SUPREME COURT OF QUEENSLAND

CITATION:	*Weaver v Endeavour Foundation* [2013] QSC 93
PARTIES:	**CHRISTINE ANNE WEAVER** (plaintiff) **v** **ENDEAVOUR FOUNDATION (ACN 009 670 704)** (defendant)
FILE NO/S:	S552 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON	12 April 2013
DELIVERED AT:	Rockhampton
HEARING DATE:	12, 13, 14 March 2013.
JUDGE:	McMeekin J
ORDERS:	**Judgment for the plaintiff in the sum of $369,000.02**
CATCHWORDS	TORTS – NEGLIGENCE – LIABILITY – where employer is responsible for outsourcing work - whether employer subjected employee to unsafe workplace – whether the injury was reasonably foreseeable – whether reasonable action was taken TORT – CAUSATION – where plaintiff was subject to prior injury – whether the injury the subject of this matter caused the injury TORT – QUANTUM – where numerous conflicting expert opinions– where the extent of the injury was in issue – whether there was significant physical and psychiatric impairment – whether future care should be awarded *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

Anderson v. Mt Isa Bastketball Association Incorporated [1997] QCA 340

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301

Colmark (Australia) Pty Ltd v Hall Unreported - Appeal No 7507 of 1997 - 27 April 1998, 26 May 1998

Da Costa v Cockburn Salvage & Trading Pty Ltd (1970) 124 CLR 192

Driver v Stewart & MMI [2001] QCA 444

Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville [1997] 1 Qd R 29

Foster v Cameron [2011] QCA 48

Griffiths v Kerkemeyer (1977) 139 CLR 161

Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18

Hegarty v Queensland Ambulance Service [2007] QCA 366

Hill-Douglas v Beverly [1998] QCA 435

Hopkins v WorkCover Qld [2004] QCA 155

Jones v Bartlett [2000] HCA 56

Lusk v Sapwell [2011] QCA 59

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638

Minchanski v Swanray No 110 Pty Ltd [1995] QCA 314

McLean v Tedman (1984) 155 CLR 306

O'Connor v Commissioner for Government Transport (1954) 100 CLR 225

Paris v Stepney Borough Council [1951] AC 367

Phillis v Daly (1988) 15 NSWLR 65

Purkess v Crittenden (1965) 114 CLR 164

Queensland University of Technology v Davis Unreported - Appeal No 3691 of 1997 - 13 November 1997, 5 December 1997

Rasic v Cruz [2000] NSWCA 66

Seage v New South Wales [2008] NSWCA 328

Sharman v Evans (1977) 138 CLR 563

Smith v Topp [2003] QCA 397

Smith v Broken Hill Pty Co Ltd (1957) 97 CLR 337

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

Thompson v Woolworths (Qld) Pty Ltd (2005) 221 CLR 234

Vairy v Wyong Shire Council (2005) 223 CLR 422

Van Gervan v Fenton (1992) 175 CLR 327

Vozza v Tooth & Co Ltd (1964) 112 CLR 316 at 319

Watts v Rake (1960) 108 CLR 158

Waugh v Kippen (1986) 160 CLR 156

Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL:	G Crow SC and with him J Ahlstrand for the plaintiff
	RAI Myers for the defendant
SOLICITORS:	Macrossan & Amiet Solicitors for the plaintiff
	MVM Legal for the defendant

[1] **McMeekin J:** Christine Anne Weaver claims damages for injuries alleged to have been suffered on 1 May 2008 in the course of her employment with the defendant, the Endeavour Foundation.

[2] Both liability and quantum of damages are in issue.

[3] The plaintiff was born on 10 January 1959. She is presently aged 54 years. She was 49 years old at the time of injury. At the material time the plaintiff was employed by the defendant as a senior individual funding services manager.

LIABILITY

Background

[4] The defendant, as is well known, provides employment for persons with intellectual disabilities. Sometimes their clients become agitated and even violent. The defendant has a duty to ensure that reasonable steps are taken to protect their

employees from acts of aggression from clients. To discharge that duty the defendant had engaged persons to train certain of their employees in techniques to deal with aggressive people in a variety of situations. The plaintiff was one such employee and she had been trained by Paul and Claire Sheehan. The techniques are taught in a course known by the acronym "PART" – Professional Assault Response Training.

[5] Those employees so instructed then become trainers in those techniques. The plaintiff was acting as such when she says she was injured.

[6] One technique that is taught is known as the "Back Steps" manoeuvre. The manoeuvre is intended to be adopted when a worker is confronted by an aggressive client and must retreat. The trainee is expected to walk backwards on the balls of the feet in a slightly crouched position while keeping their attention directed not to where he or she was going but ahead of them towards the aggressor. When attempting to demonstrate the manoeuvre the plaintiff fell onto her buttocks and back on a carpeted surface and suffered the injuries which are the subject of these proceedings.

[7] By 1 May 2008 the plaintiff had taught the various manoeuvres involved in PART on six prior occasions without incident. There is no evidence that she was not properly trained in the sense of understanding the manoeuvres expected.

[8] Having said that, it is relevant to note that the plaintiff was at that time a middle aged lady and hardly athletic. She stands 152 cms or five feet tall. She weighed around 96kgs at the time.[1] Doctors have described the plaintiff as "significantly overweight" and "morbidly obese". Not surprisingly her own perception of her performance of the manoeuvre in question here was that she was "uncomfortable", "unsteady", "wobbly", and "unco" - presumably uncoordinated.[2]

[9] On the day in question the plaintiff and a Ms Lyn York were conducting the PART training. The plaintiff had more experience in that training, Ms York having only two prior experiences of it, her initial training and once before with a "buddy". Ms York was the plaintiff's superior within the defendant's hierarchy and the training took place in Ms York's area of Rockhampton, the plaintiff having travelled down from Mackay.

[10] There is no issue about the occurrence of the fall. It happened at the Frenchville Sports Club in Rockhampton. The precise time of the event was not established but it was late in the morning, before the break for lunch. The plaintiff was wearing "joggers". The shoes were new having been purchased very shortly before the day of the incident and with the intention to wear the shoes for the purposes of the training day or days.

The Issues

[11] There are 34 particulars of negligence pleaded. It is surprising that the simple act of walking backwards in newly purchased joggers on a carpeted floor could generate 34 ways in which the employer breached its duty of care.

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1 See T1-76/1-15. The evidence was that the plaintiff's weight had varied from about 82kgs to 110 kgs.

2 See T1-48/30; 1-49/25; 1-50/30; 1-51/50-55; 1-59/10; 2-41/30; 2-42/25

[12] There were two differences that the plaintiff identifies between the prior training occasions and the one in question – on the occasion the subject of these proceedings she was wearing the joggers instead of her usual flat soled leather shoes and the manoeuvres were performed on carpet and not a wooden or vinyl floor surface.

[13] Much of the time in trial was taken up with issues connected with the two differences identified. While they may have had some causal impact I cannot see how the employer can be made liable for an employee wearing a common place shoe on a common place carpet, without some notice that there is cause for concern, whatever the engineering evidence might be about the grip characteristics of the two surfaces.

[14] In the course of submissions, while not abandoning any ground, Mr Crow of Senior Counsel was driven back to a very simple submission – that the risk of injury lay in the speed at which the plaintiff was performing the manoeuvre and in all the circumstances she had been wrongly instructed to proceed quickly where she should have been told to proceed at a slow or moderate pace – see para 8(u) and (v) of the Amended Statement of Claim. He argued too for the provision of foam mats or the avoidance of the activity entirely by having the training demonstrated on a video.

[15] Effectively the defendant argued:

(a) The plaintiff was unable to establish how or why she fell and so cannot identify the risk that the employer failed to meet and she must therefore fail at the threshold;

(b) If the risk could be identified "consideration of the magnitude of the risk and the degree of the probability of its occurrence"[3] demonstrated that no response was called for;

(c) Hence the measures proposed by the plaintiff were not reasonably required and in the absence of a defined mechanism for the fall could not be shown to be likely to avoid the risk of injury that occurred; and

(d) Any injury suffered was of no great consequence.

Principles

[16] It is convenient to look at the duties owed by an employer.

[17] Mrs Weaver bases her claim in negligence.

[18] The duty owed by an employer was explained by Windeyer J in *Vozza v Tooth & Co Ltd*[4] in this way: "[F]or a plaintiff to succeed it must appear that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment."

[19] In *Hamilton v Nuroof (WA) Pty Ltd*[5] it was said that the duty of an employer is "... to take reasonable care to avoid exposing [its] employees to unnecessary risks of injury".

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3 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 per Mason J

4 (1964) 112 CLR 316 at 319

5 (1956) 96 CLR 18 at 25

[20] The qualifying "unnecessary" makes plain that an employer is not required to guard against all risks of injury.[6] However it has long been recognized that what is a reasonable standard of care for an employee's safety is "not a low one": *O'Connor v Commissioner for Government Transport*.[7] Further an employer is not entitled to disregard the possibility of inadvertence or even carelessness on the part of an employee: see *Bankstown Foundry Pty Ltd v Braistina*.[8]

[21] While it seems obvious it is relevant to note that the duty owed is to each individual personally. So when assessing the foreseeability of risk the employer must take into account the shortcomings and idiosyncrasies of the employee in question.[9] That is not to say that special vulnerabilities unknown to the employer and which the employer could not reasonably be expected to know are relevant: *Waugh v Kippen*.[10]

[22] On the question of breach Mason J's formulation in *Wyong Shire Council v Shirt*[11] explains the response expected of a reasonable man, there being a foreseeable risk of injury (with my emphasis):

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. **The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position**."

[23] It was no part of the defendant's case that there was any "expense, difficulty and inconvenience" in taking any proposed alleviating action.

[24] In *McLean v Tedman*[12] Mason, Wilson, Brennan and Dawson JJ said[13]:-

> "The employer's obligation is not merely to provide a safe system of work; it has an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer. … And in deciding whether an employer has discharged his common law obligation to his employees the Court must take into account

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6 See also *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29 at p 41 per Williams J

7 (1954) 100 CLR 225 at 230

8 (1986) 160 CLR 301 at 309 per Mason, Wilson and Dawson JJ citing *Smith v Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342–3; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 218

9 *The Law of Employers* (2nd edn) by Glass, McHugh and Douglas at p 32; *Paris v Stepney Borough Council* [1951] AC 367

10 (1986) 160 CLR 156

11 (1980) 146 CLR 40 at 47–48

12 (1984) 155 CLR 306

13 *Ibid* at 313

> the power of the employer to prescribe, warn, command and enforce obedience to his commands."

