SUPREME COURT OF QUEENSLAND

CITATION:	*Carswell v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [2012] QSC 253
PARTIES:	**MARGARET JEAN CARSWELL** (plaintiff) v **CORPORATION OF THE TRUSTEES OF THE ROMAN CATHOLIC ARCHDIOCESE OF BRISBANE** (defendant)
FILE NO:	BS10693/09
DIVISION:	Trial
PROCEEDING:	Trial
DELIVERED ON:	7 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21, 22, 23 August 2012
JUDGE:	Margaret Wilson J
ORDER:	**1. The plaintiff's claim be dismissed and there be judgment for the defendant;** **2. There be no order as to costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – DANGEROUS AND INJURIOUS THINGS, ETC – BREACH OF DUTY OF CARE – where plaintiff was a disability support worker with children with behavioural problems and/or intellectual disabilities – where defendant provided social support services for such children – where plaintiff was employed by defendant to attend a recreation camp – where plaintiff hit on left side of head by soccer ball kicked by one of the children – where plaintiff alleges that her injury was caused because the child was insufficiently supervised – whether the child was under the supervision of his carer at time of incident - whether defendant breached its duty of care TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where plaintiff alleged that the defendant's failure to ensure supervision of the children materially caused her injury – where child was more likely to engage in anti-social behaviour when not supervised – where lack of evidence regarding the child's behaviour at the time of kicking the ball – whether plaintiff has discharged her onus of proving that the defendant's breach of duty materially caused her injury

WORKERS' COMPENSATION – ALTERNATIVE RIGHTS AGAINST EMPLOYER AND/OR THIRD PARTIES AND CONSEQUENCES THEREOF – PREVENTION OF DOUBLE RECOVERY FROM EMPLOYER – EFFECT OF CLAIM OR PROCEEDINGS FOR OR RECEIPT OF COMPENSATION ON RIGHT TO DAMAGES – EFFECT ON QUANTUM OF DAMAGES OF RECEIPT OF WORKERS' COMPENSATION PAYMENTS – where plaintiff alleged to suffer permanent impairment of function and psychiatric problems – whether plaintiff's symptoms were causally linked to being hit by the soccer ball – whether damages recoverable by the plaintiff would exceed the amount of the WorkCover 'refund' pursuant to s 270 of the *Workers' Compensation and Rehabilitation Act* 2003 if she succeeded on liability

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 270, s 275.

Bennett v Minister of Community Welfare (1992) 176 CLR 408, cited.
March v E & MH Stramere Pty Ltd (1991) 171 CLR 506, cited.
Roads and Traffic Authority v Royal (2008) 82 ALJR 870, cited.
Tabet v Gett (2010) 240 CLR 537, cited.
Tame v New South Wales (2002) 211 CLR 317, cited.

COUNSEL: R J Lynch for the plaintiff
A S Mellick for the defendant

SOLICITORS: Gouldson Legal for the plaintiff
McCullough Robertson for the defendant

[1] **MARGARET WILSON J:** Trading under the name "Centacare", the defendant provided social support services including "CHARM Support Services" - a supported accommodation program for children subject to child protection orders. Those children had behavioural problems and/or intellectual disabilities, and required individual care.

[2] Some 25 or 26 children within the CHARM program were taken on a camp between Monday 16 and Friday 20 January 2006 at the Currimundi Active Recreation Centre on the Sunshine Coast.

[3] The plaintiff was employed by the defendant as a disability support worker within the CHARM program. In that capacity she arrived at the camp on the afternoon of Wednesday 18 January 2006. At about 6.00 pm that day she was hit on the left side of the head by a soccer ball which had been kicked by one of the children, JR, and was injured.

[4] In this proceeding she alleges that her injury was caused by the negligence and/or breach of contract of the defendant, for which she claims damages.

Liability: the issues for determination

[5] Counsel agreed that the issues for determination on liability are –

(a) Was there a breach of duty – that is, was JR under his carer's supervision at the time of the incident; and

(b) If there was a breach of duty, was that breach a material cause of the soccer ball striking the plaintiff's head?

The children at the camp

[6] Each child who attended the camp was assigned a carer, the ratio of carers to children being one to one. The defendant stipulated that children were not to be left unattended by their carers while on camp. A child might be left unattended only if the assigned carer had informed another carer of his or her proposed conduct, ensuring constant supervision of all children.

[7] The children varied in age and behavioural problems/disability.

[8] The child assigned to the plaintiff's care was a 10 year old girl who had been sexually assaulted and who suffered reactive attachment disorder. I shall refer to that child as the plaintiff's child.

[9] JR was a very troubled 13 year old boy. The defendant knew that he had been diagnosed as having severe conduct disorder, oppositional defiance disorder, ADHD, attachment disorder, and special behavioural education needs. It knew that he had a documented history of poor impulse control, short attention span, little respect for others, limited capacity for remorse and limited understanding of social values. It knew that his high school had identified him as a safety risk to himself and others, and had expressed the view that his uncontrollable behaviour had escalated throughout the school year. It knew that on one occasion the school had found it necessary to call the police in respect of his dangerous behaviour, and it knew that he had exhibited violent outbursts towards teachers, staff and students. CHARM had reported that the behaviours he had been displaying had resulted in police intervention on multiple occasions, major property damage, risk of self-harm, risk of injury to CHARM staff, and that he did not deal well with change.

[10] The plaintiff knew of JR, and had met him before the camp. She had never been his carer.

[11] Before the camp the children were all provided with a list of rules, and required to sign a written agreement to comply with them.

The staff at the camp

[12] There was a hierarchy among the defendant's workers at the camp – the manager, two co-ordinators, a senior worker for each house in which children were accommodated, and the carers.

[13] There were two co-ordinators – Mr Tony Rivera and Mr Adam Hunt.

