SUPREME COURT OF QUEENSLAND

CITATION:	*Arnold v Tilecorp Pty Ltd* [2012] QSC 321
PARTIES:	**DAVID BRUCE ARNOLD** (plaintiff) **v** **TILECORP PTY LTD ACN 010 868 943** (defendant)
FILE NO/S:	BS 4900 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	15-17 October 2012
JUDGE:	Martin J
ORDER:	**The claim is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where plaintiff claims he injured his back lifting a box of tiles from a pallet over a balustrade – whether defendant liable for plaintiff's injury TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – GENERAL - where plaintiff claims he injured his back lifting a box of tiles from a pallet over a balustrade – whether defendant liable for plaintiff's injury – if so, quantum of damages for plaintiff's injury
COUNSEL:	R Myers with B Munro for the plaintiff A Mellick for the defendant
SOLICITORS:	Shine Lawyers for the plaintiff Gadens Lawyers for the defendant

[1] On 26 May 2009 the plaintiff was working as a tiler for the defendant at the Robina Town Centre. He claims that he injured his back when he lifted a box of tiles from a pallet. Both liability and quantum are in issue.

Liability

[2] The plaintiff was the defendant's employee. He, and others, were laying tiles on an area referred to as the Promenade at the Robina Town Centre. The Promenade is a large public area – about 240 square metres – designed to accommodate seating for cafes abutting the Promenade and for general access to the centre. It has a sweeping curved edge along which a wide ramp is placed to provide access to and egress from the Promenade.

[3] By 26 May the plaintiff had been employed on the site for about four weeks. He had been working on various jobs, but was assigned to the Promenade when wet weather prevented work on other areas. He said that he was injured on the second day of working on the Promenade. Witnesses called for the defendant said he had been there for at least four days, but little turns on that.

[4] There were two types of tiles being laid – grey border tiles and black in-fill tiles. On 26 May the plaintiff was laying the black tiles. Each of those tiles was 600 millimetres x 300 millimetres x 12 millimetres. They were provided in boxes weighing about 25 kilograms. A pallet of each colour of tiles had been placed on the Promenade for use by the tilers. There were two other tilers also working on the Promenade.

[5] The plaintiff said that on the morning of 26 May he noticed that the supply of black tiles was running low and asked a supervisor, Harry Himberg, to obtain more. He says that the tiles were delivered by being placed on the ramp.

[6] That broad description of events was not in dispute. The differences between the parties are on matters of detail and are significant. On the question of liability, the plaintiff gave evidence and the defendant called Mr Himberg, Anthony Blake (another supervisor), Clinton Patmore (a tiler also working on the Promenade) and Heath Mills (a labourer and safety officer).

[7] In evidence in chief the plaintiff was asked to show on a plan of the area being tiled where certain items were placed. For 25 May (Ex 9), he drew a sketch showing that there was one pallet of black tiles and one pallet of grey tiles at what was accepted to be the northern end of the Promenade. He showed that there was, at the northern and southern extremes of the area being tiled, white tape which was stretched across both ends as a means of alerting people that they should not walk in that area. Between the Promenade and the ramp, he identified what he called a "scaffold barrier".

[8] The plaintiff was then asked to insert onto a plan of the same area the details for 26 May (Ex 11). Those details differ from what he said was present on the preceding day in two important respects. First, there was not a pallet of black tiles on the Promenade. Secondly, a cherry picker had been parked at the southern end of the ramp which was the end closest to where the ramp met the level portion of the Promenade. Around the cherry picker was a barricade made up of star pickets from which was suspended an orange plastic mesh. That barricade extended across the ramp from near the top of the ramp to about half way down the ramp. The plaintiff's evidence on this point is important. He said:

> "…I noticed the Manitou, which is like a forklift type truck thing, coming through an area that was barricaded off, adjacent to the ramp - this was barricaded off because there was a cherry picker type work platform there, your Honour, doing work overhead on the roof. The guy driving the Manitou - the barrier was only made of star pickets and orange and plastic mesh. He pushed down the star pickets so that the barrier collapsed, drove the Manitou through and forked the pallet of black tiles up onto the ramp."

