence was that a few days after 7 May 1998 the pain subsided to where it had been before that date and that since 7 March 1998 her back and (predominantly right) leg pain had been continuous.

Earlier x-rays and motor vehicle accidents

[44] On 25 June 1990, Ms Calvert's chest, cervical spine and lumbar spine had been x-rayed; the x-ray of the lumbar spine showed a mild scoliosis concave to the left and a mild defect of the S1 neural arch. That was described as a common finding and of no clinical significance. There was no evidence as to why those x-rays were taken. On 17 April 1991, the plaintiff was involved in a motor car accident, and then another on 27 June 1992. On each occasion she sustained a whiplash injury, and some injury to her lower back. She was off work for a week after the first accident, and complained at that time of pain in her neck and throughout her spine. Six months later, she complained to an orthopaedic surgeon, Dr Dodd, of problems principally with her neck, but also of occasional sciatica and pressure in her sacro-iliac joints bilaterally. In May 1992, she was seen by another orthopaedic surgeon, Dr John Pentis, and again her main complaints related to her neck; he also recorded that she complained of having had past pain in the hip and some sciatic pain in the legs.

[45] After the June 1992 accident, she was hospitalised for three days, and was considered to have sustained a soft tissue injury and bruising only. Dr Pentis re-examined her in August 1995, and his clinical findings with respect to the lumbar spine were similar to his earlier ones – that was tenderness in the lower lumbar region and tenderness over the sacro-iliac joints. He thought the second accident had caused further soft tissue damage to the cervical and lumbo-sacral region and aggravated whatever problems Ms Calvert had had from the first accident. He judged then that she had a residual incapacity in the spine approximating a 10 per cent loss of efficient function of the spine as a whole. A neurologist, Dr Maxwell, who examined Ms Calvert in November 1993 and October 1994 principally in relation to her neck, recorded on each occasion complaints of back pain. In his second report, those were of complaints of occasional sciatica with low back pain radiating into both buttocks, worse on the right.

Other evidence of earlier back pain

[46] In November 1993, Ms Calvert made a claim on an income protection policy, which the judgment records was in respect of her cervical spine; in a questionnaire the insurer required her to complete in January 1994, she responded to a question as to the nature of the "back disorder" by describing it as "soft tissue injury (whiplash) to cervical spine", but advised that it did not prevent her from working as usual and

was usually limited to her neck. In that same month, when working in the labour ward at the Gold Coast Hospital, she described experiencing a sprain or strain causing her back, ribs, and hips to ache and be uncomfortable, and she had five days off work. Between January and May of 1995, she consulted the West Burleigh Chiropractic Clinic seven times, predominantly with respect to neck problems but also for occasional right leg sciatica. Thereafter, the learned trial judge held, there was no evidence of any specific complaints of either back pain or sciatica until 7 March 1998.

Grounds for challenging Ms Calvert's account of the incident

[47] The principal grounds attacking the learned judge's acceptance of Ms Calvert's version were that:

- She had not recorded or reported the incident at the time, although making entries on the patient's records that night, and although the incident was unusual and had caused her concern, and also was relevant to general nursing of that patient by other nurses.

- Her first written report (on 14 March 1998) did not mention the patient reaching forward and grabbing her.

- Although in significant pain as a result of the incident, she made no mention of it at her appointment with Dr Davidson on 9 March 1998, whereas she did tell that doctor of the previous motor vehicle accidents in 1991 and 1992, and the removal of her appendix at age nine. The learned trial judge described that omission "as somewhat odd", but otherwise did not (in the appellant's submission) adequately deal with it.

- It was unlikely the patient grabbed her with his injured left arm, and likely the wardsman had hold of the patient's right arm.

- The records established that the patient had an in-dwelling catheter, but the learned judge did not reconcile its presence with Ms Calvert's evidence, which made no mention of the catheter.

- Her description of the event was difficult to follow.

- She did not tell doctors examining her for medico-legal purposes about the subsequent motor vehicle accident of 1 May 1998, whereas all the doctors who were asked agreed that that accident could have imposed significant forces on her lumbar spine.

- She did not properly report the history of her previous lower back problems from 1990 onwards, whereas both prior injuries were significant and had been the subject of litigation.

- She had given a multiplicity of versions of the incident when speaking with different doctors.

- The account the trial judge accepted did not describe the injury resulting from her bearing the patient's weight in a lift, or because of resistance to movement,

whereas that was the apparent understanding of some of the medical practitioners who gave evidence.

- The only other person allegedly present – the wardsman – had provided a statement some years later, in which he could not recall the incident occurring at all.

[48] The learned trial judge dealt in some detail with each of the criticisms described, other than the criticisms of the judge. The learned judge accepted that Ms Calvert was certainly remiss in not noting the incident in the patient's chart and in failing to report it to the sister in charge, but did not regard that omission as reflecting adversely on Ms Calvert's credibility, because her evidence was that she thought in the first couple of days that she had sustained no more than a muscular strain. It was only over the ensuing days that her symptoms intensified. The judge also thought that Ms Calvert's delay in reporting the incident was explicable on that same basis, and accepted Ms Calvert's explanation in cross-examination for not having recorded in writing that the patient had actually reached forward and grabbed her. She had recorded only that the sharp pain in her lower back, which took a while to permit her to "straighten up", had happened after being caught off balance when lowering the patient to the chair.

[49] The judge considered it of little weight that the wardsman, who gave a statement to the appellant's solicitors in February 2001, could not recall Ms Calvert being injured on 7 March 1998 when he was assisting her to move a patient from a bed to a chair. At that time, there were 225 beds in the hospital, and the wardsman had to respond to calls for assistance from nursing staff all over the hospital, and the plaintiff's description of the incident at trial was such that it may have made no impression on the wardsman at all. The plaintiff said that her back locked, but only for a short time, and that she did not cry out; and she finished her shift. She had named that wardsman as a witness in the incident report dated 14 March 1998, and in her application for compensation dated 17 March 1998.[3]

[50] The judge did think it odd that no mention was made of the incident to the gynaecologist on 9 March 1998, but observed that while the symptomatology in the plaintiff's back was intensifying it had not reached the point where she had tried to contact Dr Keys, her general practitioner, about it. She had been referred by him to the gynaecologist the previous month and by the time she saw that doctor, the particular problem had resolved; the learned judge detected a certain shyness or reserve in the plaintiff's manner when questioned about that problem.

[51] The learned judge recorded that the appellant's counsel "made much" of Ms Calvert'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, but the judge was prepared to accept Ms Calvert's explanation that she did not do so because her back symptoms after those two accidents were very generalised and short term; and the judge considered the collateral evidence was that Ms Calvert's principal injuries and her main ongoing problems from those prior vehicle accidents related to her neck. In contrast, Ms Calvert described what she had experienced since 7 March 1998 as being of a quite different nature from anything she had

---

3 Those documents are at AR 674 and 697

experienced before, namely persistent and unrelenting back pain primarily focussed in the central lumbar region.

