SUPREME COURT OF QUEENSLAND

CITATION:	*Endeavour Foundation v Weaver* [2013] QCA 371
PARTIES:	**ENDEAVOUR FOUNDATION** ACN 009 670 704 (appellant) **v** **CHRISTINE ANNE WEAVER** (respondent)
FILE NO/S:	Appeal No 4239 of 2013 SC No 552 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2013
JUDGES:	Holmes and Fraser JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The judgment at first instance is set aside and judgment is entered for the appellant.** **3. The parties have leave to make submissions on costs within 14 days of the delivery of this judgment.**
CATCHWORDS:	TORTS – NEGLIGENCE – GENERAL MATTERS – where the respondent in the course of her employment with the appellant trained other employees in techniques for avoiding client assault – where the respondent while demonstrating a "back steps" manoeuvre fell and suffered personal injury – where the trial judge found that the appellant had unnecessarily exposed the respondent to a risk of injury by instructing her in her initial training to perform the "back steps" manoeuvre quickly – where the respondent's evidence was that she was told to move more quickly as she became more practised, and to move "as quickly as possible" – where the training and training manual given to the respondent emphasised practice as a means of becoming accustomed to the movements, in preparation for a real-life attack – whether the trial judge mistook the content of the instruction given to the respondent – whether the evidence showed that a video demonstration would have provided adequate training –

whether the instruction given to the respondent, to demonstrate the manoeuvre as quickly as she was capable of doing, was reasonable

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – GENERAL PRINCIPLES – PERSONAL INJURY OR DEATH CASES – where the trial judge, applying s 308E of the *Workers' Compensation and Rehabilitation Act*, awarded $30,000 for a wide range of future services – where the respondent had previously carried out the tasks for which she had claimed future assistance – whether s 308C or s 308E of the Act was applicable – where house cleaning services were the only paid services the respondent had received since her injury – where many of the services for which future assistance was claimed were not "services of substantially the same type" – whether the trial judge erred in making an award for all the services claimed – whether the resulting difference in the award would justify interference with the judgment

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 308A, s 308C, s 308E

Anderson v Mt Isa Basketball Association Incorporated [1997] QCA 340, distinguished
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317; [2003] HCA 51, applied
Elford v FAI General Insurance Company Limited [1994] 1 Qd R 258; [1992] QCA 41, applied
Foster & Anor v Cameron [2011] QCA 48, considered
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: G W Diehm QC, with R A I Myers, for the appellant
G F Crow QC, with E J Williams, for the respondent

SOLICITORS: MVM Legal for the appellant
Macrossan & Amiet Solicitors for the respondent

[1] **HOLMES JA:** The respondent, Mrs Weaver, was the successful plaintiff in an action for damages for personal injuries sustained in the course of her employment with the appellant, the Endeavour Foundation. At the time she was injured, Mrs Weaver was working as a trainer teaching Endeavour Foundation employees techniques to deal with aggressive clients. She was demonstrating what was known as the "back steps" manoeuvre; in that response, the staff member being confronted by an aggressive client was to walk backwards on the balls of his or her feet in a slightly crouched position, while focussing attention on the aggressor. In attempting to demonstrate the manoeuvre, Mrs Weaver fell backwards onto her buttocks and back and suffered injuries.

[2] The trial judge found that the Endeavour Foundation had unnecessarily exposed Mrs Weaver to a risk of injury by instructing her in her initial training that the "back steps" manoeuvre had to be performed quickly. The Endeavour Foundation was

liable for the resulting harm; Mrs Weaver had injured her spine and coccyx, precipitating an adjustment disorder which, in turn, perpetuated her symptoms of pain. His Honour awarded damages for those injuries, including an allowance of $30,000 for future paid services.

The appeal grounds

[3] The Endeavour Foundation appealed on a number of grounds: that the learned judge had been mistaken as to the content of the instruction given to Mrs Weaver, which was, in fact, reasonable; that his Honour mistook the nature of the instruction given by a different contractor who subsequently took over the training course, or even if he were right as to the content of the latter instruction, had failed to consider that there might be two alternative approaches, both reasonable; that he had failed to take into account the benefits of giving the instruction to Mrs Weaver as against the risks of not doing so, both for her and the Endeavour Foundation; that he had wrongly found that a video demonstration could provide adequate training; and that he had erred in a specific finding, that there was "no pretence of getting an employee used to this unnatural action" (involved in the back steps movement), when the evidence was to the contrary.