[14] There were two teams of carers. The first team attended the camp on Monday, Tuesday and part of Wednesday, and the second team attended for the second part of Wednesday, Thursday and Friday. The plaintiff was in the second team. The carers varied in age and background.

[15] The plaintiff was a 53 year old woman, with lengthy experience as a carer of children, the elderly, young adults with physical and intellectual disabilities, and, since 2004, children and adolescents within the CHARM program.

[16] There were other carers of about her age. They included Mr Ian Patterson and Mr Jeffrey Grant. Mr Patterson was a truck driver for nine years before joining Centacare in November 2002, where he was trained as a support worker. Mr Grant joined Centacare as a carer in September 2002.

[17] Some of the carers were aged in their early to mid 20's. It was common ground that the carer assigned to JR on 18 January 2006 was Antoine Chaghoury. In his opening, counsel for the plaintiff told the Court that Mr Chaghoury was a student at the time, employed by Centacare to care for children on a permanent part-time basis. There was no evidence to that effect, because Mr Chaghoury was in Port Moresby during the trial and an attempt to establish a video link to allow his evidence to be taken was unsuccessful. I am satisfied from the evidence of Mr Patterson and Mr Grant that Mr Chaghoury was one of the young carers.

[18] At the time of the camp, the plaintiff knew of Mr Chaghoury, and knew who he was. But she did not know that he was JR's designated carer on the afternoon the incident occurred.

[19] There was a degree of staff turn-over among the carers, particularly the younger ones.

The incident

[20] There was a grassed area between two accommodation blocks called Bracken and Banksia. A covered, concrete walkway ran along the Banksia side of the grassed area. At the bottom end of the grassed area, there was a building numbered 6 and a covered concrete slab or patio area. The slab projected into the grassed area, adjacent to the lower end of the covered walkway. At its lower end, the covered walkway fed into another path, which ran between the concrete slab and a building called "Leaders". Buildings numbered 7 and 8 were on either side of its upper end.

[21] Shortly before the incident a group of children, including JR, were playing soccer with a number of carers on that grassy area. The "formal" game had concluded, and some of the children, including JR, were continuing to play with the ball when the plaintiff was hit by the ball. Whether Mr Chaghoury was supervising JR at the time is disputed.

The plaintiff's evidence

[22] According to the plaintiff, lots of the children and quite a few of the carers, all males, participated in the game, which she referred to in cross-examination as "the main game". Two goals had been set up, and they were "playing an actual game of

soccer". At the same time, there was a cricket game being played in the area between building 6 and the concrete slab.

[23] The plaintiff said she was standing on the concrete slab watching her child playing in the main game. She moved from the slab on to the covered walkway because she was afraid of being hit by the ball used in the cricket game. She stood on the path adjacent to building 8. The game continued for another 20 minutes, and she supervised her child by watching her from the walkway. At times during the main game, her child would have been 40 to 50 metres from where she was standing. Her child came and went from the game.

[24] She observed carers and children going off the field in the vicinity of Bracken. She did not see the ball being kicked any more.

> "And just from the observation, it looked like to me the game was over.
>
> … I saw other carers walking off. One carer was walking down towards the path where I was standing, so I walked down the path to meet that carer."

She said she walked about two-thirds of the way down the path towards the concrete slab. As she did so, she observed a group of about four children, playing with the soccer ball near building 6.

> "…[T]hey were just having a bit of a kick around themselves. They weren't kicking the ball very far. Sometimes they were throwing the ball to each other. Majority of the time JR had the ball."

[25] The male carer stopped very briefly and told her that they were going to go down to the beach. She turned to the right to say something and was struck on the left side of the head with the soccer ball.

[26] She was in shock, and felt a lot of pain in the area of her jaw and temple. She walked slowly over to the concrete slab area where other carers were standing and lay down on the grass. She lay there with her eyes closed for about 30 seconds. She heard the voices of other carers talking and that of her child. When she opened her eyes, she saw that the other carers were Mr Patterson, Mr Grant and Ms Beaver. She saw the child JR standing by himself on the grass to the left of the concrete slab, near where he had previously been kicking the ball. Mr Patterson was next to her talking; then he went over to JR and spoke to him. She did not see Mr Chaghoury.

[27] Eventually she stood up and the carers helped her move to the path in front of the leaders' quarters, where someone got her a chair. When she was sitting down, Mr Rivera approached her and asked what had happened and whether she wanted ice. Then he went inside the leaders' quarters and returned with ice cubes which she put on her face.

[28] While she was sitting on the chair receiving first aid, JR left the scene. He walked along a grassed area near building 8, and crossed a path, going in the direction of buildings 9 and 10, which were some distance from the slab. He was by himself.

[29] In cross-examination the plaintiff acknowledged that she did not see JR kick the ball, and said that whether he did so deliberately was "debatable". She denied that at the time she was struck she was standing with Mr Patterson. She said Mr Grant was in the concrete (slab) area. She agreed there were other carers in the vicinity.

[30] It was not until about May 2007 that the plaintiff found out that Mr Chaghoury was JR's carer on the afternoon the incident occurred. Nevertheless, she denied in cross-examination that it was only on receiving that information that she turned her mind to whether he was there when she was struck. She maintained that he was not in the area, that he was not near JR, that he was not in the area when she was being given first aid, and that he never came to her aid.

Incident Report form completed by plaintiff

[31] About a week after the incident the plaintiff completed an Incident Report form. It contained provision for various particulars to be inserted, including "Possible Triggers" and "Incident Type – Assaultive? Self harm? Property damage? Personally intrusive?".

[32] Against "Possible Triggers" she inserted "N/A", and against "Incident Type" she wrote "Accidental Injury". She said the incident was witnessed by Mr Patterson, Mr Grant, Ms Beaver and Mr Rivera.