[52] The learned judge likewise accepted that Ms Calvert told only Dr Keys on 7 May 1998 about the accident on 1 May 1998, and did not tell any other doctors who examined her subsequently about it. The judge considered that clearly Ms Calvert ought to have done so, but accepted her explanation that she thought the subsequent accident was insignificant, because although immediately following it her back pain had increased, it had settled within a couple of days to the level it had been prior to 1 May 1998.

[53] Regarding the criticism that the plaintiff's account of the incident was itself difficult to accept, the judge described it as quite plausible in all respects bar that the patient had grabbed her with his left arm, which seemed unlikely. However, Ms Calvert was not dogmatic that it was the left arm, and there was no clear evidence that the wardsman had hold of the right. Regarding the submission that Ms Calvert had given multiple versions, with variations within each, of the precise circumstances of the incident, particularly to each of the many medical practitioners who had assessed her over time, the learned judge described in separate paragraphs the accounts Ms Calvert had given to each of Dr Keys, Dr Scott-Young (orthopaedic surgeon), Dr Parkington (orthopaedic surgeon), Dr John Corbett (neurologist), Dr John Wainwright (psychiatrist), Dr G M Boyce (neurologist), Dr Noel Langley (orthopaedic surgeon), Dr Peter Boys (orthopaedic surgeon), Dr Andrew Byth (psychiatrist), Dr John Pentis (orthopaedic surgeon) and Dr Johnn Olsen (consultant physician). Those accounts had been given on dates from 13 March 1998 (to Dr Keys) through to 12 September 2003 (to Dr Olsen). Dr Keys had seen her at least 10 times by 7 May 1998, and Dr Wainwright saw Ms Calvert on at least six occasions between 15 October 1998 and 3 February 1999.

[54] The trial judge examined each account, and the extent of their dissimilarity or consistency with Ms Calvert's version in oral evidence. In summary, the learned judge either considered that consistency had been demonstrated, or that any inconsistency was of little moment, for reasons explained by the judge. For example, Dr Corbett recorded only that Ms Calvert had developed acute low back pain while lifting a patient, but the whole transfer was not described in the detail the plaintiff gave in evidence. Dr Parkington had recorded that after the plaintiff had been bent over lifting the patient, she experienced right side low back pain when she attempted to straighten up; that witness gave evidence by telephone, the judge described his answers as terse, and remarked that the doctor's somewhat irritable tone did not leave the judge with confidence that the doctor had necessarily questioned Ms Calvert closely about her history, or the precise mechanism of her injury. The judge noted that Dr Parkington in his first report described Ms Calvert attending his rooms with her husband, whereas Ms Calvert had never married, and the doctor had assumed that she was married to the man accompanying her.

[55] It should be clear by now that the learned judge considered in detail each of the submissions advanced which challenged Ms Calvert's credibility and account of the incident, and rejected most of the arguments. The judge primarily did so after accepting the plaintiff's evidence that she had at first thought she sustained no more than a muscular strain, but that her symptoms had intensified in the ensuing days and weeks, and remained thereafter. The judge summed up this part of the case in the following three paragraphs which I quote in full:

"**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 *[sic]* 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."

[56] The learned judge then made the finding that the plaintiff's evidence was credible and that the judge accepted her account of the incident. The appellant's senior counsel submitted that the learned judge had adopted a process of reasoning which treated the appellant's arguments as a checklist, against which the learned judge had determined for each submission whether there was an explanation for what the appellant submitted was the relevant deficiency in the plaintiff's evidence. Mr Wilson SC submitted that what the judge had done was deal with each submission on its own merits and separately, without considering the cumulative effect of the complaints the appellant made on Ms Calvert's credibility. Mr Wilson SC referred the Court to *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, in which Winneke P wrote (at 127) that the learned trial judge in that case had engaged in a false process of reasoning by treating each of the individual evidentiary facts in a circumstantial case as if it were the ultimate *factum probandum*, rather than considering what inferences flowed from the combination of evidentiary facts which were not in contest. As Winneke P remarked at VR 128, in cases of circumstantial evidence each proven fact may gain support from the others and, although each, considered in isolation, might not provide a sound basis for inferring the ultimate

fact to be proved, a combination of all facts might provide a compelling basis from which to draw that inference.

[57] Despite Mr Wilson SC's submissions, the learned trial judge in this case did not fall into anything remotely resembling the error demonstrated in *Longmuir*. The judge engaged in a careful analysis of the evidence and the submissions made on it, and the conclusions in the paragraphs [28] and [29] quoted from the judgment are the opposite of a failure to reach a conclusion about credibility for which the evidence provides a compelling basis. A different and logical conclusion was available, reached by the learned judge; Mr Wilson SC submitted that the judge had misused the advantage as a trial judge in accepting the plaintiff as credible because of the incontrovertibly established facts – such as failing to record any note or tell anyone about the incident that day, failing to tell medical practitioners of her earlier car accidents, and failing to tell them of her subsequent one – that could not be explained. Mr Wilson SC also argued that her account of events was improbable, a matter not resolved by describing her as credible.

[58] The incontrovertibly established facts upon which the appellant relied were the ones considered by the learned judge and which did not compel a conclusion on credibility against Ms Calvert, once the judge accepted that she at first thought her injury was minor and a muscle sprain, but which progressively got worse. Once those findings were made, the incontrovertibly established facts were explained. The explanation was that the plaintiff was at first untroubled about the prospects of any significant or long term injury, and was not a sufficiently conscientious nurse to report the incident. By mid-March 1998 she considered it had caused her a different injury from anything she had previously suffered.

[59] The appellant did not complain about the conclusions drawn in paragraphs [28] and [29] quoted above or the factual summaries in those, and I respectfully consider that had paragraph [27] not appeared in the reasons for judgment, the appellant would have had no ground at all for its complaint of error in the learned judge's reasoning process, or to complain about any misuse of findings on credibility. The findings in [27] were not used to explain away incontrovertible facts leading to a different conclusion. The learned judge's conclusions on the credibility of Ms Calvert's evidence could comfortably stand without the observations in [27], and while those observations support the judge's reasoning summarised in [28] and [29], the latter reasoning does not depend on the learned judge's personal observations on the plaintiff's apparent creditworthiness. I do not consider the learned judge relied on the observations in [27] to reach those in [28] and [29], and it would have been wrong for the judge, having concluded as described in [27], not to record those observations which assisted Ms Calvert and supported the judge's reasoning. Nothing in *Fox v Percy* (2003) 214 CLR 118, or other recent decisions of the High Court, requires that a judge refrain from expressing an opinion the judge has formed about the apparent honesty of a witness.