[9] From that evidence and from the diagram made by the plaintiff, it must be the plaintiff's evidence that the person delivering the tiles deliberately put them into an area inside the cherry picker barricade. That area later became called an "exclusion zone" which various witnesses referred to as being an area generally created to prevent people from getting near machinery which might create a danger.

[10] The plaintiff did not see any other person obtain any tiles from the pallet which he said was placed on the ramp. He said that he saw one of the other tilers go over to the pallet but, apart from finding a Stanley knife there later, could only assume that somebody had cut the straps on the tiles. He was asked what he did and he gave this answer:

> "Well, I just thought well, how did he get the tiles? I thought he must have just reached over the rail and grabbed them, so I proceeded in that manner and did the same thing and retrieved a box of tiles."

[11] The rail to which the plaintiff was referring was a rail which he said was constructed along the edge of the Promenade and was made up of scaffolding poles and tubes. He said that the top of this scaffold was about 750 mm above the surface of the Promenade. He recalled that along the length of that barricade was hung orange plastic mesh.

[12] He said that at about 7.30am he went over to the pallet on the ramp, slid a box of tiles across the top of the pallet so he could get his hands underneath it and lifted it in a manner where he "sort of swung … and lifted it up over the rail". He repeated this manoeuvre at about 10.30am. At 12 o'clock he had to retrieve another box. He said:

> "I did the same thing. I reached over, slid the box across, lifted the box and as I lifted box [sic] I felt something in my back go pop, and a pain went down my right leg, so I just put the box down and I just stood there like, waiting for this pain to subside."

[13] He waited some 10 or 15 minutes until he realised that the pain was not going away. He then collected his tools and walked to the Bovis Lend Lease safety office. He was asked by the safety officer what happened and he told him that he had been lifting a box of tiles.

[14] The work which the plaintiff said was being done by the cherry picker was described as being with respect to some mesh which appears above the roof of the Promenade and which appears to contain some form of advertising or notice boards. It is clearly shown in Ex 8.

[15] The evidence given by the witnesses for the defendant was quite different. Those witnesses said that there was no white tape at the northern and southern ends. Rather, there was plastic orange mesh set up to prevent people inadvertently walking across the tiles. They said that there was no form of scaffolding barricade along the edge of the Promenade, rather, a rail supported by steel stanchions (as appear in Ex 8) was already in place save that the steel cabling had not been tightened. All of those witnesses said that there was no cherry picker in place and that there was no form of exclusion zone. Further, rather than the pallet of tiles being towards the southern end of the ramp, the defendant's witnesses said that the pallet was further along the ramp as it descended towards the northern end.

[16] The presence or not of the exclusion zone surrounding the cherry picker is of critical importance to the plaintiff's case. He said that the only thing that was preventing him from walking to the pallet on the ramp and using safe manual handling techniques to retrieve a box of tiles was the exclusion zone around and near the cherry picker.

[17] The plaintiff did not call any other person to give evidence about the existence of the cherry picker or any exclusion zone. He did not call any evidence from Bovis Lend Lease (or any other contractor on the site) which might have related to the work being done above the Promenade and when it was done. He did not call any evidence concerning the existence of the scaffolding barricade around the Promenade or when it was replaced by the final rail and stanchion set up. Against his evidence there is the evidence of Mr Himberg, Mr Blake and Mr Patmore, each of whom said that the steel rail and stanchion set up was in place, and that there was neither a cherry picker nor an exclusion zone there at the relevant time. Merely being outnumbered by other witnesses does not, of itself, determine whether or not a version given by a witness should be accepted, but it is a factor to take into account.

[18] I turn now to the other issues of credit upon which a decision can be made as to who should be accepted on these critical points.