[33] She gave the following description of the incident –

> "I Margaret Carswell was standing still when a ball used in a happening soccer game – (kicked by client JR) hit hard the left hand side of my head whilst in full flight. I did not see the ball coming when it hit me. I stood for a few moments then sat down on the ground. I heard people talking and asking me if I was alright. I could not answer at first possible [sic] due to the shock of the incident and pain in my head, jaw and neck. After a couple of minutes I stood up – staff members Emma , Ian Patterson, Jeff Grant stood around me. They asked me if I was alright. I walked towards co-ordinators quarters when co-ordinator Tony arrived, handed me some ice in a plastic bag, which I used before continued on with duties – (walk to the beach). After that took some panadol. Ian Patterson said he witnessed the ball being kicked then hitting me."

[34] She made no mention of Mr Chaghoury, and did not say that JR was not under supervision.

Notice of Claim form completed by plaintiff

[35] On 21 January 2008 the plaintiff completed a Notice of Claim for Damages in the form approved under s 275 of the *Workers' Compensation and Rehabilitation Act* 2003. This was about eight months after finding out that Mr Chaghoury was JR's designated carer at the time of the incident.

[36] She gave this description of the incident –

> **"**I was employed as a disability support worker with Centacare, working with children with disabilities. The children that Centacare facilitates have problems and Centacare in many cases is a last resort prior to Juvenile detention.
>
> We had been attending a camp on the sunshine coast. Each carer had been assigned one child. This is the case in all activities out side of the residential premises. There were approximately 25 children and 25 carers. As the children have behavioural problems for example ADHD and suffer from other disabilities including intellectual disabilities, they can be violent. The children are generally matched up with a carer and their carers are familiar with them and their behaviour.
>
> If at any point the carer needs time away from the child that they have been assigned to they are required to inform another carer of the situation. Accordingly at no point should a child be left unsupervised.
>
> At approximately 6pm in the evening a soccer game had ended. It was quite late however it was not dark. I was on the side of the soccer field and I was talking to another carer when I was struck on the side of the head with a soccer ball, that was travelling at a high speed. Ian Patterson saw the child in question kick the ball purposely and with force towards my head. The carer that [was] responsible for this particular child was not in the vicinity and no other carer had been assigned the task of supervising him whilst his carer was away from the site.
>
> I had to continue to work after this injury as there was no one else to supervise the child that I had been assigned due to the one on one arrangement."

[37] She did not name the child (JR) or his carer (Mr Chaghoury).

Mr Patterson's evidence

[38] According to Mr Patterson, he was one of four or five staff members (including the plaintiff) standing on a concreted area at about the junction of the covered walkway and the other path.

> "… it was a brilliant afternoon and we were just standing around just going over things for the next few days…"

In the adjacent grassed area children were –

> "…playing a very informal game of football, just ...doing what kids do.
>
> …..it was a very loose, there was no – memory serves me right, because I like football, there was – it wasn't a game of football, it

> was just a bunch of kids kicking the ball, running around, having a great time."

It was neither soccer nor any other code. He was not sure whether they had a soccer ball or a football. There were "15, 20" of them playing. His examination in chief continued –

> "Did something happen?-- Yes. Oh, there would have been four or five of us staff members standing around in a loose circle, and I'm standing next to Margaret and just kabang, that, whoa, and she was on the ground reeling. She was definitely taken out and - yeah.
>
> Did you see the ball kicked?-- No.
>
> Okay. From what direction did the ball come?-- Well, from up high. Up high. It was obviously an up and under kick that went high and just came down.
>
> Now, did you later speak to a boy that was involved in the game?-- The boy that kicked it ran over very apologetic and I - I know that young fella very well and I just said, you know - and he was very, "Oh, gee, I'm sorry, I'm sorry." I said, "Yeah, stand back", because he had three or four mates that were all - and that's the last thing we needed was people in the way of helping Margaret to her feet or to her seat."

[39] The boy who came over was JR. Mr Patterson knew JR because he had previously worked with him, but he did not know who was his carer that afternoon. The name "Antoine Chaghoury" rang a bell, but he could not put a face to the name. He had never worked with him as a co-worker in a house.

[40] The plaintiff sat on the ground for a few minutes and then sat in a chair someone had fetched in the meantime.

[41] Later that day the carers and their children, including the plaintiff and her child, went to the beach. She completed her duties at the camp, working for the balance of that Wednesday, Thursday and Friday.

[42] The plaintiff did not claim worker's compensation benefits until more than eight months later (in early October 2006).

Mr Grant's evidence

[43] Mr Grant was a large man with some mobility problems, who by his own admission could not "partak[e] in such sport as that". He said he was one of five or six carers standing on the edge of the concrete (the covered walkway) talking, while they kept an eye on their "clients". When asked what the clients were doing, he said –

> "There were a group of clients playing sort of footy on the grass, just kicking the ball around. There were probably two or three of the younger carers with them as well."

[44] In cross-examination, he agreed that it was not a formal game of any particular type, and said that while he did not know what type of ball they were kicking, it was probably a soccer ball.

[45] It was put to him in cross-examination that only clients (children) were playing immediately before the plaintiff was struck; he replied that that was certainly possible – he did not recall.

[46] His evidence in chief continued –

> "I had my back to the game at that moment, probably not the whole time, and I just got a few frames of a ball coming over my head and hitting Margaret in the side of the head or shoulder area. Yeah.
>
> And what happened then?-- I think that she staggered and was assisted to sit down somewhere quietly, and recover.
>
> So you didn't see the ball being kicked?-- No.
>
> Do you know how far away from the walkway the persons playing of this mix of kids and carers were when this incident occurred?-- I would suspect probably in the area outside at the end of that building you can see in photo 9. So back further towards the camera than that building on the left.
>
> Okay. Now, do you recall anything happening after the incident, apart from the assistance that was going given to Mrs Carswell?-- Not particularly, no."