[60] Mr Wilson SC also briefly submitted that Ms Calvert's account of the incident itself was improbable, in that it was unlikely the patient could have pulled her with either his right or left arm, the right being held by the wardsman and the left being broken. But that depends on the assumption that the wardsman was holding the right arm tightly, an assumption simply not established in evidence. The grounds of appeal 2(a), (b) and (c) condemning the finding accepting that the plaintiff was injured in the circumstances which she described, should be dismissed.

The appellant's submissions on the liability finding

[61] Mr Wilson SC accepted he could not challenge the finding that there is a relatively high incidence of back injuries among nurses involved in moving patients, and that Mayne Nickless knew that. When making that finding, the learned trial judge quoted from Fleming, *The Law of Torts* (9th ed., 1998) at 120 to the effect that 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; and that if a defendant, otherwise credited with such perception of the surrounding circumstances and knowledge as a reasonable person would possess, has more extensive knowledge, then the propriety of the defendant's judgment as to the risk involved is determined by what a person with such knowledge would regard as probable.[4] Accordingly, an employer with greater than average experience of a particular risk might have to respond with more than average precautions.

Would a worker with normal health have been endangered?

[62] Mr Wilson SC submitted that Ms Calvert had not established breach of the common law duty of care to her because she had not shown by evidence that the particular event to which she was exposed would have put at risk a worker with the normal range of health and strength. Mr Wilson SC reminded this Court that the plaintiff had said she was pulled forward a matter of inches only, and contended there was no evidence that in such circumstances a worker without Ms Calvert's susceptibility to injury to her back with its degenerative condition would have been exposed to a risk of injury. That argument had been rejected by the learned trial judge.

[63] Mr Wilson SC's submission had force, and he referred the Court to *Brkovic v JO Clough & Son Pty Ltd* (1983) 57 ALJR 834 at 835. Gibbs CJ, giving the judgment of the court in that case, wrote that:

> "There is no evidence that a worker, within the normal range of health and strength, would have been put at risk by the system adopted by the respondent. All that the appellant had to do was to bend down and tug on a pipe. The fact that the pipe might jam would not have been likely to endanger a normal employee."

[64] Mr Wilson SC submitted that a normal employee was a person without the susceptibility that the learned judge had found Ms Calvert had. Mr Wilson SC did not challenge the finding by the learned judge that the pre-existing degeneration in Ms Calvert's spine was quite common in persons of her age (32 years 4.5 months as at 7 March 1998), and I consider that finding does not take Ms Calvert out of the class of people within the normal range of health and strength, referred to by Gibbs CJ in *Brkovic*. In that case, that appellant had injured his back on two prior occasions, and those earlier injuries had rendered that appellant susceptible to a back injury; the report of the case does not suggest that the appellant's susceptibility from earlier injury was within the normal range of health and strength, or that that appellant's susceptibility to injury was no greater than as a result of degenerative changes quite commonly seen in a person of that appellant's age.

---

[4] Applying the principles declared by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539-540, applicable to assessing damages for breach of contract

[65] The learned trial judge found it unnecessary to determine whether the degenerative changes in Ms Calvert's spine still left her within that normal range, and the judge's findings in para [43] of the reasons for judgment described a foreseeable risk to a nurse with a spine without those degenerative changes. Mr Wilson SC's written submission criticised that conclusion, on the ground that there was no evidence led as to the forces imposed on the spine by the event which the trial judge accepted had occurred, and he submitted that Dr Olsen, Ms Calvert's expert witness in that regard, had provided an opinion on a different mechanism of injury. Accordingly, Dr Olsen's evidence could not assist Ms Calvert. After reading the relevant report,[5] I do not agree that Dr Olsen described a significantly different mechanism of injury. His report included repeating Ms Calvert's account to him that "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." He agreed in cross-examination that he was not told the patient had grabbed at Ms Calvert and pulled her forward a couple of inches,[6] and he agreed that all he understood was that the patient somehow resisted movement. The cross-examination of Dr Olsen[7] therefore did show that Dr Olsen had visualised or understood the incident differently from Ms Calvert's account accepted by the judge, but his understanding of it still included the concept that Ms Calvert and the wardsman were lowering a resistant patient to a chair. That understanding had her supporting the patient's weight, as the patient struggled. The precise mechanism of the injury seemed unimportant to Dr Olsen's opinions.

[66] Dr Olsen's second report (ex 48)[8] included the observations – not challenged in cross-examination – that there could be no doubt that the Compendium of Workers Injuries had pinpointed the health industry as a problem area, that therefore there should have been very clear attention to the problem of lifting, carrying or moving residents and patients, and that the nursing profession had been shown to be particularly at risk; and the further (unchallenged) observation that there was ample lifting equipment available in 1998 to enable the complete abandonment of the hazardous practice of lifting or handling people, particularly when such persons had personal attributes such as dementia or unstable fractures with impairment, such that they could not cooperate in the transfer.[9] In cross-examination, he described a lifting device as providing "a fair bit of protection for the nurses when they use a lifting device because during the actual transfer they don't have to be close to the patient",[10] and as Mr Diehm submitted to this Court, a nurse installing or removing a lifting device – at whom an agitated elderly patient could grab – would not be bearing or supporting the patient's weight at that time.

[67] I conclude that the learned trial judge's finding in [43] of the reasons for judgment, as to the reasonable foreseeability of injury to the spine of a nurse (without degenerative changes in that spine) who was transferring a patient from a bed to a chair when subjected to a sudden force imposing an unexpected load, was open on the evidence. This was a quite different case from *Brkovic*; Ms Calvert was put at risk of a foreseeable injury to her back, she being of a class known by Mayne Nickless to be at risk of those injuries, who was performing an operation described

---

5 Dated 17 September 2003, at AR 599
6 At AR 289
7 At AR 270 and 289
8 Dated 29 July 2004, reproduced at AR 712 et seq
9 At AR 732
10 At AR 292

by Dr Olsen in his expert opinion as hazardous,[11] and that opinion too was left unchallenged. I would reject that part of the appellant's attack on the finding of liability.

Appellant's submissions on the *WorkCover Queensland Act* 1996

Section 312(1)(b) and (c)

[68] The next ground on which Mayne Nickless challenged the finding of liability relied on the provisions of s 312 of the 1996 Act. It is necessary to quote it in full; it reads:

> "**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.

---

[11] At AR 732

> **(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 and reliance on the matters mentioned in subsection (1)(c) to (i)."