[4] A further ground identified in the notice of appeal, that the trial judge had allowed hindsight bias to influence his determination of reasonableness, was not advanced as a separate contention but, rather, as an explanation of his Honour's approach. In relation to the award on quantum, issue was taken only with the component for future services. It was said that his Honour had erred in applying s 308E of the *Workers' Compensation and Rehabilitation Act* 2003, rather than s 308C, and in allowing damages for a wide range of future services, although he had found the only paid services Mrs Weaver had engaged since her injury were for house cleaning.

The 'back steps' manoeuvre

[5] As the learned judge found, the Endeavour Foundation provided employment for persons with intellectual disabilities, some of whom, on occasion, became agitated and even violent. A record of WorkCover claims tendered at trial showed some 90 claims arising from client assault. To discharge its duty of protecting its employees from attack, the Endeavour Foundation engaged workplace consultants to train staff, who would then themselves act as trainers, in "professional assault response training" (PART). Mrs Weaver received her training in a five day course in October 2005, during which she was provided with the PART manual.

[6] Chapter 7 of the PART manual dealt with techniques to be used in avoiding an assault. It included these instructions on how to respond safely to an aggressor:

> "**4. Stay out of the Way**
>
> Use your observational strategies to stay out of striking range. Use the stance and the crouch which you have already learned, keeping your weight lightly balanced on the balls of your feet, your back straight and your head up. Practise these positions until they feel natural for you.
>
> …

5. Get out of the Way

> If you find yourself too close to the attack, move out of the way as quickly as possible. While evading, stay balanced and move smoothly. Keep up crisis communication."

[7] The reference to the "crouch" was to an exercise set out earlier in the manual, titled the "Defensive CROUCH". The manual explained:

> "Each person's crouch position is different. You will feel as if you are lightly sitting on an object situated below your hips. In this position, you can move quickly out of the path of an attack."

Also relevant was the "Backsteps" exercise, which entailed the following:

> "CROUCH. Move your one foot back behind your hips. Now pull the other foot back so that you are again in the crouch position. Weight should be evenly distributed between both feet. Remember to keep your feet close to the floor and feet approximately shoulder width apart, shuffling or stepping as you move. Do not hop. Take a few steps back, ending in your CROUCH."

[8] The exercises were prefaced with an observation that they would help those performing them to "determine if you are physically able to move quickly and keep your balance". There were accompanying teaching points, which included the following:

> "Employees must be ready to move according to their own abilities and are personally responsible for being prepared.
>
> These exercises give the instructor the opportunity to observe participants' ability and willingness to move. They also provide the participants with the opportunity to assess their own physical abilities and limitations."

The speed of the manoeuvre

[9] Mrs Weaver alleged in her statement of claim that the Endeavour Foundation had unnecessarily exposed her to a foreseeable risk of falling by requiring her to undertake "a backwards manoeuvre which required [her] to move backward as quickly as possible whilst looking for the closest exit point"; and by failing to instruct her "to move at a slow or moderate pace in a forward or sideway direction". Central to the trial judge's conclusion of negligence was his finding that Mrs Weaver was not only required to perform a difficult manoeuvre but was required to perform it quickly. In the appeal, both parties focussed their attention on the instructions given to Mrs Weaver, both orally and in written form.

[10] In her evidence, Mrs Weaver described the training she was given in moving out of the path of an attack: she was to go onto the balls of her feet in the defensive crouch, with hands up, and to say to the approaching client "Stop"; then turn and move quickly away. The instructor who taught her demonstrated those steps. Mrs Weaver said she was told in relation to the "back steps" manoeuvre to get onto the balls of her feet and move as quickly as possible. When she was asked if she was given any tuition on the importance of moving quickly out of the path of an attacker, and, more particularly, what had been said or done in that regard, she answered:

> "They showed us - the reason for moving quickly out of the way, you've got a client coming at you with - with possibly something in their hand, or just fists or whatever, and the purpose of getting out of the way quickly is to stop getting injured. To prevent you not [sic] to be injured."