[47] In his evidence in chief Mr Grant estimated the number of people playing as between a dozen and 20. But when it was put to him in cross-examination that there were as few as four, he said he could not comment – that he did not know.

[48] He remembered that there was a carer called "Antoine" in those days, but he did not remember whether that carer was at the camp.

Mr Rivera's evidence

[49] Mr Rivera's evidence in chief began on the afternoon of Day 2 of the trial; on Day 3 his evidence in chief continued, followed by cross-examination.

[50] On day 2, he told the Court that he was walking from the Leaders building towards the covered walkway. On his evidence, the plaintiff was on the covered walkway, roughly in the position she had identified in her own evidence. A number of support workers were around the field playing with the children and other support workers were in the concrete slab patio area. He saw the plaintiff hit by a ball "in the back of the neck or the head pretty much". The ball came from the opposite direction from where he had come from.

[51] He saw other support workers running to her aid. He went to the Leaders building to fetch ice. When he returned with the ice, Mr Patterson, Mr Grant and Ms Barbara McGowan were attending to the plaintiff. There were other workers, including Mr

Chaghoury, playing with the children in the field. He said that soon after he arrived with the ice pack he was told that JR had kicked the ball and aimed directly at the plaintiff.

[52] On Day 3 Mr Rivera told the Court that when he got back with the ice, he asked what had happened. JR went to the plaintiff and apologised, saying it was an accident. There was no further investigation of what had occurred. The plaintiff was given the option of leaving if she felt unwell, but she elected to stay until the end of the camp.

[53] Mr Rivera said there was no allegation at the time that the kick was deliberate, and that when on Day 2 he said it was a deliberate kick aimed at the plaintiff, he was confused and that he misinterpreted the question put to him.

[54] He agreed that what was occurring at the time of the incident was not an organised game. There had earlier been a larger more organised game involving children and carers, which had finished.

[55] He disagreed with the suggestion that at the time the plaintiff was hit there were only children playing on the field. But he accepted that in a statement made on 27 March 2008 he had said that a number of children were playing in the grassy field, but made no mention of there being carers on the field playing with them. And he had not mentioned seeing Mr Chaghoury at the scene when the plaintiff was hit. The following exchange occurred during cross-examination –

> "Well, given that you were aware that there was a serious allegation made by Margaret Carswell that the child JR was not being properly supervised, wouldn't that have been a very important fact to mention in your statement, that you actually saw him there?-- I wasn't asked about the question, to be honest, and at the time I didn't think it was.
>
> You didn't think it was relevant?-- At the time.
>
> I suggest, Mr Rivera, you specifically commented on Mrs Carswell's allegations when you said, 'Having read the claimant's response to question 38 of the notice of claim and having discussions with the other witnesses and my own recollection of the event as a witness and my knowledge of the timeframe following the camp, it appears there are inconsistencies between our documented records and the claimant's version of the event.'?-- Mmm.
>
> Right?-- Yes.
>
> You don't say, 'In addition, I saw the carer for JR present supervising him at the time.'?-- Yeah.
>
> Isn't it the case, Mr Rivera, that you've - in your evidence today and yesterday, you've attempted to do your honest best to try and reconstruct what happened over six and a half years ago, but it is all very hazy to you?-- Some of the stuff, yes.

> And the version you gave in your statement in March 2008 is far more likely to be accurate, rather than your recollection as it is now?-
> - To a certain degree."

[56] Mr Rivera made the following concessions during cross-examination –

(a) that he knew JR at the time as a troubled 13 year old child from a difficult background with a number of behavioural issues including attention deficit hyperactivity disorder and poor impulse control;

(b) that he knew that JR did not deal well with change;

(c) that there had been a changeover of carers on the afternoon of the incident;

(d) that in those circumstances it was essential that a child like JR be closely supervised;

(e) that JR was the sort of child who was less likely to engage in anti-social behaviours if he knew he was being closely supervised;

(f) that JR was the sort of child who was more likely to engage in anti-social behaviours if he knew he was not being closely supervised;

(g) that someone who knows a child like JR well can often pick up on cues which indicate escalating behaviour, for example, body language, facial expressions, language used;

(h) that the carer of such a child who recognises one of those cues can step in by saying something simple to the child like "settle down" or perhaps by offering some words of positive encouragement, or by giving the child a stern look;

(i) that such intervention might be all that is needed to turn the child back on to the path of continuing acceptable behaviour;

(j) that the one-on-one care model is adopted for these troubled children because there is a constant mentoring and monitoring presence.

Mr Chaghoury

[57] Mr Chaghoury did not give evidence, but some agreed facts relating to him were admitted as an exhibit. Those facts were –

(i) If called, he would say he was not asked about the incident concerning the plaintiff until 3 April 2008.

(ii) He would say that he had not recollection of the incident then and that he has no recollection of it now.

(iii) He would say that prior to 3 April 2008 (when first asked about the matter) no allegation had been made to him that he had left JR unattended at the camp on 18 January 2006.

(iv) The plaintiff would not submit that any adverse inference should be drawn against the defendant by reason of its not calling Mr Chaghoury.

Was JR under the supervision of Chaghoury at the time of the incident?

[58] The defendant admitted that there was a need to have JR constantly supervised while he was at the camp.

[59] Counsel for the plaintiff submitted that there was only one fact of any substance relating to breach of duty: was Mr Chaghoury supervising JR at the time of the incident? He conceded that if Mr Chaghoury was participating in the game JR was playing when the incident occurred, the defendant had discharged its duty of care, and the claim should be dismissed. But, in his submission, the evidence was completely against a finding that Mr Chaghoury was present.