[69] Mayne Nickless did not challenge the learned judge's finding, recorded in [19] herein, that Ms Calvert's claim against it did not rely exclusively on an alleged failure by Mayne Nickless to provide a safe system of work for her. That unchallenged finding means s 312(2) did not require the learned trial judge to dismiss Ms Calvert's claim if she failed to prove the matter mentioned in s 312(1)(a), and the judge made no express finding on the point. Mayne Nickless does not complain about that. Its submissions focussed on the finding described in [24] herein, that Ms Calvert had proved the matter in s 312(1)(b) and likewise the finding repeated in [25] herein, that Ms Calvert had also established the matter in s 312(1)(c). Mr Wilson SC's written and oral submissions argued that the two findings were inconsistent, and that the learned trial judge could not have found Mayne Nickless could reasonably readily foresee the actual and direct event giving rise to Ms Calvert's injury, and also find that Ms Calvert had no reasonable means of knowing that that actual and direct event might happen.

[70] Mr Wilson SC also argued that finding the event was reasonably readily foreseeable was not open anyway, because of the finding that the patient's action was totally unexpected. He repeated in this context the argument that the evidence was insufficient to establish that the actual and direct event giving rise to Ms Calvert's injury found by the judge, namely her being grabbed and pulled by the patient, was an event which would place a person who had a spine without degenerative changes at risk. Mr Wilson SC submitted that the facts relied on by the learned trial judge for the finding that Ms Calvert had proved she did not know or have reasonable means of knowing that the patient would grab her and pull her forward as he was being placed in his chair, repeated in [25] herein, described knowledge by her which was actually the same as the knowledge Mayne Nickless had of the risk. That is, Mayne Nickless had no greater knowledge than Ms Calvert did of the relevant facts either making that actual and direct event being readily foreseeable, or giving reasonable means of knowing that it might happen. Such knowledge of the patient as the appellant's other employees had gained in the three days in which he was in the appellant's hospital was relevantly recorded in the documents Ms Calvert had read, and communicated by the handover report given to her when she came on duty; and there were no other relevant facts. She was an experienced nurse, and she had given the instructions to the wardsman as to how the patient would be transferred from bed to chair.

[71] Those submissions are sound, but Mr Wilson SC’s argument that they necessarily led to other findings on s 312(1)(b) and (c) was rejected by the learned trial judge, and unless the proper construction of the two subsections excluded the trial judge from making both the described findings, then I consider they should stand. The

facts described in [25] herein, not challenged in any way, support the conclusion that Ms Calvert had no reasonable means of knowing that the patient might grab her and pull her forward. She only had reasonable means of knowing that when the patient became anxious and began plucking at the air.

[72] The matter the worker must prove in s 312(1)(c) is relevantly different from the matter the worker must prove in s 312(1)(b), in that the latter focuses on foreseeability of the event, not knowledge it might happen. Reasonable means of knowing an event might happen focuses attention on the predictability of the event in the circumstances immediately before it did happen, and the worker's knowledge of those. Unsurprisingly, that matter is tied by the Act to the matter of substantial contribution by the worker to the injury; s 312(1)(c) describes the worker's knowledge of the risk of the event happening.

[73] The matter the worker must prove about the employer in s 312(1)(b) is different in that an event causing injury to an employee, and reasonably readily foreseen by the employer, is a risk of injury from which the employer is obliged to guard the worker by steps reasonably open to the employer, including an appropriate system of work. Reasonably readily foreseeable events include events which are expected to happen, and events which are not expected, but foreseeable as possible events. I respectfully agree with the learned trial judge that as an employer, Mayne Nickless had an obligation to plan for contingencies, to devise and maintain a safe system of work, safe plant, and a safe place of work. An employer will often have far greater knowledge than an individual worker does of the variety of ways in which a worker can be guarded against the variety of events in which an employee can be injured in a work place. This employer should have been aware of the Code. The information contained in that advisory standard specifically alerted employers to the risks involved, when transferring aged persons, to others lifting or lowering those aged patients who might have sudden, uncontrolled movements. I consider the learned trial judge correct in holding that it was reasonably readily foreseeable that this injured, demented, and aged patient would become agitated, and when manually moved from a bed to a chair, would grab (and pull forward) a nurse helping to transfer the patient. Accordingly, despite the inconsistency at first apparent between the learned judge's critical findings, each resulted from the correct application of a different test and correct consideration of different matters, and each was open to the learned judge. That ground of appeal should be dismissed.

The appellant's submission on onus of proof

[74] Mr Wilson SC's next submissions attacked the finding that Ms Calvert had established a breach of the appellant's statutory duty to her, that duty being declared in these terms in s 28 of the 1995 Act. It read:

> "An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work."

Section 26(3) of the 1995 Act relevantly provides:

> "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."

[75] Section 24(1) provides that a person on whom a workplace health and safety obligation is imposed must discharge the obligation, and for fines or imprisonment for a breach of it. Section 37(1) provides that it is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under (relevantly, s 28) for the person to prove:

> "(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;"

and s 37(2) provided:

> "Also, it is a defence in a proceeding against a person for an offence against [relevantly s 28] for the person to prove that the commission of the offence was due to causes over which the person had no control."

[76] Mr Wilson SC submitted that the learned trial judge had erred in holding that Mayne Nickless bore the onus of showing that it had discharged its obligations under s 26 or that it had a defence under s 37. Mr Wilson SC did not contend that the defendant had satisfied that onus, and did not otherwise challenge the finding that Mayne Nickless had breached its duty pursuant to s 28(1) to ensure the workplace health and safety of Ms Calvert at work; this part of his attack was on the proposition that Mayne Nickless bore the relevant onus of proof.

[77] The learned trial judge's ruling that an employer sued under s 28(1) may defend the claim by showing that the obligation was discharged under s 26 (or s 27, irrelevant to this matter), or by showing a defence under s 37, has the authoritative support of the joint judgment of a five member court in *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518 at 530. That court wrote that:

> "Although the language of 'contravention of an obligation' in s 37 may be more appropriate to a proceeding for an offence, a reading of Part 3 as a whole (ie s 23 to s 37) suggests that an employer who is sued civilly or charged with an offence of failing to discharge an obligation may resist the allegation either by showing under s 26 or s 27 that the obligation has been discharged, or by showing a defence under s 37. In either case the onus is on the employer to prove the basis upon which it relies."

[78] Mr Wilson SC submitted to this Court, as he had to the learned trial judge, that the decision in the High Court in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 effectively worked an overturning of that part of the decision in *Schiliro,* in which this Court also held that s 28 of the 1995 Act created a civil cause of action, just as had s 9 of the previous Act, the *Workplace Health and Safety Act* 1989 ("the 1989 Act"). Mr Wilson SC did not challenge the conclusion that s 28 gave rise to a civil cause of action, only the conclusion in *Schiliro* that an employer sued civilly

had the onus of proving discharge of the obligation under s 26 or a defence under s 37. Mr Wilson SC submitted that the reasoning in *Schiliro* was flawed, by that conclusion as to onus having flowed on from the court's earlier decision in *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212 at 217-219, where this Court held that s 9 of the 1989 Act gave a civil action at the suit of a person injured as a result of breach of it. That section read:

> "An employer who fails to ensure the health and safety at work of all his employees, save where it is not practicable for him to do so, commits an offence against this Act."