[11] Over a morning period of training, Mrs Weaver said, as she became more practised in the "back step", she was told to "go quicker"; the trainer, Mr Sheahan, said that once she had "got" the manoeuvre, she could move more quickly. She found the exercise difficult because it was necessary to keep her eyes forward while moving backwards. There was a distinct manoeuvre, a pivot turn, as to which she was told to "make it snappy". Mrs Weaver agreed that she practised the "back step" to a point where she "got quicker or quick", although she had some difficulty doing the exercise because she felt unbalanced and wobbly. Under cross-examination, Mrs Weaver said that she trained others two or three times a year. She had practised the manoeuvres "a few times" at home.

[12] Mrs Weaver demonstrated the "back steps" movement in giving her evidence. She began from a seated position, rose, pivoted to her left, saying, "Stop" while on the balls of her feet, and then stepped backward four paces. She explained that in real life it would be done more quickly. She enlarged:

> "You've got someone coming at you, you want to get out of the road. You've got to keep your eyes on them, you need to find the door and get out. So you move as quickly as you can. When you've practiced it you move quickly."

[13] As well as the PART manual, Mrs Weaver received trainers' notes which, among other things, advised a trainer to reassure trainees who considered the activities did not reflect real life that the point was to learn the

> "principles of the moves – **speed comes later with competence and confidence**".

As to that, Mrs Weaver said she was told trainees were to practise the foot manoeuvres and, she said,

> "[W]e were told to demonstrate as slowly and then as we were confident we could move faster".

[14] Before the day she was injured, Mrs Weaver had taught the PART manoeuvres to other employees on six occasions without incident. On the occasion on which she fell, she had been asked how to move away from a seated position when a client became aggressive. Mrs Weaver had been shown how to execute that manoeuvre during her training and proceeded to demonstrate it through a role play. Describing the incident in her evidence, she said that the staff member playing the part of her attacker was coming at her quickly. She stood, pivoted, and was moving backwards with her hands up, asking the supposed attacker to stop. The latter continued to come towards her. Mrs Weaver's "both feet stuck to the carpet and just threw [her]". As to the pace of the "back steps" which she was taking, she explained:

> "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 practised 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."

[15] In Mrs Weaver's cross-examination, the following exchange occurred:

> "It was an essential element of your training, wasn't it, to practise all of these things slowly before you lifted the pace?-- Yes.
>
> To do it as it might be done in a real life situation?--- Yes.
>
> And you did that?-- Yes.
>
> You were experienced in doing that?-- Doing it slowly, yes.
>
> Initially. And I take it you'd conducted this manoeuvre, what, on hundreds of occasions?-- No.
>
> A lot? You tell us, we don't know?-- I did two or three trainings a year. We weren't given the time at work to practise it. We weren't given any hours to practise it.
>
> You didn't practise it at all in your own time?-- At home I may have a few times on occasions, yes."

Mrs Weaver went on to say that she trained others as she had been shown. To a suggestion that she had "never had problems" with the manoeuvre, she said that she did feel unbalanced.

[16] Another Endeavour Foundation employee, Ms Baynton, who had had similar training, said that she had fallen while performing a backwards manoeuvre, although she did not know why she fell. She found walking backwards an "unnatural movement". Ms Baynton had also been a witness to Mrs Weaver's accident. She saw Mrs Weaver rise from the chair, step backwards not more than five or six steps, and fall.

[17] A consulting engineer, Mr McDougall, was called in Mrs Weaver's case. He gave his view that the facts that Mrs Weaver was moving backwards as quickly as possible, and looking forwards rather than in her direction of movement would have increased the likelihood of an "underfoot incident" leading to a fall. That would have been less likely had she demonstrated the manoeuvre in a "calm, slow and careful way". He suggested in his report that a video demonstration using participants with appropriate training skills, experience and agility could have been used to minimise risk.

[18] The Endeavour Foundation relied on a number of aspects of the evidence to contend that the instruction it gave Mrs Weaver was reasonable. The manual given to Mrs Weaver during her training recognised in its "Teaching Points" that employees should be "ready to move according to their own abilities". One of those teaching points, which related to the "Get out of the Way" instruction, read:

> "Explain why practising slowly and carefully is part of all learning. You may hear, 'This is unrealistic!' Use an example with which you are comfortable to illustrate how learning a new skill is always done by starting slowly, such as learning to drive a car or to play an instrument."