[25] That power to "prescribe, warn, command and enforce obedience to his commands" is an essential part of the plaintiff's case here.

[26] Another important aspect of the employer's duty is relevant here. The employer does not avoid liability by delegating the task of properly training its employees. An employer is not simply under a duty to exercise reasonable care towards its employees but is under a higher duty - a duty to ensure that reasonable care is taken. That duty "is said to be non-delegable because a principal who engages another to perform work will be liable for the negligence of the person so engaged, notwithstanding that he exercised reasonable care in the selection of the contractor."[14]

[27] Wilson and Dawson JJ put the relevant proposition in this way in *Stevens v Brodribb Sawmilling Co Pty Ltd*:

> "Where an independent contractor is employed to do the very thing which, if done by the employer himself, would constitute a breach of duty on his part, then the employer will nevertheless be liable for any consequent loss or damage."[15]

[28] No contrary submission was made here.

[29] In summary for an employee to succeed in a cause of action against the employer in negligence the employee must establish:-

(a) that the task involved a foreseeable risk of injury;

(b) that there were reasonably practical means of obviating that risk;

(c) that her injury belonged to the class of injury to which the risk exposed her; and

(d) that the employer's failure to eliminate the risk showed a want of reasonable care for her safety.[16]

Credit

[30] I am satisfied that all witnesses were truthful.

[31] An attack was made on the plaintiff's credit. Some idea of the strength of that attack can be gleaned from the attempt to take some advantage from a simple error in the date that the plaintiff placed on a form.[17] Given that there was no dispute about the date of the incident and no apparent dispute about the date the form was completed (the day following the incident) and no attempt made by the plaintiff in any way to take advantage of the date on the form I was, and am, at a loss to understand why time was spent on the matter.

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14 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 32 per Mason J

15 *Ibid* at 43

16 *The Law of Employers* (2nd edn) by Glass, McHugh and Douglas at p 26

17 T2-48/50

[32] My impression was that the plaintiff was patently honest. She paused from time to time to consider her response, her responses did not always suit her case or were potentially against interest and in some respects she was supported by another witness, Ms Julie Baynton. Her husband, who was particularly impressive in his manner, also supported her evidence in some respects. The plaintiff's manner of giving evidence was, at times, frustrating as she was verbose and inclined to wander from the point. And many questions in cross examination were designed to confuse and did. But essentially I am sure she was doing her best to recall matters accurately. That is not to say that she was always reliable. I will identify where I have difficulties with her account.

[33] Ms Baynton was a fellow employee of the plaintiff. She was part of the class of employees being trained on the day of the fall. Her credit was attacked as well. Ms Baynton had no interest in the matter. She denied any ongoing friendship with the plaintiff[18] and said that they last met the day after the events in question, nearly five years ago. She had no reason to lie. Her manner seemed quite straight forward. As well there were occasions where there was a coincidence, unprompted, between the evidence of Ms Baynton and the plaintiff which strongly suggested that their recollections were the more accurate. Again the cross examination was at times not intended to make clear what was being asked of her. Generally I thought her a credible witness.

[34] Ms Lyn York was called by the defendant. Some of her recollections differed from those of the plaintiff and Ms Baynton. I am satisfied that she too was doing her best to be accurate. But the events of 1 May 2008 were of considerable significance to the plaintiff at the time and of much less significance to Ms York. It is natural that the plaintiff would have a better recollection.

The Fall

[35] I doubt that the precise mechanism of the fall is critical but as the defendant submitted that the plaintiff should fail because of a lack of an exact cause I will set out my views.

[36] The fall occurred well into the morning while the plaintiff was performing a demonstration of the techniques following a question from the floor. There had been discussion and demonstrations leading up to this point.

[37] It is plain enough that the plaintiff was not tripped up by any object on the carpet, or through any fault in the carpet itself. No one, including the plaintiff, saw any such object or fault. The competing causes would appear to be the plaintiff tripping over her own feet, or over the leg of the chair from which she had just arisen or, as she said, from her shoe or shoes catching on the carpet. There is a possibility that a change in the level of the floor surface was involved. The plaintiff led evidence from a Mr McDougall, an engineer engaged by the plaintiff to examine the carpeted area where her fall occurred and provide an opinion on the dangers inherent in the task and measures available to obviate any risk. His findings and opinions were not challenged. Mr McDougall found a gradual change in the level of the carpeted surface 3.5m inside the doorway which he said gave rise to the possibility "that the

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[18] While the transcript does not show it she greeted the suggestion of a friendship with what I think can be accurately called a snort of laughter – T2-107/52.

gradual change in level of the carpet … was involved in the incident and contributed to tripping/ stumbling". As well he observed the underfoot compression of the carpet in areas close to the entrance door to be significantly greater. The fall happened around that area but not necessarily at that area.[19]

[38] The plaintiff's evidence as to what occurred was:

> "Stood - stood up out of the chair. Lyn [ie Ms York] was my person coming towards me to attack me, and she was given a cylinder to have in her hand. That's what the Sheehan's used, it was just - looked more effective, I suppose. And then as she's coming at me, so she is moving very - quite quickly, actually, coming at me, and as she's coming at me I stood up out of the chair, I did a pivot, I was moving backwards and I put my hands up and asked her, "Stop, Lyn, stop." And she didn't stop she kept coming towards me, but before that, next thing I know I'm on the ground. And my both feet stuck to the carpet and just threw me. It was just both feet together. Sometimes you feel you're falling but I was down, bang, and it's hit back, bottom, back, and then my head."[20]

[39] As to the pace at which the plaintiff performed the task the plaintiff's evidence was:

> "On the 1st of May 2008, the day that you fell, what can you tell us about the speed or the pace of the back steps that you were taking? -- I was going quickly, but not - not - how can I explain it? I wasn't running, I was going quickly, what we'd been taught to do. Once you've practiced the manoeuvre, you can go quickly. You've got to get out of the road, this is going to be a real life situation. So I didn't go running or - just paced it, like I showed you before."[21]

[40] And later the plaintiff said: "So you move as quickly as you can. When you've practiced it you move quickly."[22]

[41] The plaintiff gave evidence that she had been trained by Mr Paul Sheehan to carry out the manoeuvre quickly.[23] This was not challenged and such an instruction is not inconsistent with the training manual.[24] I have no reason to doubt the plaintiff's assertion as to her endeavour to move quickly in demonstrating the manoeuvre and that she did so in an attempt to comply with the directions given to her.

[42] The accuracy of the plaintiff's assertion that the fall occurred in the manner she now describes and because "both feet stuck to the carpet and just threw me" is more controversial.

[43] The principal reason for having some doubt about her claim to an accurate recall is that in times past she may not have been as certain. The most graphic example of this is an account recorded by Dr Steadman, an orthopaedic surgeon, on 6 July

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19 T1-67/10; Ex 18
20 T1-69/1-10
21 T1-70/25-30
22 T1-57/1
23 T1-50/22
24 See Ex 7 at p 112 - Exercise 10; and at p 251 (Chapter 7 p3 para5)

2011: "While she was standing on her tiptoes walking backwards she had a fall".[25] No reference was apparently made to him of a shoe or shoes catching, or at least he recorded none. And a version given on 1 August 2012 to another orthopaedic surgeon, Dr Cook, is not entirely consistent: "the sneakers that she was instructed to wear slipped or caught on the carpeted floor".[26] The action of slipping seems antagonistic to that of catching. Dr Cook recalled her as saying that "it all happened so quickly and unexpectedly that she really wasn't quite sure what had happened, or what caused it".[27]

[44] Taking those accounts at their highest for the defendant however they stand in contrast to many other versions recorded. In an early report only months after the incident the plaintiff's version is recorded as "she caught her foot on the carpet".[28] Her history to a Dr Halliday, a treating orthopaedic surgeon, in February 2010 is recorded as "she fell as her sandshoes gripped the carpet".[29] In the Notice of Claim for Damages completed on 1 April 2011 the author has recorded: "her joggers gripped too much on the carpet causing her to fall backwards."[30] The pleadings too are consistent with the claim. And Dr Whiteford, a psychiatrist, recorded on 13 July 2011, only a week after Dr Steadman's examination, a history of "one of her joggers caught on the carpet".[31] Even to Dr Cook the plaintiff plainly made comments implicating her footwear in the incident.[32]

[45] I am hesitant to accept that a history given to a medical practitioner should result in an adverse view of the plaintiff's reliability. I am conscious that the precise detail of how the subject accident occurred is probably not of crucial significance to the expert's task and full attention is unlikely to be given to the detail of the answer or the recording of it. Nor is any attempt usually made to elucidate what precisely the patient might be trying to assert. As well I suspect that the plaintiff had the capacity to confuse the doctors. Her denial in cross examination that her joggers were "non-slip" but "grippy" suggests a level of confusion as to what "non slip" might mean.[33] In the context of a medical examination I doubt that the trouble would be taken to clarify her intended meaning with the necessary care. At least the existence of the discrepancy in the account to Dr Cook is explicable and not compelling proof of a different account being intended.

[46] I think it clear that the plaintiff has reasonably consistently maintained that the sensation she experienced was one of her footwear grabbing and suddenly stopping her.

[47] As well, Ms Baynton clearly witnessed an incident that accords with the plaintiff's account. Her account is inconsistent with the plaintiff tripping over the leg of the chair. After stating that the plaintiff had stepped out of the chair and gone backwards her evidence was:

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25 Ex 12 p 236
26 Ex 4 p 4
27 T3-3/25
28 Ex 10 at p 98 – report Konekt 8 July 2008
29 Ex 10 at p 317
30 Ex 12 p 185
31 Ex 12 p 249
32 T3-3/15
33 T2-43/50 - 44/15

> "And you've told us she was backing? -- She was walking - like going backwards, and it wasn't too long after she had risen from the chair, stepped out to go back, that she actually went back.
>
> Did you see her stepping backwards? Yes.
>
> I accept that you probably can't say precisely how many steps she took back, but can you assist the Court in giving us a range of the number of steps that you saw? -- It wouldn't have been more than five or six, I don't think. Because it was pretty - you know, it wasn't as though she kept walking backwards and then, "Oh, bang, she fell." She got up, she did move backwards, and I'm sorry, I couldn't - I wasn't going - waiting for an incident to happen."[34]

[48] While Ms Baynton made it clear that she was far from certain as to how many steps the plaintiff took before she fell her evidence is consistent with there having been a number of steps. That excludes the leg of the chair as a cause of the incident.