This Court then held by majority in *Rogers* (Pincus and McPherson JJA) that the onus of proving impracticability of a suggested remedial measure lay upon a defendant employer. That conclusion in turn followed and relied upon the majority decision of Kirby P (as His Honour then was) and Priestley JA in *Kingshott v Goodyear Tyre & Rubber Co Aust Ltd (No 2)* (1987) 8 NSWLR 707, which in turn followed a decision of the House of Lords in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. Those two decisions had been distinguished by the High Court in *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249, but the majority decision in *Rogers v Brambles Australia Ltd* remarked (at 218) that the principal judgment in *Chugg v Pacific Dunlop Limited* discussed the decisions in *Kingshott* and in *Nimmo*, but had not questioned their correctness.

[79] That last proposition no longer holds good, because in *Slivak v Lurgi* the judgments in the High Court unanimously agreed[12] with Callinan J that the majority reasoning in *Nimmo* had been effectively overruled by the High Court in *Chugg v Pacific Dunlop Ltd.* Callinan J cited with approval what Brennan J (as His Honour then was) had said in *Chugg*, namely that the measure of a duty imposed on a person does not change with the character of the proceedings taken to enforce it; and that if, on a prosecution, proof which excluded a qualification of a duty was necessary to establish the offence, then in a civil claim proof which did not exclude the qualification would fail to prove a breach of the duty. Callinan J also described as persuasive the consideration that if legislatures intended to impose a burden of proof on defendants, all doubt might be resolved by using unambiguous expression to that effect.

[80] The conclusion necessarily drawn from *Slivak v Lurgi* is that the reasoning of the majority judgments in *Nimmo* and *Kingshott* has been disapproved by the High Court. In *Slivak v Lurgi*, where the statute under consideration imposed a duty in much the same terms as the duty imposed by s 9 of the 1989 Act (in *Slivak*, namely that a person who designed a structure must ensure "so far as is reasonably practicable" that the structure was designed so that the persons who were required to erect it were, in doing so, safe from injury and risks to health) the person injured was held to carry the onus of proof. In that case, that was proof that the designer had not done that which was reasonably practicable.

[81] If this Court's reasoning on the onus of proof in *Schiliro* had relied on the judgments in *Nimmo* and *Kingshott*, then Mr Wilson SC would have had a very good argument exposing an error. His submission must be correct that the reasoning as to the onus of proof in *Rogers v Brambles Australia Ltd* wrongly relied on *Nimmo* and *Kingshott*; but the reasoning as to the onus of proof in *Schiliro* did

---

12 At 319[39] and 324[58].

not rely at all on those two cases, and relied instead, and only, on the language of s 37 of the 1995 Act. In that sense that reasoning, in *Schiliro*, has the support of Callinan J and the other judgments in the High Court in *Slivak v Lurgi*, because s 37 does unambiguously impose the burden of proof on the defendants. Accordingly, that criticism of the learned trial judge must be rejected.

The risks against which an employer must guard

[82] Mr Wilson SC developed a submission that s 312 of the 1996 Act operated on the 1995 Act, and specifically s 28 thereof, so that the obligation Mayne Nickless had under s 28 was to ensure that Ms Calvert was not exposed to the risk that the actual and direct event giving rise to her injury was reasonably readily foreseeable by Mayne Nickless. That argument became critical, to the finding on her behalf that Mayne Nickless had breached that statutory obligation, if this Court accepted the submission that the finding was not open under s 312(1)(b) that Ms Calvert had proved that the actual and direct event giving rise to her injury was actually foreseen or reasonably readily foreseeable by Mayne Nickless.

[83] I have concluded that finding was open, and that makes it strictly unnecessary to rule on the argument. However, it is an important matter, which did not fall for decision in *Schiliro*. In *Schiliro* the joint judgment made clear that s 28 of the 1995 Act did not create an offence, or provide a right of civil action, when an employer failed to formally identify and manage, or assess, trivial risks.[13] That conclusion could be rephrased by saying an employer is not obliged to ensure the employer's workers are not exposed to trivial risks, or by saying the employer is obliged to ensure that the employer's workers are not exposed to risks that are more than trivial. That would be a construction of s 28 beneficial to workers. The joint judgment in *Schiliro* noted the removal of the limitation of "as far as practicable" from the duty of care statement in the 1995 Act, but quoted the Second Reading speech in the Parliament, which described that removal as allowing the issue of practicality to become a defence to an allegation of breach of s 28.[14] The view of s 28 in *Schiliro* is consistent with the obligation actually imposed by it approximating a non-delegable duty of care in respect of other than trivial risks to health and safety. That beneficial construction actually accords with the remarks in the joint judgment in *Slivak v Lurgi* at 318[36], where that joint judgment held that the requirement of ensuring safety from injury "so far as is reasonably practicable" was not, (only) because of those words, some form of non-delegable duty of care.

[84] Section 22 of the 1995 Act describes how workplace health and safety is ensured. It provides:

> "(1) Workplace health and safety is ensured when persons are free from –
>
> (a) death, injury or illness caused by any workplace, workplac activities or specified high risk plant; and
>
> (b) risk of death, injury or illness created by any workplace, workplace activities or specified high risk plant."

The section goes on to describe in general terms the management of workplace health and safety, namely by identifying hazards, assessing risks that may result

---

13 This can be seen at [46] and [69]-[72] in *Schiliro*

14 In 532[47] of *Schiliro*

because of those, deciding on control measures to prevent or minimise the level of the risks, implementing control measures, and monitoring or reviewing the effectiveness of the measures.

[85] Mr Wilson SC submitted that this Court's decision in *Hosking v Pacific Partner Pty Ltd* [2001] 1 Qd R 378 should lead to the conclusion that an employer was only obliged by s 28 of the 1995 Act to ensure that employer's workers were not exposed to reasonably foreseeable risks of injury. That decision actually construed s 9 of the 1989 Act, and I consider that an important part of the reasoning of each of the judgments in that case relied on the provisions in s 9(1) penalising an employer who failed to ensure the health and safety at work of the employer's employees "except where it is not practicable for the employer to do so". Jones J, with whom de Jersey CJ specifically agreed, wrote that it was not practicable for an employer to have done things, the need for which was not known or required to be known by the employer. In *Joynson v State of Queensland* [2004] QSC 154, Mullins J, referring to remarks in *Schiliro*, considered that it made sense to imply the concept of foreseeability of risk of injury in the obligation under s 28(1), and reached that conclusion because of the difficulty in applying s 27 – dealing with appropriate ways to discharge an employer's s 28 obligation when there was no regulation, ministerial notice, or code of practice respectively prescribing or stating ways to prevent or minimise exposure to a risk or manage the risk – if the exposure to the risk was such that no action was required i.e. where there was no foreseeable risk of injury.