The trainers' notes instructed trainers to advise participants to practise the techniques "in a calm, slow and careful way".

[19] The Endeavour Foundation called as a witness Mrs Clare Sheahan, who, with her husband, was a former principal of the company which had trained Mrs Weaver. She had no actual recollection of Mrs Weaver's training. Mrs Sheahan said that it was frequently the case that participants did not feel comfortable with the movements required of them. Consequently,

> "...our suggestion was that you do them very slowly and you practise them until you become comfortable with them. Some people are more naturally coordinated than others, and we would certainly suggest the people who felt less comfortable with it, that it was important that they went away and they practised until they became confident in being able to carry out any of the movements that we were demonstrating and asking them to be able to then demonstrate to us."

It was not put to Mrs Sheahan that the company had departed from that practice in any instance.

[20] Mr Martin Unger, the principal of a company which had acquired Mrs Sheahan's business and currently provided training for the Endeavour Foundation, gave evidence. He was shown the exercises in the PART manual and said that the core information was still that provided in his training courses. He explained that the "back step" exercise remained one of three critical movements:

> "If there is a attacker, for want of a better word now, moving towards you, you may need to back step out of a situation, especially if the exit is behind you, and you want to be able to do that in such a way that you can maintain a visual on the attacker, and also very much be aware of your peripheral so you can move back in a safe way. Because if the staff member who's being attacked, or the person who's being attacked is going to turn away, that would be then very, very hard to deflect the kick, the punch, the push, the shove or the grab. So back step is one of the key movements of the PART material. *And it's taken through in a particular way so people do move slowly and carefully with feet apart to prevent any sort of movement away or - or loss of eye contact to the attacker*."

(The last sentence has been italicised because the learned trial judge placed particular reliance on it.)

[21] Mr Unger, asked about footwear in cross-examination, said that industrial footwear was not acceptable "[i]n training, because we are moving carefully and slowly...".

The trial judge's findings

[22] The trial judge applied what has been referred to as the *Shirt*[1] calculus to the evidence:

> "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

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1 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

> 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."[2]

[23] His Honour found that the fall occurred because Mrs Weaver's footwear (a pair of joggers) in some way grabbed on the carpeted floor surface so as to trip her up. It was possible that some unevenness in the floor surface played a part in the fall. The Endeavour Foundation was not in breach of any duty, however, in relation to the floor surface or the joggers which Mrs Weaver wore. It could not have been expected to foresee that an everyday floor surface was likely to present a hazard in training; nor was it reasonably practicable to expect an employer to carry out checks on the grip characteristics of its employees' shoe soles.

[24] The trial judge found that directing a middle-aged overweight woman (Mrs Weaver, who was 49 years old, was 152 centimetres tall and weighed 96 kilograms) to walk backwards on the balls of her feet while keeping her attention focussed elsewhere, involved a risk of injury that she might fall over; a risk which was obvious and real. Mrs Weaver's injury was in the class of injury to which the risk exposed her. The Endeavour Foundation had tendered records which showed only four injuries sustained in PART training, all recorded between September and December 2007. The learned judge said that he found those statistics of limited assistance, because little was known as to the cause of the relevant injuries and their severity, and they were only one small factor in determining the magnitude of the risk and the likelihood of occurrence. Mr McDougall's evidence that slips, trips and falls were a major cause of injury in Australian industry was not challenged.

[25] The trial judge accepted the Endeavour Foundation's argument that PART training was an important safety measure and justified some risk of injury to prepare any employee for a possible assault. But there were three significant risk factors: – that Mrs Weaver was of an age and build which meant that she was more likely to fall, with potentially more serious consequences; that she was directed to walk backwards on the balls of her feet; and that she was required to focus her attention not on where she was going, but on the person playing the part of the aggressor. To those had been added the requirement that "this unnatural activity be done quickly".

[26] The last factor was pivotal in his Honour's conclusion that the Endeavour Foundation had breached its duty of care to Mrs Weaver. He accepted that the risk of injury entailed in the first three features could be justified having regard to the importance of preparing an employee against assault, but the requirement to move quickly was unnecessary and the risk was avoidable. Mr Unger's evidence was that he emphasised that a demonstrator should perform the "back steps" manoeuvre "slowly and carefully". Mrs Weaver had not been trained to perform the manoeuvre in that way; had she been, she would have complied and the risk of injury to her would have been substantially reduced.