[60] The plaintiff was adamant that Mr Chaghoury was not present. She said there were only about four children playing the informal game, which followed the formal game in which both children and carers had played.

[61] I accept that the plaintiff was hit with some force, and that while she was not knocked unconscious, she was shaken and stunned by what happened. I accept that JR went over to her and apologised, saying it had been an accident. I accept that Mr Patterson spoke to JR.

[62] Apart from fellow carers and Mr Rivera rallying around the plaintiff to ensure she was all right, nothing was done to investigate. This is understandable, given her remaining at the camp until its conclusion, the manner in which she filled in the incident report form, and her continuing to work for some months,

[63] It was not until she completed the notice of claim form in January 2008 that the plaintiff alleged that JR was unsupervised at the time of the incident. Even then, she did not name the child or his carer, despite having ascertained about eight months previously that it was Mr Chaghoury.

[64] It is somewhat curious that Mr Chaghoury has no recollection of the incident, and that he had none when he was asked about it in April 2008, if he was present. This may be because, JR having apologised, the plaintiff having kept working, and there having been no investigation, he thought no more about it. But given the force with which the plaintiff was hit and the number of people who rallied to her assistance, this seems unlikely. If Mr Chaghoury was there, it is odd that it was Mr Patterson who spoke to JR, and not Mr Chaghoury who was the child's designated carer.

[65] In my assessment, the evidence of Mr Patterson and Mr Grant did not provide any basis for an inference that Mr Chaghoury was present. Mr Patterson said that 15 to 20 children were playing: he made no mention of carers. Mr Grant had no reliable recollection of who was playing. In examination in chief he said between 12 and 20 children and two or three of the younger carers, but when it was put to him in cross-examination that there were only children playing, and that there were as few as four of them, he could not remember. Everyone accepted that there was a one on one system of care in place on the day of the incident. JR went over to the plaintiff after the incident and apologised to her, and it was Mr Patterson spoke to him - despite Mr Chaghoury's being his designated carer. Mr Patterson's and Mr Grant's

recollections of Mr Chaghoury were dim, and neither of them said he was there at the time.

[66] Mr Rivera was the only witness who said Mr Chaghoury was playing with the children at the time of the incident. I found him an unreliable witness. When he recanted from his evidence of having been told at the scene that the kick had been deliberate and aimed at the plaintiff, the explanation he gave was weak and unconvincing. Similarly, unconvincing was his explanation for not having mentioned Mr Chaghoury's being present in the statement he gave in March 2008 - that he did not think it was relevant.

[67] I find that Mr Chaghoury was neither participating in the informal game being played nor in any other manner supervising JR when the child kicked the ball which hit the plaintiff.

[68] In the circumstances, the defendant breached its duty to take all reasonable precautions for the safety of the plaintiff.

[69] Mr Chaghoury breached the duty of care he owed the plaintiff by leaving JR unattended, failing to supervise him, and failing to inform another carer that he was leaving him unattended. The defendant is vicariously liable for Mr Chaghoury's breach of duty.

Causation

[70] Causation is a question of fact on which the plaintiff bears the onus of proof. She must persuade the Court on the balance of probabilities that the failure to supervise JR was a cause of her being struck and injured.

[71] In *March v E & MH Stramere Pty Ltd*[1] the High Court adopted "the common sense" approach to causation. Whether a particular act or omission caused a particular occurrence is to be determined "by applying common sense to the facts" of the case.[2] The High Court held that the "but for" test was neither a comprehensive nor an exclusive test of causation in tort: As Gummow and Kirby JJ observed in *Tame v New South Wales*[3]

> "…value judgments and policy considerations necessarily intrude."[4]

[72] The "but for" test retains a role as a negative criterion of liability in tort. Beazley JA, writing extra-judicially in *Fleming's The Law of Torts*,[5] explained its role when she said –

> "*The 'but for' test*

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1 (1991) 171 CLR 506.

2 *Stapley v Gypsum Mines Ltd* [1953] AC 663 1t 681 per Lord Reid.

3 (2002) 211 CLR 317 at [211].

4 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-413; *Chappel v Hart* (1998) 195 CLR 232 at 238 [7], 243 [24], 255 [62], 269-270 [93], 281-282 [111]; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 43-46, 68-71, 71-75, 111-112.

5 Sappideen and Vines (eds) *Fleming's The Law of Torts* (10th ed, 2011) chapter 9 at [9.40]

> **[9.40]** The 'but for' (sine qua non) test of causation postulates that the defendant's conduct is a cause of the plaintiff's harm if such harm would not have occurred without, or 'but for' it.[6] The 'but for' test thus operates as a negative criterion of causation[7] that eliminates factors which made no difference to the outcome. Thus the causal inquiry is directed to the wrongdoer's breach of duty, and not conduct, which caused harm but which was not wrongful.[8] It is not all negligent conduct that results in legal liability. The defendant's conduct is not a legal cause if the harm would have happened in any event, fault or no fault; for example, a doctor's delay in attending a patient is causally irrelevant if the patient would have suffered the same damage in any event.
>
> When the 'but for' test yields a positive answer, the conduct qualifies as a possible, though by no means necessarily, sufficient cause for legal purposes. To be a sufficient cause, the wrongful conduct must pass an additional test as a 'proximate' or 'legal' cause. In other words, 'but for' is a necessary but not always a sufficient condition of legal responsibility.
>
> The objection is sometimes raised that the question is not what might have happened 'but for' the negligent conduct, but what did happen. This objection fails to understand the role of the 'but for' test as a negative criterion of causation. It is by comparing what has happened with would have happened 'but for' the negligent conduct that enables the decision-maker to determine the effect of the negligent conduct and thus its causal relevance.[9] This is a central notion in tort law: that injury could have been avoided by acting differently."