[86] I respectfully observe that reasoning is sound, but that was not the way this Court dealt with that situation in *Schiliro v Peppercorn Child Care Centres*. The joint judgment held there[15] that in the *absence* of a reasonably foreseeable risk, an employer was entitled to rely on, for example, s 26(3) and s 37(1)(b)(ii) of the 1995 Act, by establishing that the employer had adopted and followed "another way" of managing exposure to risks that were not reasonably foreseeable. In that particular case that "other way" was quite informal; it consisted of being willing to listen to any employee who did not wish to undertake the relevant task, which in that case was straightforward, ordinary and physically undemanding and which required only the removal of a small quantity of sand over a short distance, and for which task a suitable shovel and small wheelbarrow were provided. The employer had placed no pressure on the employee to hurry or accomplish the task within a particular time. This Court held that in those circumstances the employer followed "another way" that gave the same level of protection to that low risk manual task, (which task was not susceptible to further consultations, inquiries or investigations), as would have been given by managerial practices recommended in the relevant advisory code for those tasks.

[87] I consider that once Ms Calvert proved that she was not free from a trivial risk of injury created by her workplace or work activities, as she did, she established the prima facie conclusion that Mayne Nickless had breached its obligation to ensure her workplace health and safety. The onus then lay on Mayne Nickless to establish either of the matters specified in s 26(3), and that it had accordingly discharged its workplace health and safety obligation, or to establish the defence provided by s 37(1)(b) of that Act. Mayne Nickless did not discharge either onus, and the trial judge correctly concluded that Ms Calvert had established it had breached its duty

---

15 At [70] and [71]

pursuant to s 28(1). Proof by that means (a defendant's failure to satisfy an onus) of a breach of that statutory duty could be sufficient proof of the matters a worker must establish under s 312(1)(a), depending on the evidence, but proof that the worker's injury arose out of events that were reasonably readily foreseeable is not mandated by s 28 or any other section of the 1995 Act.

[88] Enforcement of the cause of action given by s 28 of the 1995 Act would still be subject to the conditions imposed on claimants generally by the 1996 Act, particularly in s 312.[16] Nevertheless it would be inconsistent with justice if an employer criminally responsible for a breach of s 28 which resulted in injury to an employee could easily avoid civil liability to that employee; accordingly a court still required to apply the provisions of the 1996 Act[17] would be appropriately slow in concluding that an event causing injury, which was a risk to which an employer was obliged to ensure that employer's workers were not exposed, was not a reasonably readily foreseeable event.

[89] For those reasons I do not accept Mr Wilson SC's submissions on the manner in which the 1996 Act impacted upon the 1995 Act, and the submission that the learned trial judge accordingly misconstrued s 28. I would dismiss that ground of appeal.

Appellant's arguments on causation

The negative submission

[90] Mr Wilson SC attacked the finding that the appellant's negligence, breach of contract, and breach of its statutory obligations had caused injury to Ms Calvert, assuming or accepting that liability was otherwise established. He submitted that Ms Calvert had not established that it was probable that provision of a lifting device would have made a difference, having regard to the actual and direct events which happened. He contended that there was no evidence that the incident would still have not have occurred, had Ms Calvert and the wardsman been using the lifting device, and that all Ms Calvert had shown was that, at most, Mayne Nickless had exposed her to an increased risk of injury.[18] He argued that, had there been a lifting device, there would still have been a need for Ms Calvert or the wardsman to be in physical proximity to the patient, both when putting him into and when removing him from that device (the specific device which his submissions assumed was one which had two canvas straps, supporting the patient underneath and on the patient's back). The evidence showed that the elderly patient could easily have become agitated when being moved by that device, or placed in or taken out of it. His submission stressed that this was not a case in which Ms Calvert had been injured when actually lifting the patient, and accordingly he contended there would be little or no avoidance of the risk of the patient becoming agitated and grabbing a staff member by the provision of that lifting device; because the staff member had to be in proximity to the patient when loading or taking him out of it.

---

16 I consider that conclusion to be unavoidable, given the judgment in *Tanks v WorkCover Queensland* [2001] QCA 103, and *Bonser v Melnacis* [2002] 1 Qd R 1

17 The 1996 Act was repealed by s 588 of the *Workers' Compensation and Rehabilitation Act* 2003, in force from 1 July 2003

18 His submissions referred to *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 316, and to *Wallaby Grip (BAE) Pty Ltd v Macleay Area Health Service* (1998) 17 NSWCCR 355.

[91] Those arguments are all quite valid, but I respectfully consider they deftly avoid the point that use of a lifting device would have meant it was unlikely Ms Calvert was bearing the patient's weight at any time when he became agitated. Dr Olsen's report[19] was to that effect; he wrote that there "is good published work suggesting that the most effective by far is to engineer out the problem of lifting in certain situations. In the case of handling people that in fact in my opinion is a very sensible and realistic option". The learned judge was entitled to accept that opinion, and the submissions by Mr Diehm about the importance of Ms Calvert not being obliged to carry any part of the patient's weight if and when grabbed by the patient. I agree with Mr Diehm's argument that a nurse being grabbed when a lifting device was being used would only be at the same risk of injury as a nurse grabbed when giving a patient a glass of water. The point is that the nurse would only be supporting the nurse's weight. I consider that part of the challenge to the finding of causation should fail.

The positive submissions

[92] Mr Wilson SC made a strong submission on what he termed the positive aspect of causation, namely that the learned judge erred in being satisfied that the incident found to have happened had actually caused the L5-S1 disc protrusion, or that the respondent's condition after the incident was a result of it. The CT scan taken on 22 March 1998 did not show that disc protrusion, and the medical evidence was divided as to whether or not that scan would be in sufficient detail to show that protrusion, which was picked up on the MRI scan in June of 1998. The x-rays and CT scan taken in March 1998 after the incident, and before the motor vehicle accident on 1 May 1998, revealed only degenerative changes. Mr Wilson SC submitted that a number of doctors had formulated their opinions based on different mechanisms of injury, including lifting; and that independently of that submission, it was very difficult to conclude that the disc prolapse could not have been present before 7 March 1998 or caused after that date, for example, on 1 May 1998. Mr Wilson SC submitted that Ms Calvert had created a particular and insoluble problem for herself by her failure to mention the latter incident, or her earlier motor vehicle accidents, to medical practitioners examining her, and whose opinions were necessarily based on assumed facts which were significantly wrong. Further, there had been ongoing complaints over four years of back pain and sciatica in the same distribution as that about which Ms Calvert complained after 7 March 1998. Mr Wilson SC described the evidence as establishing that the nerve at L5-S1 runs down the lower half of the leg and causes pins and needles and pain, of which Ms Calvert had complained after those earlier incidents.