[49] The significant difference between these accounts and that of Ms York is that Ms York has the plaintiff proximate to the chair at the time that she fell.[35] What I think is significant, apart from my general comments on creditability above, is that Ms York made clear that she was not asserting that she saw the plaintiff to be caught by the leg of the chair. What is also of interest is that Ms York says that the plaintiff blamed the fall on her shoes immediately after the event.[36]

[50] On balance I am satisfied that the fall occurred because the plaintiff's footwear in some way grabbed on the carpeted surface sufficiently to trip her up.

[51] The precise location of the fall was not shown. It was at least near to the area where Mr McDougall found a change in the level of the floor surface with an increase in the underfoot compression characteristics. It is possible that those variations played a causative role in the fall.

Foreseeability of Risk of Injury

[52] The defendant admitted in its defence "that activities of the nature of those involved with PART Training involved a foreseeable risk of injury"[37] but cautiously also pleaded that "the risk of injury in the manner alleged was not reasonably foreseeable to the defendant."[38] Mr Myers, counsel for the defendant, submits:

> "The question which obviously arises for determination is whether the combination of the plaintiff wearing joggers on the carpeted surface of the Frenchville League Sports Club, coupled with the activities being performed on the day, gave rise to a reasonably foreseeable risk of injury."[39]

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34 T2-91/49 – 92/5
35 See T2-22-23 (wrongly marked as Day 1)
36 T2-24/8 (wrongly marked as Day 1)
37 Para 2L of the Further Amended Defence
38 Para 6(h) of the Further Amended Defence
39 Ex 25 – Submissions of the Defendant para 10

[53] Whatever the intention of the admission in the defence the defendant seems to put foreseeability in issue. I note that the authorities that Mr Myers cites immediately following the submission I have quoted are directed to the issue of breach and the question of the reasonableness of the response to the identified risk, not foreseeability.

[54] The test for foreseeability is undemanding – is the risk in question "far fetched or fanciful"?[40]

[55] It seems to me clear beyond doubt that directing a middle aged and, with respect, overweight lady to walk backwards on the balls of her feet while keeping her attention directed not to where she was going but to the "aggressor" in front of her from whom she is retreating involves a risk of injury that she might fall over. It is nowhere near "far fetched or fanciful". The risk is obvious, real and not at all unlikely to occur. That is so irrespective of whether the plaintiff was required to traverse a change in the level of the carpet and irrespective of the grip characteristics of her shoes. A change in level would compound the risk, as would the grip characteristics too.

[56] So much seems obvious to me. That view is reinforced by the fact that Ms Baynton fell over while doing the same manoeuvre at the same venue on the same date. Ms Baynton shares with the plaintiff the characteristics of being middle aged, far from agile or athletic, and, again with respect, of considerable weight. Ms York said that Ms Baynton had been "mucking around" with her partner but this was, even on Ms York's account, prior to her fall. It was submitted that this "mucking around", whatever that might mean, was the cause of her fall. I am not persuaded that was so. Ms York did not see Ms Baynton's fall nor purport to know the cause of it. Ms Baynton denied the allegation. Apart from that it seems inherently improbable - she was not a youngster at the time on a frolic but a middle aged lady at her work place.

[57] Finally on this point Mr McDougall makes some valid points as to the magnitude of the risk. He points out:

> "…any backwards movement involves not only an increased likelihood of an underfoot incident occurring, but due to the limitations of vision, the limitation of protective reflexes to reduce or attenuate damage during a backwards fall, and due to body structures impacted in backwards fall (head and spinal damage), also an increased severity of risk of injury".[41]

Reasonably Practical Means of Obviating the Risk

[58] The plaintiff submitted that the risk could easily have been avoided – direct the plaintiff to carry out the manoeuvre at a slow or moderate pace.

[59] Mr Unger took over the training of the defendant's employees from the Sheehans. In contrast to the Sheehan's training he emphasised that the demonstrator perform the "Back steps" manoeuvre slowly and carefully.[42] The plaintiff had not had the benefit of that direction. I am confident that the plaintiff would have followed any such direction. There is no suggestion that she was anything but conscientious.

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40 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–48 per Mason J

41 Ex 5 at p 17

42 T3-56/26; 3-58/55

[60] Such a direction would have substantially reduced the risk and given that the plaintiff had practised the technique previously and had some experience with it, justifies a finding that the fall would probably have been avoided in this instance had such a direction been given. As well, as Mr McDougall points out, if the demonstration is done in a "calm, slow and careful way, the likelihood of motion being abruptly arrested and a fall occurring is reduced even if a trip or stumble was initiated."[43]

[61] The giving of such a direction was obviously reasonably practical as it was in fact given to those employees who trained after the plaintiff under Mr Unger.

[62] Other arguments were advanced by the plaintiff going to the relative hardness of the carpeted surface, the checking of the co-efficient of grip of the carpeted surface and the examining of shoes and their interaction with such a surface.

[63] In my view the employer was not guilty of any breach of duty in requiring that the plaintiff carry out the training on this carpeted surface nor was there any breach in permitting her to wear, or encouraging her to wear (as seems occurred), joggers.

[64] I am not prepared to accept the evidence from the plaintiff that there was any view entertained by the Sheehans or Mr Unger that the training ought to have been performed on a wooden or vinyl surface. That evidence carries the implication that they had formed an opinion that a carpeted surface was in some way more hazardous than a wooden or vinyl one. I am quite satisfied that they had formed no such opinion.

[65] There is no reason to doubt the evidence from several witnesses that training in fact took place over many years on a variety of surfaces, including carpets. That training had occurred, or usually occurred, without incident. While it is evident that the grip characteristics of such surfaces could vary I think it entirely unrealistic for an employer to foresee that an every day floor surface was likely to present such a hazard as demanded that it not be used for this training. That is not to say that the fact that grip characteristics of such surfaces could vary should not inform the employer's response to the risk.

[66] In all these respects the important point is that the employer had no notice whatever that there was anything untoward about the floor surface or the joggers. The plaintiff made no complaint about any problem before, or indeed immediately after, her fall. No other person made any observation that the carpet presented any difficulty. All that was observed was that the carpet was "spongy". Both the plaintiff and Ms Baynton made the observation.[44] But assuming that to be so that cannot to my mind amount to some reason for an employer to have concerns about the performance of PART training on that surface.

[67] Mr McDougall's testing demonstrated that the co-efficient of friction between the carpet and the joggers was high. That adds to the probabilities that the plaintiff's foot or feet caught in some way on the carpet. The fact that two ladies fell at the same venue on the same day suggests that the surface onto which they fell may have played a causative role in both falls – whether because they were at the change in level point or because of the carpet's innate characteristics. But it seems to me

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43 Ex 5 at p 16/20

44 As to the latter see T2-89/52: "very cushed"

entirely unreasonable to expect an employer to engage an engineer to check the grip characteristics of a carpet in a commonly used conference area without some antecedent reason to have concern. And it is not irrelevant that the usual reason to check such grip characteristics is a concern about slipping because the grip is too small, not about tripping because the grip is too great.

[68] Nor does it seem to me that any legitimate complaint can be made about the employer not introducing mats or the like to make the surface onto which the plaintiff fell softer. First, the training was not such as to call for the participants to fall over – that is, it was not an intended part of the training that people fall to the floor. A feature of the places that use such mats is that eventuality is intended. Secondly, it is not clear that the risk of injury would have been significantly reduced. There is always the risk of injury through falling awkwardly, whatever the surface. But importantly Mr McDougall did not advance any evidence to show that mats were significantly different in terms of injury prevention than a "spongy" carpet. Similarly in relation to a grassy surface. No testing was carried out on grassy surfaces in Rockhampton to show that they were softer than the carpet onto which the plaintiff fell here.

[69] The complaint about requiring or permitting the plaintiff to wear joggers, if given effect to, would require the employer to check every shoe worn for excessive grip in relation to any new surface encountered. It is evident that the concern was for participants to wear an enclosed shoe. No attention was directed to the grip characteristics of the sole. Why should there have been? The response, I think, is that so far as grip is concerned any employee is in as good a position to judge the suitability of their footwear as an employer can possibly be, short of engaging an engineer to carry out the checks of the type done by Mr McDougall here. It is not reasonably practicable to expect employers to carry out such checks given the magnitude and probability of the risk of injury involved.

Want of Reasonable Care

[70] Plainly enough the plaintiff's injury fell into the class of injury to which the risk exposed her.

[71] The final issue to consider is whether the defendant's failure to eliminate the risk showed a want of reasonable care for the plaintiff's safety. This was the principal focus of the defendant's submissions. The submissions require a judgment to be made as to whether the risk of injury was so low as to be safely ignored by a reasonable employer.

[72] I have mentioned already Mr McDougall's observations on the magnitude of the risk in this particular case. Mr McDougall also supplied statistics on the incidents of trips and falls and the potential for injury that such events obviously carry in a wider sense.[45] His evidence was unchallenged. Slips, trips and falls are a major cause of injury in Australian industry. Approximately two-thirds occur on the same level. By far the largest single cause of being admitted to hospital in Australia is from falls – nearly twice the next most common cause. It is plainly reasonable to expect employers to be alert to the risks involved. The risk was not one that could reasonably be completely disregarded.

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45 Ex 5 - see Attachment 1 to his report

[73] The defendant argued that statistics of injury showed that incidents of harm when carrying out PART training were relatively rare. There had been four incidents involving injury recorded over the years with only one incident involving time lost[46] despite a great deal of training.[47] Little is known as to the cause of the injuries or their severity. What incidents there were had occurred when the Sheehans had been in charge of delivering the training. There were no instances after the time that Mr Unger took over. In the absence of more information it is difficult to draw any conclusion. But the defendant's statistics are only one small aspect of the overall picture and do not inform, at least solely, the determination of the magnitude of the risk or the likelihood of its occurrence.