[73] The present state of the authorities was summarised by Kiefel J in *Tabet v Gett*,[10] where her Honour said –

> "[111] The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. 'More probable' means no more than that, upon a balance of probabilities, such an inference might reasonably be

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6 *Hotson v East Berks* AHA [1987] AC 750; *Tabet v Gett* (2010) 240 CLR 537.

7 In *March v Stramare* (1991) 171 CLR 506, the majority held the 'but for' test was neither an exclusive nor comprehensive test of causation but accepted that as a negative criterion it has an important role to play. See also *Chappel v Hart* (1998) 195 CLR 232 at [93]; *Roads and Traffic Authority v Royal* [2008] HCA 19 at [32], [135].

8 Becht and Miller, *Factual Causation* (1961), 2.2, calls for a "parallel series" by changing the actor's actual conduct just enough to make it conform to the law. Green, "The Rationale of Proximate Cause" (1962) 60 Mich L Rev 543 advocated the contrary.

9 *Chappel v Hart* (1998) 195 CLR 232 at [113]; *Prosser and Keeton*, p 265.

10 (2010) 240 CLR 537 at [111] – [113]

> considered to have some greater degree of likelihood; it does not require certainty.[11]
>
> [112] The 'but for' test is regarded as having an important role in the resolution of the issue of causation, although more as a negative criterion than as a comprehensive test.[12] The resolution of the question of causation has been said[13] to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation[14] and that may require value judgments and policy choices.[15]
>
> [113] Once causation is proved to the general standard, the common law treats what is shown to have occurred as certain.[16] The purpose of proof at law, unlike science or philosophy, is to apportion legal responsibility.[17] That requires the courts, by a judgment, to 'reduce to legal certainty questions to which no other conclusive answer can be given'.[18] The result of this approach is that when loss or damage is proved to have been caused by a defendant's act or omission, a plaintiff records the entire loss (the 'all or nothing' rule)."

[74] It was for the plaintiff to prove that the failure to supervise JR materially caused her injury. She had to prove that the failure to supervise gave rise to a risk, or an added risk, that she would be injured, and that that risk eventuated.[19]

[75] In *Bennett v Minister of Community Welfare*[20] Gaudron J said –

> "… generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had

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11 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6.

12 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515-516 per Mason CJ; at 522 per Deane J.

13 *Fitzgerald v Penn* (1954) 91 CLR 268 at 277; *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 590; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ; at 523 Deane J; at 531 per McHugh J.

14 *Chappel v Hart* (1998) 195 CLR 232 at 256 [63]; *Henville v Walker* (2001) 206 CLR 459 at 491 [98]-[99]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CRL 109 at 128 [56].

15 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ; at 524 per Toohey J; at 531 per McHugh J.

16 *Mallett v McMonagle* [1970] AC 166 at 176 per Lord Diplock; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 642-643 per Deane, Gaudron and McHugh JJ.

17 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 509 per Mason CJ.

18 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 340 per Dixon J, cited in *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 137 [70] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

19 *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [118]; *Chappel v Hart* (1998) 195 CLR 232 at [27] per McHugh J; *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at [137] – [144] per Kiefel J.

20 (1992) 176 CLR 408 at 420 – 421.

> no effect,[21] or that the injury would have occurred even if the duty had been performed,[22] it will be taken that the breach of the common law duty caused or materially contributed to the injury…"

As Gummow, Hayne and Heydon JJ observed in *Roads and Traffic Authority v Royal*,[23] her Honour's reasoning proceeded on the assumption that a chain of causation had been established.

[76] Counsel for the plaintiff submitted –

> "… once a Plaintiff demonstrates that a breach of duty has occurred, followed by injury within the area of foreseeable risk, a prima facie casual connection will be established and the Defendant has an evidential burden to adduce evidence that the breach had no effect or that the injury would have occurred even if the duty had been performed. If there is evidence sufficient to displace the prima facie case, it remains for the Plaintiff upon the whole of the evidence to satisfy the tribunal of fact that the injury was caused by or materially contributed to by the Defendant's negligence."[24]

[77] For present purposes, I shall assume that to be a correct statement of the law. Importantly, it acknowledges the need to establish "injury within the area of foreseeable risk".

[78] What was the risk, or added risk, arising from the absence of supervision? It was that, given the sort of child he was, JR was more likely to engage in anti-social behaviour, or that there would be an escalation in any inappropriate and potentially anti-social behaviour on his part.

[79] The Court may draw inferences only from facts which it finds to be proved to the requisite standard.

[80] There is a dearth of evidence about JR's behaviour at the time he kicked the ball. There is no evidence of anti-social behaviour, or of escalation in misbehaviour. There is no evidence that in kicking the ball he deliberately aimed at the plaintiff. There is no evidence that he acted recklessly in kicking the ball: he may well have simply made a miscalculation. In short, there is no evidence that the identified risk eventuated.

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21 *McGhee v National Coal Board* [1972] 1 WLR 1, per Lord Wilberforce at pp 6,7 where it was said that in the circumstances of that case the defendant bore an onus to that effect. But cf *Wilsher v Essex AHA* [1988] AC 1074, per Lord Bridge of Harwich at pp 1087, 1090, where the issue of causation in that case and the remarks of Lord Wilberforce in McGhee were analysed in terms consistent with an inference arising from the evidence in the plaintiff's case in chief with a resultant evidentiary onus on the defendant. Also note the debate in Canada on a possible shift in the onus of proof, seemingly resolved in the manner indicated by Lord Bridge in *Wilsher* by the Canadian Supreme Court in *Snell v Farrell* (1990) 72 DLR (4th) 289, at p 301.

22 See *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 and *British Road Services Ltd v A V Crutchley and Co Ltd* [1967] 2 All ER 785.

23 (2008) 82 ALJR 870 at [33].