[93] Mr Wilson SC's supplementary written submissions described with care the information not provided, or the incorrect information provided, to three doctors, namely Drs Scott-Young, Langley, and Olsen, upon whose opinions Ms Calvert particularly relied. The fourth doctor upon whom she relied was a Dr Pentis, who as it happened had examined her in 1995, for the purpose of providing opinions as to the effect on her of the first two motor vehicle accidents which she had suffered, and accordingly that doctor was well versed in that history before March 1998. Returning to the other three doctors, Dr Scott-Young, who first saw Ms Calvert on 11 June 1998, was not given any previous history of back problems, not told of the motor vehicle accident on 1 May 1998, and not given a history of episodic sciatica

---

19 At AR 732

being suffered 1991 and 1995, which history the evidence otherwise established. Further, he was told that prior to the incident on 7 March 1998 Ms Calvert had no symptoms in relation to her back and lower legs.

[94] Dr Langley was given a history of *a* car accident causing whiplash injury which had settled within three months, was not told of any ongoing pain in the neck or lower back after either the 1991 or 1992 accidents, not told of symptoms of low back pain and sciatica from 1992 to August 1995, and not told about the 1 May 1998 accident. Dr Olsen was told by Ms Calvert that she had no prior history of low back pain; she gave him a history of no neck pain, and told him nothing about the 1 May 1998 accident.

[95] Formidable as those omissions were, Mr Diehm did conduct some lengthy re-examinations of the relevant witnesses, putting to them Ms Calvert's description of her symptoms of before and after the 1 May 1998 accident. All up, she did have medical evidence supporting the proposition that the 7 March 1998 event had had a significant and disruptive effect on her back. Dr Pentis, who knew of the earlier motor vehicle accidents and who was informed in lengthy questions in re-examination of the plaintiff's account of the effect of the 1 May 1998 incident, said that, based on the history of pain described by Ms Calvert, the latter car accident was not important. He had expressed in his written reports the opinion that Ms Calvert has sustained injury to her spine on 7 March 1998, consisting of a derangement to her lower discs.

[96] Dr Langley was asked in evidence-in-chief about the 1 May 1998 incident, and, like Dr Pentis, expressed the opinion that, accepting Ms Calvert's account of her history of pain before and after that event, it had not much effect at all. His report had advised that he considered that a disc injury, and aggravation of her degeneration to her spine, had happened at her work on 7 March 1998, as described by her. In re-examination he expressed the view that the 1 May 1998 incident did not cause the disc lesion at L5-S1. His answers in re-examination revealed that he had been provided with reports from Drs Pentis, Maxwell, and Dodd, detailing the history of Ms Calvert's symptoms with respect to her neck and her back through until August 1995. He had taken that history of symptoms into account in expressing his opinion.

[97] One of Dr Olsen's two written reports revealed that he had reviewed the opinions of at least 14 other named doctors, and had been referred by a firm of solicitors to information about the two prior motor vehicle accidents. His written report expressed opinions agreeing with ones he attributed to Dr Scott-Young, namely that the two prior motor accidents had caused only minor disturbance (presumably to Ms Calvert's back) from which she had subsequently recovered, and that Dr Olsen agreed with Dr Scott-Young's opinion that the 7 March 1998 incident more than likely resulted for Ms Calvert in internal disc disruption in her back. Dr Olsen also expressed agreement with what he described as Dr Scott-Young's opinion, that Ms Calvert had had asymptomatic degenerative disc disease before 7 March 1998, and that that incident had caused further disruption, and that she had been symptomatic since that event. Dr Olsen's own firm opinion was that her present pain was a consequence only of the incident of 7 March 1998. He was informed in re-examination of the incident of 1 May 1998, and expressed the view that, based on the pattern of attendance on her general practitioner before and after it, that incident did not seem to have made a great contribution to her problem. He also opined that

what was more reliable was the contemporaneous history of what had happened and what symptoms a patient had.

[98] Dr Scott-Young did express the views attributed to him by Dr Olsen, and Dr Scott-Young likewise reviewed a number of reports by other practitioners, (on my count of at least 16 other health professionals, mostly doctors). His written report described the two prior motor vehicle accidents, and he was asked in re-examination about the 1 May 1998 incident, and supplied with Ms Calvert's description of her symptoms before and after. His opinion was that the 7 March 1998 incident was a significant contributing factor to her deterioration, and the while the motor vehicle accident on 1 May 1998 had to be taken into consideration in some way, shape or form, the 7 March 1998 event was the turning point from a historical, clinical basis of assessment.

[99] That was a substantial body of opinion evidence appropriately informed about her medical history and supporting her claim of an event on 7 March 1998 which had significantly contributed to her disc lesion and ongoing pain since then. That evidence did rely on accepting her description of pain experienced from mid-1995 to 7 March 1998 and thereafter, and Mr Wilson SC submitted that, assuming in Ms Calvert's favour that she did experience actual back pain as described by her on and from the occasion of her first visit to Dr Keys on 13 March 1998, that may have resulted from some event happening on either 10, 11, or 12 March 1998. But with respect, on the evidence that submission was really speculation, and the conclusion drawn by the learned trial judge was open on the evidence, namely that on the balance of probabilities her problems which emanated from the L5-S1 level protrusion had occurred in the incident on 7 March.

Future economic loss

[100] Mr Wilson SC submitted that the trial judge erred in not applying s 317 of the 1996 Act in its unamended form, that is as at 7 March 1998. On that date it read:

> **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."

[101] As described by the learned trial judge, that provision was amended by s 39 of the *WorkCover Queensland Amendment Act* 1999 commencing on 1 July 1999, which removed the words "because of the percentage of WRI resulting from the injury sustained". The trial judge held that the Act in its amended form applied to a claim such as this one, not yet finalised when the amendment came into force, because it was a technical amendment apparently introduced to remove any confusion as to the necessary evidence when determining the likelihood economic loss would continue to be suffered. I agree; the section concerns the proof necessary to establish a claimed right to a particular head of damage. The assessed percentage of WRI (which means Work Related Impairment, as calculated by WorkCover in accordance with s 41, s 196, s 197, s 198 and s 201 of the 1996 Act) issued by

WorkCover on 9 November 1998[20] described Ms Calvert as having a five per cent degree of permanent impairment to her "musculo-skeletal system lumbosacral spine." Mr Wilson SC's submission was that the trial judge had to be satisfied to a 51 per cent degree of likelihood that because of that five per cent injury, the plaintiff would suffer future economic loss or diminution of her future earning capacity. That point was important in this case, he submitted, because the learned judge had referred to evidence from Dr Pentis describing Ms Calvert as having a 25 per cent loss of function of the spine, of which 10 per cent was due to the incident on 7 March 1998 and 15 per cent due to pre-existing factors, and a Dr Boys had opined Ms Calvert had a 15 per cent impairment of bodily function referable to the lower back, of which half was apportioned to the effects of the March 1998 incident and half to the effects of the pre-existing degenerative change. Mr Wilson SC submitted that s 317 in its then form bound the judge to consider only the WorkCover WRI calculation, and not the opinions of the two doctors, which both described impairment from other and independent factors, and disagreed with WorkCover's in any event. I respectfully agree with Mr Wilson SC's submission that that was the effect of s 317 as it stood, but respectfully disagree that it continued to apply as if unamended after 1 July 1999; its provisions were procedural and not substantive.