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2 Per Mason J at 47–48.

[27] The risk entailed in moving quickly would be justified in the instance of a real attack, but there was no "countervailing benefit to the instruction" in a training situation, in which there was "no pretence of getting an employee used to this unnatural action, if it were possible". Mr Unger's approach, of moving slowly and carefully, supported that view. If it were really necessary to convey a need for speed in performing the manoeuvre, that could be done by a video demonstration using younger and more agile participants.

[28] Addressing the Endeavour Foundation's contention that the risk was an everyday, obvious one against which it was not necessary to take precautions, the primary judge referred to similar arguments made in *Anderson v Mt Isa Basketball Association Incorporated*.[3] The plaintiff in that case was a basketball referee who had been injured while running backwards in the course of a game. Davies JA and Demack J, in a joint judgment, noted that too much weight ought not be placed on the factors of obviousness and ordinariness of the risk involved: courts increasingly recognised the need to take into account the possibility of inadvertent or negligent conduct by individuals at risk, and such factors, in any event, assumed less importance where the risk of injury could be "eliminated without undue difficulty or expense".[4] Those considerations, the trial judge said, applied with more force in Mrs Weaver's case, because there was a positive instruction by the Endeavour Foundation which increased the risk. The latter had exposed Mrs Weaver to an unnecessary risk of injury. There was no countervailing consideration of expense, difficulty or inconvenience to excuse its failure properly to instruct her.

The appeal on liability

[29] The Endeavour Foundation complained that the trial judge had wrongly found that Mrs Weaver was instructed to do the activity quickly, when the instruction was that it be done as quickly as possible. The instruction manual had emphasised the need for employees to learn to appreciate what their capacity was. Mrs Weaver was instructed that she should perform the "back steps" manoeuvre slowly at first, and that as competence and confidence developed, she could move faster. Mrs Weaver's evidence was that she was told once she "got" the back step manoeuvre, she could move more quickly and that, having practised the foot manoeuvres, as she became more confident, she could move faster.

[30] The "Get out of the Way" direction, which instructed an employee under attack to "move out of the way as quickly as possible", had to be read in context with the preceding direction, "Stay out of the Way" which instructed the employee to use a crouching stance with weight balanced on the balls of the feet to stay out of striking range, and also directed the employee to "practise these positions until they feel natural for you". Mrs Weaver had confirmed that that passage was read to her during the course. In Mrs Weaver's description of going quickly, as she had been taught immediately before she fell, she had also said that she had not run but had "just paced it".

[31] The Endeavour Foundation submitted that it was a reasonable instruction to tell Mrs Weaver to perform the manoeuvre "as quickly as possible"; that is, within the bounds of her skills. It was appropriate to instruct her to practise the manoeuvre so that she could do it faster, and ultimately as quickly as she possibly could, and there

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3 [1997] QCA 340.

4 At 8.

was nothing unreasonable in requiring her to maintain the skill and demonstrate it to trainees within the bounds of her ability. The trial judge had overlooked the fact that the Endeavour Foundation would be liable for negligence were an employee assaulted in the absence of such a direction because he or she had moved slowly and carefully, rather than as quickly as he or she was capable. Its obligations in that regard were one of the "conflicting responsibilities" which fell to be considered among the other factors identified in *Shirt*.

[32] The learned judge was wrong in finding that there was "no pretence of getting an employee used to this unnatural action" in the training situation. Instead, employees were instructed to develop, by practice, their ability to perform the manoeuvre. There was no sufficient evidence that a video demonstration would be adequate: the only witness who gave evidence on the point was the consulting mechanical engineer, Mr McDougall, who had no expertise in training employees. The finding should not have been made without the proposition's having been put to Mrs Sheahan and Mr Unger, both of whom had experience in training. As a matter of common sense, to teach students credibly, it was appropriate that a trainer who was a peer of those being trained and was not young and agile demonstrate the activity.