24 Written submissions for the plaintiff, para 14.

[81] For these reasons, the plaintiff has not discharged her onus of proving that breach of duty for which the defendant is responsible was a material cause of the harm she suffered. Her claim should be dismissed.

Quantum

[82] I turn to the assessment of the damages recoverable by the plaintiff should I be wrong in my conclusion on liability.

The plaintiff's symptoms

[83] The plaintiff was struck on the left side of her head, in the area of her face and jaw. She described being in shock and in a lot of pain in the left jaw area. Ice was applied. But she was not disabled from fulfilling her duties at the camp.

[84] She told the Court that her jaw was painful and she suffered headaches, for which she took Panadol. The muscles in the right side of her neck slowly started to become sore. After about a week, the jaw problem all but resolved, and she was left with only very minor symptoms. But her neck became worse: the muscles leading from the neck to the back of the head and those on the right side of her neck across her shoulder area to the point of the shoulder were "sore".

[85] On 8 February 2006 (three weeks after the incident) she consulted her general practitioner, Dr Irene Hides, who was then in a practice at Boronia Park. Dr Hides recorded in her clinical notes that the plaintiff complained of pain in the right side of her neck. On examination, there was no facial tenderness, but the trapezius muscles (which span the neck, shoulders and back) were tense. She prescribed anti-inflammatory medication and heat packs.

[86] The plaintiff returned to the Boronia Park practice for unrelated medical problems on 21 February and 8 March 2006.

[87] By 21 March 2006 Dr Hides had joined another medical practice, at Browns Plains. The plaintiff consulted her on 21 March 2006. According to Dr Hides' notes, the plaintiff's right supraspinatus muscle was still tense from the previous injury. She referred her to physiotherapy, and completed the necessary form to allow her to claim the costs of the treatment from WorkCover, referring to pain on the right side of the neck and muscular strain.

[88] The plaintiff attended Mr David Chiang, physiotherapist, on seven occasions between 28 March 2006 and 4 May 2006. His notes of the attendances are as follows –

> "**28th of March 2006**
> - Initial Consultation
> - Treatment:
>
> · C4/5, C5/6 contract relax mobilisation technique.
> · T1/2, T2/3 unilateral mobilisation.
> · Chin retraction and shoulder retraction exercises.
>
> **4th of April 2006**
> Reporting:

· Getting headaches
· Range of Motion (ROM) – unremarkable.
· C7/T1 level pain.

Treatment:
· C7/T1 level – pulsed ultrasound @ .8w/cm^2 for 5 minutes
· Cervical extension mobilisation technique (SNAGS).
· Postural advice.

6th of April 2006

Reporting:
· Last night a little sore. This morning not too bad.

Treatment:
· No notes entered.

20th of April 2006

Reporting:
· Left side of neck feeling better. Reduced headaches. Reduced ache, sleeping better.

Treatment:
· C7/T1, Right T1/2 level contract relax mobilisation technique.
· Massage.

26th of April 2006

Reporting:
· Been busy, worked 8 days straight.

Treatment:
· T2/3, T3/4 unilateral mobilisations.
· Shoulder retraction strengthening exercises using theraband.
· Massage.

2nd of May 2006

Reporting:
· Occasional morning stiffness.

Treatment:
· Left and Right side nuchal line stretch.
· Stretching to the levator scapulae muscle.
· C1/2 mobilisation.
· Theraband exercise reviewed.

4th of May 2006

Treatment:
· Exercises reviewed.
· Heat pack applied to neck.
· C1/2 mobilisation."

[89] Meanwhile, the plaintiff continued to attend the Browns Plains medical practice for other problems, usually seeing Dr Hides. Dr Hides recorded in her notes of a consultation on 7 April 2006 -

> "Had a bad night with her neck but this morning it was good physio is helping."

[90] There were more attendances about unrelated matters in July, August and September 2006.

[91] On 13 September 2006 the plaintiff saw Dr Deborah Wardle at the Browns Plains practice. The doctor recorded –

> "ONeck did get better with physio
> Now recurred
> Tender insertion trapezius
> Tender over ~ C4-5."

She prescribed Valium, and ordered an X-ray of the neck, and subsequently a CT scan. These expenses were claimed from WorkCover.

[92] The scan revealed significant degenerative changes in the C4/5 disc, which combined to narrow the right C4/5 lateral canal. There was also slight narrowing of the left lateral canal. There was also evidence of disc pathology at the C5/6 and C6/7 levels.

[93] On 3 October 2006 Dr Hides referred the plaintiff to Dr Richard Kahler, neurosurgeon. The plaintiff saw Dr Kahler on 26 October 2006. He recorded her giving him the following history –

> "… She states she was on a camp in January when she was hit in the left side of her face and temple on 18 January 2006, by a soccer ball. She states that this was travelling at some speed resulting in a very sore jaw. Initially, she managed this with Panadol but over the subsequent weeks described increasing right neck pain. This was right-sided neck pain radiating up the suboccipital region and across her right shoulder into her upper arm. She also described some upper scapular discomfort. Her medication was initially of no benefit and she subsequently underwent physiotherapy which provided some initial relief. She continued to have significant ongoing pain despite this. She has also tried anti-inflammatory medication and currently just takes intermittent Panadol."

[94] Dr Kahler arranged an MRI scan. The radiologist, Dr Robert Clarke, reported the following findings –

> "Findings: There is a mild degenerative disc disease in the mid cervical spine with disc dessication at the C3/4, C6/7 levels. There are minor posterior spondylotic disc bulges at C3/4 to C6/7 and associated uncovertebral joint degenerative change resulting in moderately severe right C4/5 foraminal stenosis with potential compression of the exiting right C5 nerves. There is also moderate left foraminal stenosis at this level and mild left foraminal stenosis at C5/6. The remaining neuroforamina are generous in size. There is no spinal canal stenosis and no abnormal signal within the cervical or upper thoracic spinal chord."