[102] I agree with Mr Wilson SC's submissions that the award was generous to Ms Calvert in assessing future economic loss on the basis that she would have worked, absent the incident on 7 March 1998, for another 15 years, that is up to age 54. Dr Boys thought that degree of degeneration meant Ms Calvert would have been unable to do general ward nursing by the time of the trial in any event. The learned judge did not accept that evidence, and was not satisfied that absent the 7 March 1998 injury Ms Calvert would have reached her present level of disability by any particular age, but expressed satisfaction that Ms Calvert would have had to cease general ward nursing at some indeterminate time before aged 60. I agree with Mr Wilson SC that that conclusion may be inconsistent with the subsequent finding the learned judge made that there was a 51 per cent likelihood that Ms Calvert would sustain economic loss in the magnitude of $450 per week for another 15 years. The evidence had included evidence that the plaintiff's back was susceptible to injury from common enough events such as bending over to pick up an object from the floor, or sneezing,[21] and a more reduced period of anticipated future earning capacity might have been found. But the difficulty with overturning the learned trial judge's calculations of future economic loss is the absence of any solid basis for any other finite conclusion. The judge discounted the potential earning capacity from around $600 per week net earned as a general ward nurse, to $450 per week, taking into account a residual capacity to do some part time sedentary work; and discounted the resulting figure by a further 20 per cent. The Court was not referred to any evidence contradicting the learned judge's findings other than that of Dr Boys, which the judge did not accept. I would not disturb the future economic loss award.

Past *Griffiths v Kerkemeyer* Damages

[103] Mr Wilson SC submitted that the modest sums of $5,473 awarded under this head were unjustified, because excluded by s 315 of the 1996 Act. It provided:

"Gratuitous services

---

20 At AR 10007

21 AR 204 and 217

> **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;
>
> (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."

He submitted that the reference to a member of the worker's family or household was a description of the kind of services for the provision of which damages have been abolished, and submitted although the actual claim was for gratuitous care in fact provided by friends, it was the "kind" of services specifically excluded, because those answer the description of services of a kind which would have been provided to Ms Calvert by a member of her family. It was immaterial that she in fact lived alone.

[104] I consider the submission focuses too heavily upon the description in s 315(b) of services of a kind that "ordinarily would be" provided to the worker by a family or household member, and the submission tends to place to one side the description in that same subsection of those services as being of a kind "that have been, or are to be" provided by a family or household member. The latter is a description of actual services; Mr Wilson SC's response that those words were included to cover a situation where there was a particular type of service performed by one member of a household for another of a type not ordinarily provided was thoughtful, but did not respond to the textual significance of the expression "the" worker to whom those services have been, are to be, or ordinarily would be provided by a family or household member. For Ms Calvert, who lived alone, the services for which damages were awarded did not answer any of those descriptions. Accordingly, s 315 did not exclude her from claiming the cost of those services provided by her non-family or non-household members. I would dismiss that ground of appeal.

[105] Those were the grounds upon which the appellant made written and oral submissions, and those relevantly encompass all of the grounds in the amended notice of appeal. That is, if Mayne Nickless had succeeded on any of the grounds it argued, it would have succeeded as well on any other grounds of appeal in its amended notice of appeal and about which no submissions had been made. It follows that its appeal should be dismissed.

Cross-appeal

[106] Ms Calvert cross-appealed on the quantum of her economic loss, particularly complaining about the 25 per cent discount for contingencies on past economic loss. The Court was referred to observations by Luntz in *Assessment of Damages for Personal Injury and Death*, (4th ed, 2002), Butterworths, at para. 5.2.8, as authority for the proposition that ordinarily there should be no discounting of past economic loss for contingencies. The essential proposition was that the vicissitudes of life which did happen were known by the date of trial, and counterbalanced by the possibly favourable contingencies in that same period. Likewise there was complaint about the 20 per cent discount for calculated future economic loss. Mr Diehm made the argument respectable, and apparently better than simply a

negotiating point with his opponent, but I respectfully consider that calculation of Ms Calvert's damages, past and future, was very much a matter of swings and roundabouts, and that she had no grounds at all for complaint about the result. I would dismiss the cross-appeal.

***Astley v Austrust Ltd* point**

[107] Mr Diehm's further written submissions, which each party was requested to provide regarding the medical evidence, included the new submission that the finding of liability in Ms Calvert's favour was founded amongst other things on a breach of contract as well as on negligence, and that in accordance with the decision in *Astley v Austrust Ltd*,[22] and the reasoning of Atkinson J in *Karanfilov v Inghams Enterprises* [2002] QSC 141 at paragraphs [91] to [104], there was no basis for any reduction of her damages for contributory negligence, should that be found. Mr Wilson SC's supplementary submissions directed the Court to a clear division of authority[23] in this Court as to whether s 312 of the 1996 Act applied to a claimant's claim in contract, having regard to that decision and to the amendments to the *Law Reform Act* 1995 effected by s 5 of the *Law Reform (Contributory Negligence) Amendment Act* 2001, in force from 7 August 2001. It is unnecessary to pass opinion on the point raised so late by Mr Diehm, because on the trial judge's finding which I would uphold, the question of contributory negligence did not arise.

[108] I would order:

1. The appeal be dismissed and the appellant pay the respondent's costs of the appeal assessed on the standard basis;
2. The cross-appeal be dismissed, and the respondent pay the appellant's costs of the cross-appeal assessed on the standard basis.

[109] **ATKINSON J:** I agree with the reasons for judgment of Jerrard JA and the orders proposed.

---

22 (1999) 197 CLR 1

23 *Appleyard v Maryborough City Council* [2004] QSC 429 at [51]-[52]; *Campbell v CSR Limited* [2002] QSC 266 at [40]-[44]; *Constantinou v Ansett Australia Limited* [2004] QSC 409; and *Karanfilov v Inghams Enterprises Ltd* [2002] QSC 141 at [91]-[104]