[19] At various times during the history of the pleadings in this matter, the plaintiff has claimed the following: "The plaintiff's spinal injuries and the impacts they have wrought in his life and to his lifestyle have caused the plaintiff to suffer a Chronic Adjustment Disorder." That claim was deleted in at least two of the amended pleadings but was reinstated in the second further amended statement of claim filed on 22 June 2012. That claim was then abandoned at trial. It had been made despite the fact that he had never sought psychiatric treatment or had any psychiatric medication. As a result of the claim being made, the plaintiff's solicitors arranged for the plaintiff to see Dr Byth, a psychiatrist, and the defendant's solicitors arranged for the plaintiff to see another psychiatrist, Dr Whiteford.

[20] Even though the claim for psychiatric injury was abandoned, evidence was opened for the plaintiff that his mother would be called to speak of her knowledge of her son over the years – the periods of time that he spent with her – his work ethic and whether he manifested any symptoms that might have been of relevance in limiting his economic capacity in any way. It was said in the opening:

> "Going to a psychologist over a period of years would sometimes be seen as giving rise to an indication that the person had some problem

> which might impact on earning capacity and she'll give evidence of his behaviour and her observations during that period.

The plaintiff's mother was not called.

[21] Evidence was led from the plaintiff that in about the year 2000 he was convicted of armed robbery. He was using illicit drugs at around this time. He said that he was not actually armed but just had his finger in his shirt. The plaintiff said that he received a four year sentence, with a recommendation for parole after nine months. The fact that someone has committed an offence such as armed robbery does not, of itself, mean that he is a person who should not be believed. An act of violence of that nature though is something which I will take into account in assessing his credit. It is relevant, also, to take into account the fact that when he was released on what he called "home detention" he started using drugs again, was breached for that and returned to prison. He was given another period of "home detention" towards the end of his sentence but he consumed alcohol and was again returned to jail. He served his entire period of four years without any early release.

[22] There was another incident about which he gave evidence where he became involved in what he called "a domestic argument with a woman" on New Year's Eve in 2006. He was convicted with respect to an offence which he did not identify and received a 12 month suspended sentence. He was required as part of that suspended sentence to attend counselling sessions.[1]

[23] As to the issue of the various barricades of which the plaintiff spoke, it appears that the first time these were made public was in the statement of claim filed on 13 May 2010. In that document it is pleaded that "the work area was bordered along its entire length by a balustrade … which was constructed of metal supports with horizontal wires running its length". That is consistent with the defendant's evidence but the allegation was gradually amended through the various versions of the statement of claim until it was finally alleged that the Promenade was "bordered by a barricade consisting of metal scaffolding poles comprised of vertical poles connected via brackets to a horizontal pole attached near their top" and with orange mesh hanging from the top horizontal scaffolding pole. It was alleged, and the plaintiff gave evidence, that the horizontal pole was approximately 750 mm higher than the floor level of the Promenade.

[24] The plaintiff gave evidence (not supported by anyone else) that he was a very competent, very experienced and very good tiler. He agreed that he knew about the requirements for safe manual handling. Yet his explanation for doing what he did, apart from his evidence about the existence of the two types of barricade, was that he thought that some someone else must have retrieved tiles in the manner in which he said he retrieved tiles. He was very reluctant to accept that he could have sought direction from or assistance from a supervisor. In cross-examination, when asked if it had occurred to him to talk to the supervisors about how unsafe the method being used was, he said that there were no supervisors around. He eventually accepted that there would possibly have been someone within about 200 metres that he could have spoken to. I accept the evidence of the two supervisors that they were constantly moving about the worksite and that they would have moved through the

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[1] More details of these offences were set out in the written submissions provided by counsel for the plaintiff. I was not directed to any evidence which supported those assertions. I have ignored them.

area in which the plaintiff was working on a number of occasions during that particular morning.