[33] The learned trial judge, it was submitted, had misunderstood the effect of Mr Unger's evidence. The latter confirmed that his instructions were consistent with the manual's advice that trainees should be told to move slowly and carefully, as Mrs Weaver had been at her training course. Nothing in his evidence indicated that he did not also tell trainees to build up their speed and to practise in order to gain confidence and competence. In any event, assuming the effect of his evidence was that he advised anyone performing the manoeuvre to move slowly, that was not conclusive. The Endeavour Foundation relied on this statement from the judgment of McHugh J in *Dovuro Pty Ltd v Wilkins*[5]:

> "A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course."[6]

[34] The learned judge had, it was submitted, made the error of reasoning backwards by identifying what risk had eventuated, considering what step could have been taken to prevent it from eventuating and then determining whether it was unreasonable for the employer not to take that step. In doing so, he had failed to consider the reason for issuing the relevant instruction, which was to promote employees' safety.

The respondent's submissions

[35] It was put for Mrs Weaver that the Endeavour Foundation was attempting to make too fine a distinction between the word "quickly" and the expression "as quickly as possible". If it were to be suggested that the manual, in using the latter phrase, meant "as quickly as the individual could manage", that should have been put to Mrs Weaver; but it was not. The trial judge had assessed the risk of injury prospectively. The exercise required of Mrs Weaver, given her build, was inviting an accident. To ask her to do it as quickly as possible was to increase the risk, but she was encouraged to do so, and complied. Although she had agreed that she was

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5 (2003) 215 CLR 317.

6 At 330.

experienced in doing the activity slowly, that was to be taken in context with her further evidence that she had felt unbalanced.

[36] Mr Unger's evidence referred specifically to the point of performing the exercise slowly and carefully; it was to prevent loss of eye contact with the attacker. That, plainly, was not an instruction limited to those at the initial stages of their training. Moving "as quickly as possible" was the opposite of performing an exercise "slowly and carefully"; it followed that Mr Unger's instruction was different from that given by the Sheahans. Had Mrs Weaver been instructed to perform the manoeuvre slowly and carefully, the risk of injury would have been avoided, with no undue disadvantage occasioned to the Endeavour Foundation.

[37] It was not correct that the trial judge had not considered the risk of injury to employees which might be entailed in an instruction to move slowly. He had accepted the necessity, in general, for PART training as a safety measure; but not for an employee in a training exercise to be required to move as quickly as possible. Mr McDougall's evidence about the adequacy of a video demonstration was unchallenged and the finding was open and proper. Mrs Sheahan and Mr Unger could not have given evidence on the point because they were not experts, so the submission that the proposition should have been put to them was unsustainable. The trial judge's statement that there was "no pretence of getting an employee used to this unnatural action" was consistent with the evidence of Ms Baynton and Mrs Weaver that they found the "back step" manoeuvre uncomfortable and unnatural.

Discussion

[38] I may say at the outset that I do not think that his Honour's reasoning process involved hindsight bias. His considerations came in a context in which the Endeavour Foundation had admitted, in its defence, that PART training activities included a foreseeable risk of injury, while maintaining that injury in the manner Mrs Weaver alleged was not reasonably foreseeable. It had submitted that the particular activities being performed by Mrs Weaver did not give rise to such a risk. In that context, his Honour considered the nature of the manoeuvres Mrs Weaver was required to perform in concluding that there was a real and foreseeable risk of a fall. Having reached that conclusion, he turned to consider what a reasonable employer would have done, if anything, to obviate or mitigate that risk. There was no error in that approach.

[39] The Endeavour Foundation's complaint that the trial judge mistook the content of the instruction given has substance. His Honour recorded that Mrs Weaver gave unchallenged evidence that she had been trained by Mr Sheahan to carry out the manoeuvre quickly and that such an instruction was not inconsistent with the training manual. In fact, in the passage of evidence which his Honour referred to in this context (summarised at [11] above), Mrs Weaver's evidence of being told to go quickly was not unqualified; she said that she was told to move more quickly as she became more practised and gained a command of the manoeuvre. The manual similarly gave no instruction in absolute terms to move quickly, but rather to "move out of the way as quickly as possible". Mrs Weaver confirmed that that passage was read to her and that she was, in addition, told to "move as quickly as possible".