[74] The defendant argued that the plaintiff could have elected to carry out the training on the dance floor nearby to where she in fact demonstrated the back step manoeuvre. That assumes that the grip characteristics of the carpet were a causative factor and significantly different to the dance floor – a possibility but not necessarily established. But assuming that to be established the submission involves the concept of an employee determining the safe means of carrying out the task, and an employee without any demonstrated training or skill in carrying out such an assessment.[48] If the wooden floor was safer and would have avoided the risk then it was the employer's duty to direct that the surface be used, not the plaintiff's task to work that out.

[75] Emphasis was laid by the defendant on the need to approach the question of breach prospectively and not with the benefit of hindsight, not to argue from the known and established injury through a chain of causation back to what might have avoided the injury, and to bear in mind that the reasonable response of an employer might be to do nothing in relation to the risk citing *Vairy v Wyong Shire Council*[49]; *Lusk v Sapwell*[50]; *Hegarty v Queensland Ambulance Service*[51]. The judgement of Hayne J in *Vairy* was quoted: "The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be 'nothing'."[52]

[76] Those general principles can be accepted as applicable to any negligence action. But the cases relied on involve a significant difference to this case. Each of those cases was a case of omission – it was alleged in each that the defendant had failed to do something which would have obviated the risk. The complaint here – restricted to the question of instruction – is one of commission. The crucial point here is that the employer through its contractor positively increased the risk of injury to which the plaintiff was exposed. The plaintiff was endeavouring to perform her duty to the best of her ability. She felt duty bound to carry out her instructions to perform the task quickly. Mr Unger's approach shows that the instruction was unnecessary.

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46 See Ex 14 and T3-76/55 – the defendant supplied the list as a complete record of injuries from PART training. The plaintiff was in no position to disprove this claim. It is odd that all four occurred in a four month period.

47 Ex 9 at pp 16-518

48 The circumstances in which an employee would come under such a duty have been described as "marginal and rare": *The Law of Employers* (2nd edn) by Glass, McHugh and Douglas at p 25

49 (2005) 223 CLR 422

50 [2011] QCA 59

51 [2007] QCA 366

52 (2005) 223 CLR 422 at 461

[77] No case was cited to me where an employer has escaped liability where it has directed an employee to carry out a task, which already carried an obvious risk of tripping up and falling, in a manner designed to increase the risk by directing that it be done quickly. The reliance on cases such as *Hill-Douglas v Beverly*[53], *O'Connor v Commissioner for Government Transport*[54], *Thompson v Woolworths (Qld) Pty Ltd*[55] and *Rasic v Cruz*[56] misses this point. In the first two cases the plaintiff asserted that the breach of duty lay in the failure to take some positive action – warn or instruct about an every day hazard or, additionally in *Hill-Douglas*, alter the layout of a vehicle. In the latter two cases the court was concerned with plaintiffs who created the risk by their own carelessness. The defendant seeks to assert that the plaintiff has created the risk here by her own carelessness but that is not right at all.

[78] No doubt many employees throughout Australia walk backwards at some point in their working day to carry out their tasks. It is an everyday event carried out without injury or incident in the vast majority of cases. Generally speaking an employer would not be liable for a worker tripping over as they walked – forward or backwards, absent some other feature.[57] To succeed the plaintiff must take this case out of the usual. There are four features which in my opinion do that:

(a) The plaintiff was a middle aged overweight lady, not a robust or athletic person, or even a person accustomed to physical activity – the likelihood of a fall occurring was greater for her and the potential consequences more serious;

(b) The plaintiff did not choose how she walked backwards – she was directed how to do so. She was supposed to walk backwards on the balls of her feet. This too increased the risk of mishap;

(c) The plaintiff was not to keep her attention where she was headed so she could see where she was to place her feet. Rather her attention was required to be directed to the "aggressor" in front of her from whom she was retreating. Again this increased the risk of mishap;

(d) To this ever increasing risk of mishap is added the requirement that this unnatural activity be done quickly.

[79] The defendant can legitimately argue that PART training is an important safety measure and the risk of injury worth running to prepare an employee for a possible assault.[58] I would accept that that argument would carry the day if the unusual

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53 [1998] QCA 435

54 (1954) 100 CLR 225

55 (2005) 221 CLR 234

56 [2000] NSWCA 66

57 Cf. the remarks of Macfarlan JA (with the concurrence of Tobias JA and James J) in *Seage v New South Wales* [2008] NSWCA 328 at [31] regarding "a commonplace activity likely to be encountered, just as frequently, if not more frequently, in the course of ordinary domestic life than in the workplace". Macfarlan JA continued (at [32]–[33]): "It would be a large step to take to find as a general proposition that employers have an obligation to warn or take other precautions in relation to everyday activities in which employees might incidentally engage in the course of their employment, being activities which if not performed with care might lead to injury. Should employers reasonably be expected to warn employees not to cut themselves when using knives in the staff kitchen? Or not to scald themselves when pouring water which they have boiled for their tea or coffee? Or to be careful when ascending or descending steps? Or not to bump into furniture? Cf *Phillis v Daly* (1988) 15 NSWLR 65 at 74B–C; *Jones v Bartlett* [2000] HCA 56 ; (2000) 205 CLR 166 at 177 [24].
A reasonable employer would ordinarily regard it as quite unnecessary to give warnings or take other steps in relation to these commonplace activities."

58 There was evidence of prior attacks on employees: see Ex 13; Mr Myer's analysis at T3-76/40; the summary of incidents at Ex 9 pp 6-15

features were restricted to the first three features I have mentioned. But why add the last instruction? It significantly increases the chance of a mishap. It may be that in a real life situation an employee would have to move quickly – but there the risk justifies the action. In the training situation there is no pretence of getting an employee used to this unnatural action, if it were possible. I cannot see that there is any countervailing benefit to the instruction. Mr Unger's approach supports that view. Far from a need to move quickly Mr Unger maintained that his approach was useful to ensure the maintenance of eye contact with the aggressor.[59]

[80] If, contrary to Mr Unger's approach, it be thought essential to convey the possible need for speed in the performance of the manoeuvre then the suggestion that there be a video demonstration of the technique would meet the need. There, at least, the risk of injury could be substantially reduced as conditions could be controlled and the participants younger and more agile.

[81] Underlying the defendant's case here is the notion that this was just an everyday, obvious risk against which the employer need take no precautions. Similar arguments were considered in *Anderson v. Mt Isa Bastketball Association Incorporated*[60] where a basketball referee succeeded in an action for damages against her employer where she suffered an injury whilst running backwards in the course of a game. There it was not in issue that running backwards on a basketball court involved an unnecessary risk of injury. After referring to factors such as the magnitude of risk, the degree of probability of occurrence, the expense, difficulty, and inconvenience of taking alleviating action and other conflicting responsibilities which the defendant may have Davies JA and Demack J added:

> "The above statement of factors requiring consideration in determining breach of duty is not intended to be exhaustive. Two other factors mentioned in some cases are the obviousness and the ordinariness of the risk. There are, however, two difficulties in the way of placing too much weight on these factors negating a breach of duty. The first is the increasing recognition given by courts to the need to take into account the possibility of inadvertent or negligent conduct on the part of others and consequently a decreasing weight being given to the obviousness or ordinariness factors. The second is they assume less relative importance where the risk of injury can be eliminated without undue difficulty or expense. That appears to be the case here."[61]

[82] The same considerations apply here and with more force – a positive instruction was issued here which increased the risk.

[83] To adopt the language of *Hamilton v Nuroof (WA) Pty Ltd*[62] the employer here exposed its employee to an unnecessary risk of injury. There is no countervailing consideration, whether it be expense, difficulty and inconvenience or some wider consideration as was relevant in *Vairy* and *Hegerty*, to excuse the employer from having given an instruction to proceed quickly or prevents a finding that an instruction to proceed at a slow or moderate pace be seen as reasonably required.

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59 T3-56/27 - and consistently with the training manual: Ex 7 at p 251 para 6

60 [1997] QCA 340

61 *Ibid* at p 8

62 (1956) 96 CLR 18 at 25

[84] In my view liability is established.

[85] Contributory negligence, whilst pleaded, was not argued.

QUANTUM

[86] The defendant sought to downplay the severity of the initial injury. The incident does seem to have been relatively innocuous. The plaintiff was cross examined to the effect that she had continued on with her work on the day on the incident, that she had not complained of injury to Ms York, or at least not to any extent, and had not shown Ms York any bruising to her back or buttocks. The plaintiff disputed each of these contentions. To an extent she is supported by Ms Baynton. I think the true situation lies somewhere between the memories of the plaintiff and Ms York. Given that Ms York took the plaintiff to the general practitioner on the afternoon of the incident and given Ms Baynton's evidence of what occurred at her meeting with the plaintiff on the day following[63] it seems plain that there was something wrong with the plaintiff and that her companions knew it.

[87] Generally speaking, I accept that the plaintiff had the symptoms referred to in her evidence.

[88] The plaintiff complains that as a result of the fall on 1 May 2008 she has suffered the following problems[64]:

a) Pain in her lower back;

b) Bruising and pain in her coccyx;

c) Swelling of the back, right hip and left hip;

d) Incontinence;

e) Pain which radiated down her right leg to her foot and toes;

f) Pain between her shoulder blades;

g) A laceration to the back of her head.

The Opinions

[89] As I have mentioned the plaintiff was examined by an orthopaedic surgeon, Dr Cook. His examination was carried out on 1 August 2012. He concluded that as a result of the subject fall the plaintiff had suffered the following injuries:

a) A generalized musculo-ligamentous injury and/or soft tissue injury to the mid back region including aggravation of pre-existing degenerative changes now fully resolved;

b) A generalized musculo-ligamentous injury and/or soft tissue injury to the lumbar sacral spine with aggravation to the very mild to minimal degenerative changes and lumbar sacral spine;

c) Possible injury to one other or both sacroiliac joints;

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63 T2-92/20

64 Taken from Ex 1 at para 34

d) Secondary trochanteric bursitis both hips;

e) Direct injury to the coccyx and sacro-coccygeal joint resulting in now chronic coccygodynia.