The scan did not demonstrate the presence of any injury that could have been suffered as a result of being struck by the soccer ball.

[95] On 3 November 2006 Dr Kahler performed a CT guided right C5 nerve root injection. On review on 9 November 2006 the plaintiff described resolution of her neck pain, shoulder pain and upper arm pain. She still had a buzzing sensation at the back of her head. Based on that, Dr Kahler considered that the impingement of the C5 nerve root was symptomatic.

[96] On 8 February 2007 Dr Kahler operated on the plaintiff, performing an anterior cervical discectomy and interbody fusion, with decompression of the exiting right C5 nerve root.

The issue for determination

[97] At trial the plaintiff had a permanent impairment of function and psychiatric problems relating to her pain experience, at least in the nature of an adjustment disorder. She had not returned to work since October 2006, apart from a very short period of part-time light clerical work a couple of months after the surgery.

[98] Counsel for the defendant told the Court that the parties had agreed that the issue for the Court's determination was whether the soccer ball striking the plaintiff's head had caused the C5 nerve root compression that resulted in the surgery performed by Dr Kahler. If that question were answered "no", there should be judgment for the defendant, because the modest damages to which the plaintiff would be entitled would not exceed the amount of the WorkCover "refund" pursuant to s 270 of the *Workers' Compensation and Rehabilitation Act* 2003.

[99] On the evidence, the C5 nerve root compression clearly resulted from degenerative changes in the cervical spine rather than from the soccer ball striking the plaintiff's head. Such nerve root compression develops over a prolonged period. It may remain asymptomatic, or it may become symptomatic quite suddenly, even in the absence of trauma.

[100] On the assumption of a temporal connection between the soccer ball incident and the onset of symptoms, Dr Kahler was of the view that there was a clear relationship between the incident and the need for surgery. But he conceded in cross-examination that the arm symptoms, which he attributed to the pinched C5 nerve root, were not directly related to the incident if they did not begin until several months after the incident.

[101] The real issue for determination emerged during oral submissions – namely, whether the symptoms which led to the plaintiff's having surgery in February 2007 and those she experienced thereafter were causally linked to the hit with the soccer ball. The resolution of this issue turns on the Court's finding as to the history of her symptoms.

Discussion

[102] The plaintiff told the Court that before she saw Dr Hides for the first time she had pain in her neck up into the back part of her head and down the right side and across the shoulder to the point of the shoulder. The plaintiff did not complain of neck or related symptoms at the consultations on 21 February 2006 and 8 March 2006. Dr Hides recorded that on 21 March 2006 she had muscular stiffness, and completed a Workcover medical certificate in which she referred to pain on the right side of the

neck and muscular strain. On 7 April 2006 the plaintiff's complaint was about her neck.

[103] The plaintiff told the Court that the physiotherapy helped her symptoms, but that they never completely abated. In fact, she said, they got worse until she returned to the general practitioner in September 2006. However, after last seeing the physiotherapist on 4 May 2006, she did not seek further relevant treatment until she saw Dr Wardle on 13 September 2006. The history recorded by Dr Wardle was that the neck had got better with physiotherapy, but had "now recurred".

[104] Neither the general practitioners' notes nor those of the physiotherapist record the plaintiff's making any complaint of pain radiating into her arm before she saw Dr Kahler on 26 October 2006.

[105] In September 2011 the plaintiff attended Dr Gavin Ballenden, an occupational physician retained by the defendant. The history she gave Dr Ballenden was substantially the same as that recorded by the general practitioners and the physiotherapist. She told him that she initially experienced pain on the left side of her neck and in the back of the head. Some weeks later, the right side of the neck became sore, affecting the top of her right shoulder. The pain went away, and recurred in September 2006, some five months later.

[106] I do not think that the plaintiff deliberately gave false evidence about the history of her symptoms. But I do not think her testimony was accurate or reliable. I do not accept that her symptoms did not go away but got worse until she returned to the general practitioner. Nor do I accept that she experienced arm pain before October 2006. I prefer the chronology as revealed by the general practitioners' and physiotherapist's records.

[107] The plaintiff's evidence as to the history of her symptoms was put to Dr Alison Reid, a neurologist. When asked whether that history could be linked to the soccer ball incident, Dr Reid told the Court that, even if she had apparently been asymptomatic before that incident, it was not really consistent with the natural history of cervical degenerative disease to suggest that the symptoms were due to one particular event on one particular day at one point in time. She conceded that the incident had caused an aggravation of the underlying condition, but did not accept that it was the only event which had ever had an effect on her neck.

[108] Dr Michael Coroneos, another neurosurgeon, strongly disagreed with Dr Kahler's opinion about the appropriateness of the surgery he performed. However, it is not necessary for me to resolve that conflict.

[109] Nor is it necessary for me to consider the psychiatric evidence.

[110] I am satisfied that the arm symptoms did not emerge until some months after the soccer ball incident. I am satisfied that that incident resulted, at most, in a minor aggravation of pre-existing degenerative change. The symptomatology that led to the plaintiff's having surgery in February 2007 was not causally linked to her being hit with the soccer ball.

Conclusion on Quantum

[111] I find that the symptoms which led to the plaintiff's having surgery in February 2007 and those she experienced thereafter were not causally linked to the hit with the soccer ball.

[112] As the damages recoverable by the plaintiff would not exceed the amount of the WorkCover "refund", even if the plaintiff succeeded on liability, the claim should be dismissed.

Costs

[113] The defendant does not seek costs.

Orders

[114] I order –

(i) that the plaintiff's claim be dismissed and there be judgment for the defendant;

(ii) that there be no order as to costs.