[25] For a person who claimed that he was an experienced tiler and familiar with safe manual handling techniques, he did not, when he reported the injury, give any details other than that he was picking up a box of tiles. He gave no explanation to the safety officer about where the pallet was or that there was an exclusion zone or that the ramp was barricaded off. He agreed that somebody from the defendant's office had rung him the following day and that he did not say anything to that person about the barricade or cherry picker.

[26] The plaintiff was focussed when giving his evidence in chief but became overly evasive when answering cross-examination about a few issues. The plaintiff called Mr Justin O'Sullivan as an expert ergonomist to give evidence about the dangers of lifting as the plaintiff said he did and to detail how the defendant could have taken steps to avoid the situation described by the plaintiff. He provided two reports. The first was only in February this year when he went to the site with the plaintiff. He again visited the site with plaintiff in August. The plaintiff claimed to be unable to remember what he told Mr O'Sullivan on the first occasion and at one stage claimed not to recall the second meeting at all. The plaintiff gave different versions of where the pallet was to Mr O'Sullivan in those two meetings. This, along with other variations of the plaintiff's story over time, was explained by Mr Myer as being nothing more than that the plaintiff's recollection improved. I accept that recollections can become better. In this case, however, based on the plaintiff's answers and reaction to questions, I formed the view that the plaintiff was not being frank about his recollection of his discussions with Mr O'Sullivan.

[27] I turn now to the evidence given on behalf of the defendant. It was said against the defendant's witnesses that they were uncertain as to their recollection and that they had not been required to recall the events of that day until some years after the event. That is explained, at least in part, by the fact that no details of the alleged cause of the injury were provided until this action was commenced. There were inconsistencies in the evidence given by the two supervisors and the tiler called by the defendant. That is, in part, no doubt due to the lapse of time since the event and that fact that they were not required to recall the events until some considerable time after 26 May.

[28] Importantly, the evidence of the defence witnesses was relevantly consistent as to the non-existence of an exclusion zone, that a cherry picker was not in place, and that the rail and stanchions which appear in Ex 8 were in place on the relevant day. On those issues they were firm in their recollection. They were also present at that site both before and after the accident for some time. It is also relevant, as one of the witnesses pointed out, to observe that if there was work being done above the Promenade as claimed by the plaintiff, then the exclusion zone would have necessarily carried over and included that part of the Promenade which was being tiled.

[29] I have come to the conclusion that the plaintiff's version of events is not to be relied upon. I do not accept that there was a cherry picker in place, or that there was an exclusion zone, or that the rail and stanchions were not in place at the relevant time. I have come to this conclusion after taking into account all of the factors set out above.

[30] These findings are fatal to the plaintiff's case for two reasons. First, the incident he described could not have occurred because the rail and stanchions were in place. The existence or otherwise of the 750 mm high scaffolding barricade is vital for the plaintiff's case because he accepted that if the rail as shown in Ex 8 was in place on 26 May then as he said "… you would not be able to lean over [and] grab a box of tiles".

[31] Mr Myers sought to argue that the mere presence of the pallet on the ramp would constitute a breach of the defendant's duty to the plaintiff on the basis that it was well known that workers would take the "easy" way of obtaining the tiles by leaning over the "barricade" to take them. In the light of the finding that the full height rail was in place and the plaintiff's evidence that it would prevent such an action, this submission must be dismissed.

[32] Secondly, the existence of the "exclusion zone" is a key element in the plaintiff's case. In cross-examination he gave this evidence:

> "If the barricade that you say was there had not been there, what would you have done?-- If it wasn't there?
>
> Yes?-- I would have gotten closer to the pallet and lifted the box of tiles as close to my body as I could.
>
> All right. And you would have applied the safe manual handling techniques that you were aware of?-- Correct.
>
> So you wouldn't have leaned over and down to retrieve a box of tiles?-- No.
>
> You would have walked to the pallet?-- Yes."

[33] In other words, as there was nothing to prevent him from walking to the pallet, he could have done so and could have used a safe lifting technique.