[90] Dr Cook's assessment of permanent impairment overall was of a 15% impairment for the orthopaedic injuries made up as follows:

a) 0% for the thoracic spine;

b) 5% for the lumbar and lumbar sacral spine;

c) 5% for the coccyx and sacro-coccygeal joint;

d) 2% whole person impairment related to the right side lateral trochanteric bursitis;

e) 3% for healed surgical scars on the lateral aspect of both hips;

[91] In addition to these physical problems the plaintiff complains of psychiatric problems. Dr Chung, a psychiatrist, has diagnosed the plaintiff as suffering from a major depressive disorder and generalized anxiety disorder. The symptoms the doctor recorded included a general sense of unhappiness on most days, anhedonia, decreased motivation, decreased energy levels, sleep disturbances, appetite disturbances, tearfulness, hopelessness and suicidal ideation. He recorded that the plaintiff worried about many aspects of her life including financial issues, family issues, employment issues and health issues. The doctor thought that some of her concerns were realistic but many were exaggerated. She complained of excessive tiredness, sleep disturbances and lack of energy.

[92] Dr Chung thought that the plaintiff's prognosis was poor because her pain condition was "likely to be chronic". He considered that the plaintiff's depression was also likely to be chronic "if it is unresponsive to treatment". Dr Chung pointed out that from his perspective the plaintiffs pain condition was "unlikely to improve significantly in the near future".

[93] These opinions were formed following an examination on 22 July 2011.

[94] These opinions were contested.

[95] The defendant called Professor Harvey Whiteford, a very experienced psychiatrist. Professor Whiteford formed the view following a consultation on 13 July 2011 that the plaintiff met the diagnostic criteria for a chronic adjustment disorder with depressed mood. He pointed out that there had been some improvement in her symptoms over time with a reduction in her antidepressant medication. Professor Whiteford estimated a 5% PIRS rating. He opined that the plaintiff was likely to need to remain on that medication until there was better control of her pain. The psychiatric condition alone was not preventing her working.

[96] The defendant called Dr Steadman, an orthopaedic surgeon. He thought that there was a "major, non-physical contribution of a non-orthopaedic condition" to the plaintiffs' presentation. In his view the plaintiff's problems had more to do with her psychiatric condition and what he termed her "co-morbidities" rather than any

physical injury resulting from the fall. He assessed her permanent impairment as 0% whole person impairment in relation to any lumbar sacral spine injury or coccygeal injury and 4% for bi-lateral trochanteric bursa. He expressed the view that the plaintiff could return to seated employment, that she may benefit from operative treatment of the right hip which would be risky surgically given her diabetes and that her morbid obesity was more of a limit to her future work than any injury.

[97] I observe that the plaintiff was not granted a notice of assessment of permanent disability from WorkCover Queensland for injuries related to the left trochanteric bursitis. It was conceded that as a result she is not entitled to claim damages for that condition.[65]

An Early View

[98] In addition to the two orthopaedic surgeons who were called the defendant tendered the reports of Dr Mark Shaw, a consultant Orthopaedic Surgeon who was asked to assess the plaintiff by WorkCover Queensland in 2008. He has the advantage of having seen the plaintiff much closer in time to the subject incident and on more than one occasion. As well it would seem that when he first saw the plaintiff the psychiatric condition had not taken hold.[66] He concluded that the plaintiff had suffered the following injuries in the subject fall:

a) Coccygodynia;

b) Aggravation of pre-existing early lumbar spondylosis;

c) Musculo-ligamentous thoracic spine injury;

d) Musculo-ligamentous lower cervical spine injury.

[99] In June 2008 Dr Shaw thought that the plaintiff would be fit to return to some duties in the workplace by late July or early August. He thought the prognosis was for complete resolution of thoracic and cervical pain. He considered that there was likely to be some intermittent recurrence of the lumbar pain with heavier physical tasks because of pre-existing lumbar spondylosis. He acknowledged the risk of a development of chronic coccygodynia which might require further treatment.[67]

[100] Dr Shaw saw the plaintiff again in May 2009 when he was asked to consider a permanent impairment assessment. In his view there was a 0% impairment relating the musculo-ligamentous to the cervical spine, similarly in relation to the thoracic spine and the right trochanteric bursitis. He assessed a 5% impairment related to the aggravation of spondylosis of the lumbar sacral spine and a 5% impairment related to the coccygodynia. He advised then that the plaintiff's incapacity for work due to her "work related physical injuries" had ceased.[68]

The Injuries of 2000

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65 See s 250(1) *Workers' Compensation & Rehabilitation Act* 2003

66 The first mention of psychiatric problems by a treating practitioner seems to have been in February 2009 – see entry for 23 February by Dr Holford and the reference to a diagnosis of "adjustment disorder": Ex 11 at p 5

67 Ex 10 at p118

68 Ex 10 at p141

[101] The defendant stressed, and with some reason, the plaintiff's past history.

[102] In 2000 the plaintiff complained of suffering injury to her left shoulder and cervical spine as a consequence of an incident at her workplace. She brought a claim for common law damages in respect of those incidents. She was successful in obtaining a settlement of her claim in September 2003.[69] Her then claims were that she had a 19% permanent impairment of the left shoulder, a 5% permanent impairment of the cervical spine and a 10% permanent impairment resulting from the development of a major depressive disorder. She claimed damages on the basis of a complete destruction of her earning capacity. Because of these impairments the plaintiff was out of the workforce from 28 July 2000 until October 2004 when she gained employment with the defendant.

[103] At the time of her settlement in September 2003 the prospects of the plaintiff ever returning to work at all seemed bleak. Dr Purssey, a specialist orthopaedic surgeon, saw the plaintiff in May 2003 and recorded symptoms of a complete lack of strength in the left arm with significant symptoms of pain and ongoing disabilities.[70]

[104] Doctor Mulholland, a psychiatrist, reported in May 2003 that the plaintiff continued to complain of chronic pain in her left shoulder and down her left arm and fingers, chronic neck pain with decreased range of movements, generalized headaches and substantial swelling in the left sterno-mastoid region. She was then taking substantial medication for her problems including panadeine forte and diazepam.

[105] As well Dr Mulholland recorded that the plaintiff's psychiatric symptoms were significant. They included "crying all the time", a loss of drive and motivation, a life dominated by pain, profound frustration and a sense of pointlessness and futility in life, impaired sleep and decreased libido with no sexual relations for the past twelve months. The plaintiff had not been taking appropriate care of her diabetes which was recorded as being "out of control". She was then taking antidepressants. Doctor Mulholland diagnosed a major depressive disorder. He opined that the plaintiff "was precipitated into this psychiatric disorder by experiencing chronic pain and the various losses and changes in her life the most important one of which is that she is not able to continue on at work".[71] Doctor Mulholland then thought she required psychiatric treatment which could continue indefinitely. He was then of the view that her long term prognosis depended upon what happened to her from a physical aspect. He said:

> "If the physical aspects were to clear up overnight and she was able to resume a normal life again then likewise psychiatric issues would correspondingly clear up quickly".

[106] A sudden recovery three to four years after suffering an injury is of course highly unlikely. As Dr Cook recorded it is normally expected that improvement can go on for up to two years post injury but any symptoms that are still present at the end of

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69 In the course of the trial I struck out that part of the defendant's pleading that set out the amount of the settlement on the authority of *Minchanski v Swanray No 110 Pty Ltd* [1995] QCA 314. I held that the amount of the settlement could not logically assist in the determination of any issue before me. On reflection I am not sure that was right. No logical connection was pointed out in argument but it may be that the receipt of a significant sum of money had an effect on the plaintiff's then psychiatric health and has that potential now.

70 Ex 10 at p55

71 Ex 10 at p76

that two year time span are normally considered permanent and are unlikely to improve with the passage of time.[72] Dr Cook was talking of physical symptoms without regard to psychiatric complications clouding the picture.

[107] Despite that very bleak prognosis, following the settlement of her claim in 2003 the plaintiff was apparently able to take up her life again. She undertook a course at TAFE, attained a Certificate IV in Community Services and Certificate IV in Disability Services and Management and, as I have mentioned, about a year after her settlement obtained employment with the defendant. She maintained that employment with the defendant until the day of the subject incident, nearly four years later, apparently without difficulty. That the recovery was substantial is evidenced by the plaintiff's range of activities that she enjoyed prior to the subject incident that she sets out in her statement.[73]

[108] In a sense Dr Mulholland's prediction that I have quoted above proved to be accurate. The plaintiff's psychiatric issues apparently cleared up quickly but there was no evidence that the plaintiff's "physical aspects" cleared up beforehand - whether "overnight" or over a significantly longer period.[74] Indeed the plaintiff complained of continuing symptoms at trial, albeit at a much reduced level.[75] That tends to suggest, absent fraud, that Dr Mulholland had it around the wrong way - it is the psychiatric issues which perpetuate the plaintiff's perception of serious complaints, not the physical problem. Some support for that can be found in Dr Chung's evidence. When asked about the recovery from the psychiatric injury he opined: "Once the stressor is removed, then the likelihood of recovery is actually pretty high."[76] The issue is in identifying the stressor. He too assumed the stressor was the physical injury – but given that there was no evidence of any rapid recovery of the physical complaints in 2003 explaining the easing of the depressive condition that assumption seems untenable. I return to the issue below.

Causation

[109] Mr Myers submitted that no causal link should be drawn between the plaintiff's present psychiatric state and the subject incident. Mr Myers submitted that because there was a report of continuing symptoms from the 2000 incident, even at trial, and because Dr Mulholland had opined that the psychiatric state would not improve until the chronic pain condition abated then it followed that the present psychiatric condition was simply a continuation and manifestation of that earlier condition.

[110] I cannot agree. The submission overlooks a number of matters.

[111] One is that Dr Mulholland thought the important factor in any potential recovery was for the plaintiff to get back to work, which she eventually did.

[112] Another is that the psychiatric symptoms recorded by Dr Mulholland in 2003 plainly disappeared for some years. Based on his detailed survey of the available material Professor Whiteford concluded that the plaintiff recovered from the earlier bout of depression.

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72 Ex 4 at p11
73 Ex 1 at para 217
74 T1-84/45 -85/10
75 T1-86/15
76 T2-75/52

[113] A third is that Professor Whiteford related the existing psychiatric state to the existing physical condition – the adjustment disorder he diagnosed was related to the physical symptoms and he opined that if those symptoms were caused by the fall at work then so was the adjustment disorder. The physical symptoms referred to were the symptoms associated with the plaintiff's coccyx and back. There is no doubt as to the cause of those physical symptoms. They at least provided the trigger.