[40] Indeed, Mrs Weaver's pleaded case was that she was required to "move backward as quickly as possible." There was some argument in this Court as to whether that instruction should be regarded as urging maximum speed or had implicit in it a recognition of the individual's physical limitations. In the context of other reference to an employee's physical capacities, the manual's instruction could, in my view, only be read in the latter light. Consistent with that was Mrs Weaver's evidence, the thrust of which was that it was a matter of practice:

> "So you move as quickly as you can. When you've practised it you move quickly";
>
> "[W]e were told to demonstrate as slowly and then as we were confident we could move faster";
>
> "Once you've practised the manoeuvre, you can go quickly".

and her acceptance of the proposition that it was

> "an essential element of [her] training...to practise all of these things slowly before [she] lifted the pace".

Those responses suggested a perception that she was to move at the pace of which practice had rendered her capable.

[41] The distinction which the learned judge drew between the situation of a real-life attack, in which moving quickly backwards would be justified and the training situation, in which there was "no pretence of getting an employee used to this unnatural action" similarly suffers from some flaws. The evidence was that both the manual and the actual training emphasised practice as a means of getting employees accustomed to the movement. The "stay out of the way" instruction recommended practice of the "crouch" position until it felt natural and Mrs Sheahan's unchallenged evidence was that she suggested to participants in the courses she ran that they undertake the movements slowly and practise them until they became confident.

[42] Those errors were significant. There is a real difference between the findings which the trial judge made, that Mrs Weaver was required to move quickly and in an "unnatural action" at which there was "no pretence" of getting her accustomed, and the conclusion to which the evidence, in the form of the manual's instructions, Mrs Sheahan's description and Mrs Weaver's own understanding, pointed: that she was to move within the limits of her physical capacities as improved by practice. In my respectful view, his Honour misapprehended the nature of the instruction given. The question which now falls for consideration is whether that instruction was reasonable.

[43] The trial judge was correct in his conclusion that Mr Unger's evidence supported a different manner of proceeding. As to that, the submission for Mrs Weaver as to the effect of Mr Unger's evidence must be accepted. It was, that the manoeuvre should be performed slowly and carefully, not merely at the commencement of training, but also in the context of an actual attack; Mr Unger's specific reference to moving in that manner to prevent loss of eye contact with an attacker makes that clear. The question remains, though, whether it was reasonable to give Mrs Weaver an instruction that she should move as quickly as she could, rather than "slowly and carefully". The fact that Mr Unger regarded the latter as an appropriate way of

training employees to respond does not mean that a different view, that an employee should gain the capacity to move as quickly as possible away from the threat, was not reasonable.

[44] Mrs Weaver's case at trial did not involve any suggestion that there was a difference between instructions which might reasonably be given to an employee as to how to escape an attack and those which might be appropriate for an employee being taught how to train others in avoiding assault. It was not contended that if the instructions given to Mrs Weaver were reasonable in the former context, they were not reasonable in the latter. There undoubtedly was some risk entailed in Mrs Weaver's performing the manoeuvre, whether for the purposes of practice or demonstration. But the reasonableness of the Endeavour Foundation's response to the risk had to be assessed in the larger context of the purpose of the activity, which was to provide Mrs Weaver and other employees with the means of avoiding an attack.

[45] In concluding that there was "no countervailing benefit" to the instruction in any circumstance short of actual assault, the trial judge seems to have overlooked the benefit pointed to by the Endeavour Foundation: that an employee would, presumably, be more able to move quickly in a real-life assault situation for having practised the back steps manoeuvre with the aim of performing it as quickly as possible. Certainly, the ability to perform it slowly and carefully seems unlikely to prove of value, except in evasion of an equally slow-moving aggressor. *Anderson v Mt Isa Basketball Association* was a different case: there the employer had no conflicting responsibility which might prevent it from giving the instruction against running backwards. In this instance, with the Endeavour Foundation's responsibility of safeguarding employees from attack, the instruction to move as quickly as possible was a reasonable one.

[46] It was, of course, possible for a video to be used to demonstrate the technique. However, there was an absence of evidence as to the effectiveness of a video demonstration as a form of training. As the Endeavour Foundation pointed out, Mrs Sheahan and Mr Unger were not questioned on the point, and Mr McDougall, as a mechanical engineer, was not in a position to assist. Indeed he did not purport to do so; his opinion was as to the efficacy of videos in minimising risk, not in teaching. In any case, to ask Mrs Weaver to demonstrate the manoeuvre to others as quickly as she was capable of doing was not unreasonable. There was no logic in training her with the aim that, through practice, she achieve whatever speed she could manage in the manoeuvre, only to require that she demonstrate it in slow motion or through use of a video. The concern against which the activity was directed, the risk of assault, with the corresponding need to be able to move with expedition, had not ceased to operate.