[34] The plaintiff's case depended upon the presence of:

(a) the barricade as he described it; and
(b) the exclusion zone.

In their absence, I find that the plaintiff did not injure his back in manner alleged and that he has not demonstrated any negligence on the part of the defendant. The claim is dismissed.

[35] If I have erred in the findings above, then I will proceed to deal with the issue of quantum.

Damages

[36] The first medical assessment of the plaintiff was carried out by Dr Day in November 2009. His opinion at that time was that the plaintiff had suffered an aggravation of a pre-existing severe lumbar spondylosis. He said that there was evidence that Mr Arnold had pre-existing severe multi-level degenerative change in the lumbar spine from the L1/2 disc to the L4/5 disc. He said that the pre-existing

spondylosis was severe and likely to result in significant loss of range of movement in the lumbar spine. He would not assess any level of impairment at that stage because he regarded the plaintiff's then condition as not stable and stationary.

[37] Dr Day examined the plaintiff again in March 2010. He formed the view that the condition was stable and stationary. He said that the plaintiff's pain was moderate in level and that he felt more comfortable than he did in November 2009. He said the plaintiff still had moderate symptoms. He was told by the plaintiff that he had severe difficulty lifting anything and moderate difficulty sitting for any period of time. He formed the view that as a result of those, the plaintiff would find it difficult to obtain work as a tiler. As the plaintiff was unable to lift anything heavy, he was also not suited to work in occupations similar to that of a tiler. He expressed the view that the plaintiff had a 7 per cent whole person permanent impairment from the lumbar spine condition.

[38] In June 2012 Dr Day provided some answers to questions posed by the plaintiff's solicitors. He said that he thought it unlikely that the plaintiff would return to any sort of manual work in the future. Dr Day also referred to an issue that arose as a result of an opinion expressed by Dr McPhee, the specialist engaged by the defendant to examine the plaintiff. I will deal with that after I have set out Dr McPhee's opinions.

[39] Dr McPhee examined the plaintiff in July 2009. He was of the opinion that there were longstanding degenerative changes throughout the lumbar spine which had existed prior to May 2009. The extent of the plaintiff's degeneration is substantially greater than might be anticipated when compared with an individual of a similar age. He said that the incident on 26 May resulted in a strain of the lower back with aggravation of pre-existing lumbar spondylosis and that although there was complaint of right leg pain, there was no objective evidence of radiculopathy.

[40] Dr McPhee again examined the plaintiff in March 2010. He came to the conclusion that the plaintiff was suffering from a whole body of impairment of 5 per cent.

[41] There was some difference between the two experts on the issue of whether or not the plaintiff would have suffered the same degree of impairment in any case because of the pre-existing condition of his back. The material provided in evidence allowed for some level of prognostication but not enough to say with any relevant degree of satisfaction that the plaintiff would have been in the same position he is now whether the alleged incident had occurred or not. Dr McPhee also said that the fact that the plaintiff has back pain is entirely consistent with the high end degeneration that appears in the radiology material and that the back pain could have been triggered by a lifting event as he describes, or by a trivial insult, or it could have been of spontaneous onset.

[42] The plaintiff was 43 years old at the time of the alleged incident and is now 46. He gave evidence that the pain in his lower back is always present but is aggravated by sitting or standing for long periods, walking for extended periods, walking up hills or stairs, driving for long periods, or bending and lifting and also by cold weather. One of his favourite activities prior to May 2009 was surfboard riding. He still engages in that to a limited extent but the pain prevents him from engaging anywhere near the extent he did previously.

[43] He is now engaged in study for a Bachelor of Arts degree from the University of the Sunshine Coast. He is undertaking a major in creative writing and would like to do an honours course or a doctorate. He had hoped to become a teacher but, given his criminal record, that is now most unlikely. He has also given considerable thought to work as an editor or a journalist or in creative writing. He said that his results were good apart from some periods when he had been subject to external distractions. He says that he has difficulties with concentration and that the pain does distract him. Taking into account all of the matters advanced on behalf of the plaintiff, an award of general damages in the sum of $45,000 is appropriate.