[114] Finally, despite hearing evidence from two psychiatrists and having the reports of a third before me, there was no evidence to support the argument.

Discussion

[115] The assessment of damages here is complicated. Plainly there is a psychological or functional overlay, as it used to be called. The problems that such cases represent were discussed long ago by Pincus JA in *Colmark (Australia) Pty Ltd v Hall*[77] and *Queensland University of Technology v Davis*.[78] His Honour said in the latter case:

> "A significant proportion of the disputes about quantum in personal injury cases which come before this Court are of a character similar to the present case, in that they involve a component of what is sometimes called "functional overlay". Experience suggests that such cases are particularly hard to assess, medically and legally.
>
> Included in the summary of the chapter on this subject to be found in an Australian text, "Medicine and Surgery for Lawyers", 2nd ed LBC Information Services 1996, edited by Buzzard and others, one finds these comments on "functional overlay" cases:
>
> > "Because of constant brooding and introspection, a person either has multiple symptoms, or a few specific symptoms which are often constant, intractable and persistent. The diagnosis of a functional overlay aspect is not something which can be definitely made. There is no scientific test or litmus test whereby the diagnosis can be definitely proved". (150)
>
> The author goes on to refer to what he describes as "inconclusive" studies of the extent to which persons in this category recover after the case is over.
>
> In the present case, damages were assessed on the basis that the psychiatric condition from which the respondent suffered was permanent and substantially attributable to the minor injury which the respondent sustained. Trial judges generally take a rather cautious approach to cases of this kind, one reason for that no doubt being that, if the community understands that very large sums are likely to be awarded in such circumstances, there is a possibility that the tendency to exhibit functional overlay may be enhanced, among people who are injured in circumstances which give them a prospect of recovering damages. It would be unfortunate if too generous an approach to cases of this sort were actually to promote the exaggeration of symptoms.

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77 Unreported - Appeal No 7507 of 1997 - 27 April 1998, 26 May 1998

78 Unreported - Appeal No 3691 of 1997 - 13 November 1997, 5 December 1997

> Approaching that point from another angle, one would hope that injured plaintiffs who try their best to ignore minor disabilities rather than dwell on them should not be excessively disadvantaged in court proceedings, as compared with those who act otherwise."

[116] The other members of the Court did not join in those remarks.

[117] Whether a cautious approach is justified here must depend on the evidence.

[118] The plaintiff contends for an assessment of damages in excess of $1,000,000. That assessment assumes that the plaintiff will be as she is now for the rest of her life. It largely assumes an ongoing need for medication at the present levels. It assumes no earning capacity and to a large extent an uninterrupted earning capacity, if uninjured, to retirement at age 67. As will be seen I think these assumptions are unrealistic.

[119] The defendant submitted that an assessment of approximately $158,000 was appropriate. Effectively the defendant submitted that there while the plaintiff had significant present complaints she would make a rapid recovery.

[120] While it seems to me that there is a great deal wrong with the plaintiff there are good reasons for the defendant's scepticism about the long term impact about the injuries the plaintiff has sustained.

[121] The defendant's submission effectively was that there was little in the way of objective evidence supporting any significant problem with the plaintiff,[79] that her current presentation largely reflects her psychiatric condition, and that in any case upon the resolution of this claim for damages her condition is likely to resolve, much as it did following the incident and injury of 2000. Further it was submitted that the plaintiff was plainly vulnerable to the development of psychiatric complications following upon stresses in her life and this must require very substantial discounting of any damages.

[122] There is a great deal of force in these submissions. There is certainly a remarkable similarity between the picture that the experts had of the plaintiff in 2003 and the picture that is now portrayed. There are substantial complaints of physical symptoms, a serious psychological condition precipitated by complaints of chronic and intractable pain, a need for medication and predictions of an inability to function usefully again.

[123] The coincidence between the opinions expressed by Dr Chung in 2011 and the opinions expressed by Dr Mulholland in 2003 is quite marked.

[124] What Dr Chung did not explore was how it was that a chronic pain condition that had existed for some three years in 2003, and that was then seen to be permanent, resolved to the extent that it did, thus enabling the plaintiff to take up a life of full employment and substantial activity. Nor did he say why, if such a recovery occurred then, it was unlikely now.

[125] The same comment can be made of Dr Futter's reports that the plaintiff referred to. Mr Crow SC stressed that Dr Futter had most recently examined and reported on the

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79 See for example the cross examination of Dr Cook at T3-7; 3-12

plaintiff and so weight ought to be given to his opinions. I note that the last "report" from Dr Futter is a brief medical certificate supplied for insurance purposes.[80] It makes no reference to any examination having been conducted or the results of any examination if one was conducted. But a significant difficulty with Dr Futter's opinions is that he plainly has the wrong history. He assumed that the episode of depression in 2000 "resolved within a year": Ex 10 at p 158. That seems plainly wrong. The plaintiff first saw a psychologist in April 2001 (see Ex 10 at pp 16-18) and was diagnosed with a major depressive disorder at least by August 2002 (Ex 10 at p 37). While it was not the subject of any submission I was somewhat puzzled by Dr Futter's recording that the plaintiff had been told by an orthopaedic surgeon prior to September 2009 that she would never work again – Ex 10 at p162. That led the doctor to think that the plaintiff's prognosis was "very negative". As best I can see no such opinion had been expressed by any orthopaedic surgeon. Dr Shaw had seen the plaintiff on 18 May 2009 and expressed the opinion that she would be ready for a return to limited hours of work in July/August: Ex 10 at p147. As mentioned Dr Shaw then formed the view that the plaintiff's incapacity for work due to her "work related physical injuries" had ceased – see [100] above.

[126] In my view Dr Steadman has more accurately assessed the plaintiff – her psychiatric state substantially influences her perception of her pain and her presentation. There seems to be little in the way of objective evidence to support the view of any significant ongoing organic cause justifying the severity of the complaints.

[127] I prefer the views of Professor Whiteford. Her current medication is significantly lower than it once was. The plaintiff was at one time taking 300mg of Pristiq,[81] an anti depressant, daily and by the time of trial was on 100mg.[82] This reduction, the Professor explained, provides some ground for optimism and justification for his opinion that the plaintiff's psychiatric state has fluctuated and is not as serious as it once was and as Dr Chung assumes. I note that Dr Futter too drew comfort from a reduction in medication.[83]

[128] As I understood the psychiatric evidence, the significance of the diagnosis of a major depressive disorder is that it is self perpetuating – it no longer needs a stressor for the condition to continue. If the condition is at a lesser level – and as Professor Whiteford explained these conditions are all at points along a spectrum - then a reduction in the stressors facing the plaintiff can only be beneficial. Professor Whiteford said as much: "It's very common for depression to fluctuate, especially if there are fluctuating stressors in the person's life."[84] I did not understand Dr Chung to disagree.

[129] The plaintiff had a remarkable recovery following the injury suffered in 2000 with a substantial resolution of her symptoms more than three years after their onset, long after any normal recovery period. The coincidence of that recovery after the receipt of settlement monies suggests two possibilities. One is that she was fraudulently exaggerating her symptoms for the purpose of gain. My impression of the plaintiff, as I have said, is that she is a genuine person and I am not persuaded that occurred.

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80 Ex 10 at pp 166-167

81 See report of Dr Futter – Ex 10 at p163

82 Ex 1 para 189 at p 35

83 Ex 10 at p 164

84 T3-44/20

[130] The other possibility is that the stress of the litigation and the reaffirmation of her symptoms to examining medical practitioners as is usually required by the lawyers on each side of the case had a considerable impact on her psychiatric state. There was the inevitable "brooding and introspection" that Pincus JA discussed.[85] Those were the relevant stressors. The understandable relief at a successful conclusion of litigation, the consequent easing of any financial worries and the banishing of lawyers and medical experts from her life brought about the genesis of the recovery. If that was so then it is difficult to see why the same factors won't again apply.

[131] Mr Crow SC pointed out that there was no evidence to the effect that cessation of the present litigation would have any beneficial consequence for the plaintiff. He is correct in the sense that no direct questions were asked. It is usual in my experience, in cases of this type, for such evidence to be led. That such questions were not asked here could count against the defendant. But there is the coincidence of the general evidence of Professor Whiteford and Dr Chung that I have referred to above of the lessening of stressors and the consequent impact on the depressive condition that provides support for the approach. And the plaintiff has not sought to proffer any other explanation as to how it is that she recovered from her serious problems in 2003 or why it is that whatever was then the trigger for her recovery no longer has any role to play.

[132] With those general considerations in mind I will turn to the individual heads of loss.

General Damages

[133] The parties submitted that the award should be $15,000 on one side and $100,000 on the other.

[134] The plaintiff's subsequent course of treatment and consequent difficulties are comprehensively detailed in her statement (Ex 1). I will only touch on some of the more significant matters.

[135] The plaintiff presents as suffering from an extreme level of serious pain - it has been at a level she describes as "severe unbearable pain".[86] She was hospitalised in June 2008 for pain management, evidently unsuccessfully.

[136] Given the level of her complaints it is surprising that the plaintiff returned to work, but she did in early July 2008 working 4 hours per day. That continued for some months. By November 2008 the plaintiff was working at least 30 hours per week.[87]

[137] The plaintiff went off work in January 2009 to have a CT guided steroid injection into her coccyx. She has not attended at her workplace since.

[138] In February 2009 the plaintiff underwent a steroid injection into her right hip. Due to complications brought about by her diabetic condition the plaintiff became unwell following these injections and was hospitalised.

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85 Consistently with a psychologist's report on the plaintiff's personality – see report of Ms Bettinzoli: "Pain and suffering may occupy a disproportionate amount of Christine's attention and concentration…likely to interfere with treatment and rehabilitation efforts": Ex 10 at 176

86 Ex 1 at para 54

87 Ex 1 at para 87

[139] By May 2009 the plaintiff was under the care of a psychiatrist and a diagnosis of a major depressive disorder was made. The plaintiff reported suicidal ideation and two attempts at self harm by injection of insulin. Hospitalisation was not required.