[44] For past economic loss the plaintiff seeks to work on the basis that he would have continued to receive income at a level which he had obtained from 1 January 2009 to 26 May 2009, that is, an average net weekly sum of $929. Prior to that five month period, the plaintiff had been earning in the year ended June 2006 an average of $895 net per week; in the year ended June 2007 an average of $549 net per week; and in the year ended June 2008 an average of $520 net per week. It is appropriate in this case, given the circumstances of the plaintiff, to use those figures to arrive at an average to allow for the peaks and troughs of his income. A figure of $725 net per week is appropriate. That should be discounted by 20 per cent for the various contingencies together with the inherent vulnerability of the plaintiff to back problems. Interest on 40 per cent of that sum at 5 per cent for 3.5 years should be awarded.

[45] With respect to future economic loss, it is appropriate to award a sum based on the same income for two years, being the time it will take the plaintiff to complete his studies with that amount discounted by 25 per cent. There is no certainty as to what the plaintiff might be able to earn once his studies have concluded. The amount a writer can earn extends from nothing to immense amounts. I was not provided with any evidence which would allow me to make any form of estimate as to the possibilities of likely income for Mr Arnold. He cannot return to work as a tiler or do any similar type of physical work. He will be impeded in any work he does by the need to move his position from time to time. He would have faced the prospect of pain of a similar nature occurring at some time in the future due to his pre-existing back condition. The plaintiff contends that I should adopt an ongoing loss of $430 net per week until age 65. That, of course, assumes an earning capacity prior to the incident of $930 a week. I have already determined that the appropriate figure is $725 a week. The plaintiff submits that he will have an earning capacity of approximately $500 a week. I will use that as a basis upon which to assess this head of damage. That loss should be assessed on the basis that it will exist for 19 years, and deferred for two years. It should then be discounted by 30 per cent for contingencies.

[46] Past special damages are agreed at $11,426.01. Some receipts were tendered for treatment recently received by the plaintiff. No evidence was led as to any connection between those receipts and the incident the subject of the plaintiff's claim. I will allow future expenses in the sum of $5,000 with respect to necessary sessions of Pilates, medical expenses and pharmaceutical expenses.

[47] The parties are to agree on the proper calculation of damages based upon these findings.

30 October 2012

[48] Pursuant to the direction given to the parties they have, based on the findings I made, agreed that this schedule properly reflects those findings with respect to damages.

DAVID BRUCE ARNOLD v TILECORP PTY LTD
DAMAGES CALCULATED AS PER REASONS FOR JUDGMENT

1	General Damages	$45,000.00
2	Interest on $22,500.00 @ 2% p.a. for 3.5 years	$1,575.00
3	Special Damages – agreed	$11,426.01
4	Interest on $500.00 @ 5% p.a. for 3.5 years	$87.50
5	Future/Recurring Expenses	$5,000.00
6	Fox –v- Wood Damages	$3,303.00
7	Past Economic Loss: $725 net per week for 3.5 years from 26/05/09 to 25/10/12 = $131,950.00 discounted 20%	$105,560.00
8	Interest on $60,741.54 ($105,560.00 less benefits received $44,818.46) @ 5% p.a. for 3.5 years	$10,629.77
9	Past Superannuation @ 9%	$9,500.40
10	Future Economic Loss:	
	$725.00 net per week for 2 years (99.4) discounted 25% is $54,048.75	
	Add $225.00 per week for 19 years, deferred 2 years (586.2), discounted 30% is $92,326.50	$146,375.25
11	Future Superannuation @ 9%	$13,173.77
12	Gross Damages	$351,630.70
13	Less WorkCover refund	$26,125.21
13	Net Damages	$325,505.49