[140] The plaintiff was again hospitalised in March 2010 for surgery to her left hip for a condition of trochanteric bursitis. As mentioned this condition has not been accepted as related to the subject incident.[88]

[141] The plaintiff was again hospitalised in April and May 2011 for surgery related to a blocked bowel and again in November 2011 for a hernia. In February 2013 she was hospitalised for a blocked bowel and a urinary tract infection. While the plaintiff might believe these conditions are in some way linked to the subject incident they are not shown to be casually related to the injuries suffered in the subject incident by any cogent medical evidence.

[142] The plaintiff has had many sessions of physiotherapy, hydrotherapy and Bowen therapy, all to no avail, at least so far as long term relief is concerned. She takes an array of medication all of which seems to be largely ineffective. As Professor Whiteford points out she very likely has a therapeutic opioid dependence given the high doses of narcotic analgesia that she takes daily. No doctor who was asked supported the medication regime and all suggested that it was in her interests to be weaned off the medication.[89]

[143] The orthopaedic evidence that I accept is that her psychiatric state clouds her presentation. Her complaints of pain are genuine enough to her but are not physically based. I note Dr Steadman's comments on the severity of her pain.[90] Her perception of the severity of her symptoms depends on her psychiatric state. That pain cannot be controlled even by extremely strong medication. Presumably that is so because the pain is not physically based. The psychiatric evidence is consistent and that is that to the effect that her psychiatric state depends upon control of her pain, that is her physical state. But those opinions seem to assume that the plaintiff's pain is physically based, which assumption in my view, to a large degree, is not well founded.

[144] It seems to me that a finding that the plaintiff will remain in her present state is unwarranted. In the absence of any reason to think that her condition this time is any different to her condition in 2003 I will assume that her prospects of recovery are reasonably good once this litigation process is ended. She might not recover completely but I think on balance, with time, the factors that led to a remarkable recovery in 2003-4 will again come into play, her psychiatric state will correspondingly improve and her perception of her pain will lessen allowing a recovery of function in time.

[145] Essentially the plaintiff has a small impairment associated with a right sided trochanteric bursitis,[91] a coccygeal injury that causes her some level of difficulty but

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88 See [97] above

89 For example see Dr Cook at T3-12/59

90 T3-50/55

91 While there was some debate about the casual link to the subject incident it seemed to me that Dr Cook demonstrated a sufficient probable link, a link that Dr Steadman did not entirely discount: T3-47/25-48/5

with a 0% impairment,[92] and an aggravation of degenerative changes in her lumbar spine, again with no significant impairment. I acknowledge that impairment does not equate with disability, necessarily.[93] I note that the symptoms complained of are much more extensive than that recitation would suggest – they are listed at para 176 of Ex 1.

[146] I will allow $50,000 under this head of loss. In my view that allows for a serious level of pain that the plaintiff says she has endured to date with a generous allowance for future troubles but with alleviation in the years ahead.

[147] I will allow interest on one half of that sum at 2% - $2,470.

Past Economic Loss

[148] The competing submissions were for $75,000 and $182,674 respectively. The latter figure was based on the plaintiff's expected income assuming no interruption to her employment with the defendant. I am not sure how the defendant's figure was derived save that I understand it is intended to represent economic loss both past and future.

[149] The assumptions underlying the plaintiff's approach are generally sound. There are reasons to discount the award but not significantly so.

[150] While I accept that the plaintiff may well have been vulnerable to the onset of a significant depressive condition irrespective of the subject incident occurring I assume that there would need to have been some sort of trigger. No such potential triggers were identified by the experts. There is an evidential onus on the defendant to demonstrate why there should be a discount on the ground for pre-existing vulnerability.[94] Where proof as to the pre-existing condition and its likely future effects is necessarily unobtainable the court must assess the degree of probability that an event would have occurred or might occur and adjust damages accordingly to reflect that degree of probability.[95]

[151] Thus there is the possibility of the vulnerability being exposed had the subject incident not occurred but in the absence of any identifiable trigger all that is justified is a very modest discount to allow for that prospect. Surprisingly perhaps, no attempt was made to show that the unrelated problems – the hernia, blocked bowel, urinary tract infection or the left hip problems, each of which hospitalised the plaintiff, could be such a trigger.

[152] It is not irrelevant that the plaintiff has been a long time sufferer of type 2 insulin dependent diabetes. She is, as I have mentioned, grossly overweight. Continued employment depended upon good control of her diabetes. To the extent that her diabetic condition was disrupted by the steroid injections into her right hip it would

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92 I am conscious of the coincidence of views of Drs Cook and Shaw as to impairment and Dr Cook's reasons for his acceptance of a coccygeal problem (T3-11/20-35). The difficulty is assessing the impact of the developing or florid psychological condition on the plaintiff's presentation.

93 *Driver v Stewart & MMI* [2001] QCA 444 at [13] per R Douglas J

94 *Purkess v Crittenden* (1965) 114 CLR 164,168; *Watts v Rake* (1960) 108 CLR 158*; Smith v Topp* [2003] QCA 397; *Hopkins v WorkCover Qld* [2004] QCA 155

95 *Hopkins v WorkCover Queensland* [2004] QCA 155 per Mackenzie J at [34]*; Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643

appear the treatment was related to her compensable condition and the defendant obtains no discount for the consequent interruption to the plaintiff's working capacity.

[153] However the same cannot be said of the left hip surgery undertaken in October 2010 or the other unrelated problems. I cannot see that there is any evidence of the period during which the plaintiff was disabled by these conditions (apart from the relatively short periods of hospitalisation), or by the surgery or her recovery from that surgery. The surgery to the left hip proved effective.

[154] There is no reason to discount on the ground that the plaintiff has not followed medical advice or has acted in any way unreasonably.

[155] Sometimes a deduction is made for the inevitable costs that are incurred in earning an income – travel, clothing, meal expenses and the like. While justified by authority[96] there ordinarily needs to be some basis in the evidence for a discount to be determined. There is none here.[97]

[156] Essentially it seems to me that the plaintiff's approach is justified in a general sense. Save for the health issues unrelated to the subject incident there seems no reason to question the probable continuation of the plaintiff's employment if uninjured. I will deduct about 20% to allow for the matters I have identified and allow $145,000 for past economic loss.

[157] The plaintiff has received benefits in the form of workers' compensation payments in the net sum of $56,874. I will allow interest on $88,126 at 5% - $21,700.

Future Economic Loss

[158] The plaintiff claims $389,523 representing a loss of the present day net weekly wage for a senior individual funding services manager employed by the defendant ($969.93) over 13 years (5% multiplier 502) to take the plaintiff to age 67 with a 20% discount for contingencies.

[159] There are two key assumptions – that the plaintiff will remain much as she is now for the next 13 years; and that but for the subject incident the plaintiff would have maintained her employment with the defendant until aged 67 years. Doubt attends both assumptions.

[160] Quite apart from idiosyncratic factors I seriously doubt that as a general proposition most women work to age 67 years, which I think is the hypothesis underlying the claim, particularly in occupations that expose employees to possible violent attacks from their clients.

[161] At the time of her earlier claim in 2003 the plaintiff had spoken of an interest in working to age 60. The plaintiff explained that her views were guided by her perception of the usual community expectations. She thinks they have now changed. No statistical evidence was led to support the theory. Data published by the

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96 *Sharman v Evans* (1977) 138 CLR 563 at 577 per Gibbs and Stephen JJ

97 I note that an arbitrary sum was fixed in *Sharman v Evans*

Australian Bureau of Statistics[98] while supporting a trend of increasing participation in employment by women in the 55 to 64 year age group still has that participation rate at fewer than 50% and with a dramatic falling off after age 64.

[162] Usually when claims are made of a likelihood of working well beyond what might be thought to be the "average" evidence is led of good reasons why that might be so. No such evidence was led here. I note that while the plaintiff said she enjoyed her work there seems to have been no economic imperative to continue for so long a period. Self serving statements of intentions to work long into the future and which are incapable of being tested are no great guide to that likely future. They are of even less weight where they contradict statements that the witness has previously made.

[163] I very much doubt that the plaintiff fell into the relatively small category of females who work past age 64.

[164] That doubt is reinforced by the health factors personal to the plaintiff that very likely would have limited her working life in any case irrespective of injury. It is not irrelevant, as Dr Steadman pointed out, that the plaintiff has "co-morbidities" by which he meant the insulin dependent diabetes and morbid obesity. Dr Steadman thought that they were more significant factors in preventing a return to work than any orthopaedic injury. While Dr Steadman claims no specialist qualifications as a physician he is, as he pointed out, a holder of degrees in medicine and surgery and has the usual basic working medical knowledge. The plaintiff chose not to lead any evidence from physicians to dispute the assertion that these co-morbidities were significant matters.

[165] As well as those matters the plaintiff had a vulnerability to develop a depressive illness[99] and the pre-existing problems with her shoulder and neck. Both are significant discounting factors. Added to that the plaintiff has had the health issues that led to her hospitalisation in 2010-11 and earlier this year.

[166] I question whether given those personal factors the plaintiff would have worked much past her mid fifties. It is at least a possibility that the plaintiff might have contemplated retiring in the now not too distant future. These assessments must be made on the basis of the principles discussed in *Malec v J C Hutton Pty Ltd*.[100] While accepting that the hypothesis that the plaintiff may have worked on is not so remote a possibility that it can be ignored entirely, the probabilities seem to me to favour a very much earlier retirement.

[167] Those comments go to the hypothetical future if uninjured. What of the probable future in her injured state? I note that Dr Shaw thought that any incapacity associated with physical injury had ceased to operate in 2009. Dr Steadman thought the plaintiff capable of seated employment when he saw the plaintiff. Professor Whiteford thought that psychiatric factors alone were not preventing the plaintiff working.

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98 See ABS 4125.0 - Gender Indicators, Australia, Jan 2012 and ABS 4102.0 - Australian Social Trends, 2008

99 Dr Chung spoke of a 50% chance of a relapse with a significant stressor: T2-75/14

100 (1990) 169 CLR 638 at 643

[168] In my assessment it is the combination of some relatively minor organic problems with the plaintiff's perception of her difficulties, now exacerbated by an entirely inappropriate regime of medication, that prevents the plaintiff returning to work.

[169] On my assessment the plaintiff, on balance, will have a reasonably rapid recovery once this litigation process ends. There are grounds for optimism given Professor Whiteford's views.

[170] While the plaintiff's husband gave evidence that in his view the plaintiff's depressive condition was significantly worse this time than following the 2000 incident[101] the psychiatric evidence I accept does not support that. Mr Weaver is, of course, very close to the daily difficulties that the plaintiff must present and indeed he bears the burden of those difficulties to a large degree. That could hardly but affect his perceptions.

[171] In 2003 Dr Mulholland assessed the plaintiff as having a 10% impairment. She has been at that level at times since the subject incident but according to Professor Whiteford is better assessed at a 5% permanent impairment. Consistently with some improvement the plaintiff has recently returned to needle work classes.[102]

[172] If the psychiatric condition is less serious than in 2003 it follows that the condition might well respond even more favourably to a lessening of the stressors in the plaintiff's life than in 2003-04.

[173] I acknowledge that allowance must be made for the prospect that the plaintiff may not recover as fully or as quickly as I expect. And I acknowledge that the plaintiff will be at a disadvantage in regaining employment given her age and having been out of the workforce for a lengthy period. There remains the question of whether she would have wished to work much longer in any case.

[174] There are obviously many factors that impact on the assessment. I allow $110,000 roughly reflecting 2 years complete loss of employment at the current wage level for the plaintiff's former position with some relatively small additional amount for a more adverse future than I have assumed.

Loss of Superannuation

[175] It is not in issue that I should allow 9% of the past and future economic loss components of the award - $13,050 and $9,900 respectively.

Future Medical Expenses

[176] I have mentioned that the plaintiff consumes a great deal of medication and she has had a great deal of treatment. Some 12 different medications were mentioned as regularly taken by the plaintiff.[103] Some are designed to relieve her pain – but they do not have that effect or not markedly so. Some are designed to relieve the effects of the pain relieving medication. The cost is very great. Capitalizing the present day

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101 T2-126/1-10

102 Ex 1 para 219

103 See Ex 1 at para 189

cost on the 5% discount tables would result in an award over the plaintiff's expected life of over $85,000.[104] A claim is made for 75% of that sum – nearly $65,000.

[177] There is an evident need for anti-depressants which on my findings will continue for a reasonable period. As mentioned no medical expert supported the present regime of morphine based medication. In some respects it is potentially harmful. The issue thus raised is whether it is reasonable to allow these costs if they have no significant effect or medical support so far as the expert evidence called in the case shows.

[178] In *Sharman v Evans*[105] Gibbs and Stephen JJ said:

> "The appropriate criterion must be that such expenses as the plaintiff may reasonably incur should be recoverable from the defendant; as Barwick CJ put it in *Arthur Robinson (Grafton) Pty Ltd v Carier* (1968) 122 CLR 649 at 661; [1968] ALR 257 at 267: "The question here is not what are the ideal requirements but what are the reasonable requirements of the respondent" and see *Chulcough v Holley* (1968) 41 ALJR 336 per Windeyer J, at 338; [1968] ALR 274 at 279–80. The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits."

[179] Here there are no or limited demonstrated benefits from the pain relieving drugs and some possible harm. I cannot see how it is reasonable in these circumstances that the defendant be required to fund the taking of such drugs over the longer term. As Professor Whiteford pointed out the plaintiff probably now has an addiction and her withdrawal from these drugs will need to be carefully managed. That there will be costs is inevitable. There is no evidence to guide the assessment.

[180] As I have previously discussed, the plaintiff has a reasonably good prospect of recovering in due course as she has done before.

[181] Doing the best I can I will allow $15,000.

Future Care

[182] The plaintiff claims $130,000 for future paid care.

[183] Section 308E of the *Workers' Compensation & Rehabilitation Act* 2003[106] ("WCRA") is relevant. It provides:

> **"Services not required by or provided to worker before injury**

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104 I reflect the plaintiff's submission but the detail is set out at para 195 of Ex 1 and the total there is more in the order of $130,000 ignoring the right hip surgery.

105 (1977) 138 CLR 563 at 573

106 Reprint 3 applied at the date of injury

> (1) This section applies if the worker usually did not require or was not provided with particular services before the worker sustained the injury.
>
> (2) A court can not award damages for the cost or value of any services provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services."

[184] For the purpose of that section the following terms are defined in s 308A:

> ***gratuitous services*** means services, other than paid services, that are provided to a worker by a member of the worker's family or household, or by a friend of the worker.
> ***paid services*** means services that are provided to a worker at commercial rates by another person in the person's professional capacity or in the course of the person's business.
>
> ***services*** means services of a domestic, nursing or caring nature.
> *Examples of services—*
> • assisting with personal hygiene needs
> • changing bandages
> • cleaning
> • cooking
> • dressing wounds
> • gardening
> • housekeeping
> • mowing the lawn

[185] It was not in issue that the plaintiff satisfied the pre-condition in s 308E, that is, she "usually did not require or was not provided with particular services before [she] sustained the [subject] injury".

[186] The common law provides that if as a result of the tortiously inflicted injuries the plaintiff has a need for the provision of services, whether paid for or gratuitously provided, the cost of the provision of those services should sound in damages: *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327. The damages are to compensate for the plaintiff's reduced capacity to meet her own needs. Section 308E removes the entitlement to claim damages for services to be required in the future whether to be paid for or gratuitously provided but only where services that have been received after the injury were gratuitously provided. It follows that where services are provided post injury but are within the definition of "paid services" the common law entitlement remains.

[187] The plaintiff's case is that she falls into this category. The defendant made no submission to the contrary.

[188] The plaintiff gave evidence[107] of having paid a number of individuals – her mother, her neighbours, a friend - for services rendered that were plainly of a domestic

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[107] Ex 1 paras 200-212

nature. However there was no evidence that the payments satisfied the definition of paid services – that is, "at commercial rates by another person in the person's professional capacity or in the course of the person's business". Rather they were services rendered by members of the family or friends and the payments made do not seem to be at commercial rates. Some payments for example were not only in cash but in kind – petrol and free accommodation and board. Thus even though paid for the services are defined to be "gratuitous services".

[189] However in addition the plaintiff engaged Blackwater Commercial Cleaning to provide cleaning services at her residence. That firm has provided five hours of cleaning at $65 per hour.[108] While there is no express evidence that the rates charged reflected commercial rates, the inference is plainly that they were. Thus the services provided to the plaintiff after her injury were partly gratuitous and partly paid.

[190] The plaintiff's argument is that the outlay of $325 would entitle the plaintiff, if her case was otherwise accepted, to damages of $130,000. There are reasons to doubt that the legislature intended such a result: the approach largely removes the barrier that the legislature sought to put in place in restricting access to such damages; as well this approach has the effect, presumably unintended, that those plaintiffs who are better off and can afford to engage others, or better advised, or who are friendless, are at a considerable advantage. The difficulty is in coming up with any other workable meaning for the section.

[191] In *Foster v Cameron*[109] the Court of Appeal considered the application of s 308C of the *WCRA* which excludes the payment of damages where the injured party usually performed the services in question before the injury "if the services that have been provided to the worker after the worker sustained the injury are gratuitous services". Thus the disqualifying condition was precisely the same as in s 308E. It was there held that where the services provided subsequent to the injury were partly gratuitous and partly paid that the exclusion in the section did not apply.

[192] I see no reason to distinguish the two sections. Hence I am required to apply the approach set out in *Foster v Cameron*.

[193] The plaintiff then is entitled to damages for the need for future services if the evidence justifies the claim. Give the size of the claim I would have expected some examination of it but there was none. As best I can see there is no medical or other expert evidence touching on the matter.

[194] The plaintiff says that she effectively is unable to do most ordinary household chores. Hence she has obtained assistance, and claims a need for future assistance, with cooking, cleaning, washing, washing up, yard work, mowing, vacuuming, driving, feeding pets and the like. Given the lack of any challenge to the plaintiff's assertions I propose to accept them. The plaintiff assesses her own claim as a need for eight hours assistance per week at a cost of $35 per hour for 13.5 years.[110]

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108 See Ex 1 at para 214 and Ex 21

109 [2011] QCA 48

110 Ex 1 at para 215

[195] I was not informed of any agreement as to the rate per hour, but given the hourly rate charged by Blackwater Commercial Cleaning the amount claimed would seem reasonable.

[196] How the eight hours was derived is not apparent. In the absence of any cross examination or argument I will assume the claim reflects a reasonable number of hours for the various tasks mentioned. It is not inherently improbable.

[197] There are a number of factors that have the potential to impact on the plaintiff's capacity to carry out these various tasks had she remained uninjured. The pre-existing shoulder and neck problems that had not completely subsided, her morbid obesity, and the possibility of the diabetes becoming less well controlled all might come against the plaintiff.

[198] Consistently with my findings above, I will assume there is a good prospect of a substantial recovery from her present difficulties within a relatively short period of time.

[199] I will allow $30,000. That equates to a continuing need at the present level for about two years. I do not make that assumption but rather assume a gradual recovery with improving function over the next few years with some further amount for a residual continuing need.

Special Damages

[200] The defendant allows $50,000. Given that WorkCover seeks repayment of $41,729.12 that submission allows for outlays by the plaintiff of only $8,270. The plaintiff's evidence supports outlays of $23,850.45 by her personally. There was no challenge to the fact of the expenditure.

[201] In the absence of any demonstrated reason why the amounts outlaid should not be met I propose to allow the amount claimed. There was no evidence that the plaintiff has done anything but follow her medical advice in the treatments that she has sought and the medications that she has taken. She acted reasonably in doing so.

[202] I will allow interest at $4,900. I rely on the calculation by Mr Crow SC which is not precise but based on one half of the outlay, presumably because some part of the amount outlaid, which was not identified, was met by the plaintiff's medical insurance.

Summary

[203] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$50,000.00
Interest on past general damages	$2,470.00
Past Economic Loss	$145,000.00
Interest on past economic loss	$21,700.00
Future Economic Loss	$110,000.00

Loss of superannuation benefits	$22,950.00
Special damages (paid by WorkCover)	$41,729.12
Special damages (paid by the Plaintiff)	$23,854.45
Interest on special damages	$4,900.00
Future medical expenses	$15,000.00
Fox v Wood	$9,705.00
Future Paid Care	$30,000.00
Total Damages	**$477,308.57**
Less refund to WorkCover	$108,308.55
Net Damages	**$369,000.02**

[204] There will be judgment for the plaintiff in the sum of $369,000.02.

[205] I will hear from counsel as to costs.