[47] In my respectful opinion, the appellant has made out some of its appeal grounds: that his Honour mistook the nature of the instruction; that he erred in finding that there was "no pretence of getting an employee used to this unnatural action"; and, crucially, that he erred in concluding that the instruction given to Mrs Weaver was unreasonable. Its appeal should be allowed. But it is necessary also to consider the ground of appeal relating to the damages awarded for future services, in case my conclusion on liability does not stand.

The award for future services

[48] Mrs Weaver claimed $130,000 for future paid assistance, on a basis of eight hours per week at $35.00 per hour for 13.5 years. The trial judge summarised the tasks

identified in her quantum statement as "cooking, cleaning, washing, washing up, yard work, mowing, vacuuming, driving, feeding pets and the like". He awarded damages of $30,000 to reflect Mrs Weaver's need for assistance over a two year period.

[49] His Honour applied s 308E of the *Workers' Compensation and Rehabilitation Act* 2003:

> "**308E Services not required by or provided to worker beforeinjury**
>
> (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."

[50] The Endeavour Foundation contended that his Honour should, instead, have adverted to s 308C of the Act:

> **"308C Worker performed services before injury**
>
> (1) This section applies if, before the worker sustained the injury, the worker usually performed particular services.
>
> (2) A court can not award damages for the cost or value of services of substantially the same type that have been 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."

[51] The *Workers' Compensation and Rehabilitation Act* 2003 defined various terms used in both sections:

> *"**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".[7]

[52] Mrs Weaver's evidence, accepted by the trial judge, was that she had, after her accident, paid her mother, neighbours and a friend for domestic assistance, but not at any commercial rate and sometimes through means other than cash: accommodation or provision of petrol. In addition, however, she had retained a commercial cleaning service which had provided five hours of cleaning at $65.00 per hour. The learned trial judge found that only the commercial cleaning could be classified as a paid service as defined in the Act, but relied on the decision of this court in *Foster & Anor v Cameron*[8] to conclude that because the services provided were partly gratuitous and partly paid, the exclusion in s 308E did not apply.

[53] The plaintiff in *Foster & Anor v Cameron* could not, because of his injuries, mow his lawn. Members of his family usually performed the task for him, but on seven or eight occasions, when they were not available, he engaged a commercial contractor to perform the task. As here, the trial judge had applied s 308E, but this court regarded s 308C as applicable. The court ruled that the services - some paid, some not - did not, taken collectively, fall within either the definition of paid services or that of gratuitous services. Instead, they were a hybrid, with which s 308C(2) did not deal. The provision of those services did not, therefore, preclude the award of damages to the plaintiff in respect of the need for lawn mowing services.

[54] The Endeavour Foundation argued that the reference in s 308C(2) to "services of substantially the same type" required attention to the particular types of services being performed pre-injury and a corresponding distinction between types of services performed post-injury in determining whether they had been provided gratuitously or not. The only paid services his Honour found that Mrs Weaver had received were house cleaning services; the quantum statement claimed for a broader range of services without any differentiation so as to allow for assessment of the cost of the house cleaning services; and his Honour had allowed damages for all of the types of services claimed. He should not have made any award because Mrs Weaver had not established the extent of the "services of substantially the same type" as those she had previously performed.

Discussion

[55] According to Mrs Weaver's quantum statement, she had previously carried out the tasks for which she now claimed future assistance. The Endeavour Foundation is, accordingly, correct in saying that s 308C(1), not s 308E(1), was enlivened. Its submission as to the distinction between services entailed in s 308C(2) must also be accepted. The words "substantially the same type" suggest a categorisation of services, although not necessarily precise delineation. To construe the section as contemplating that the court would deal with services at large in considering their classification as gratuitous or paid would produce absurdity. By way of example, if

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7 s 308A.
8 [2011] QCA 48.

a plaintiff were over a matter of years between injury and trial to benefit from a wide range of gratuitous services – driving, nursing, cleaning, housekeeping – and on one occasion to pay a commercial enterprise for lawn mowing, all the other services, on that construction, would lose their character as gratuitous and move into the 'hybrid' category.

[56] It is, accordingly, not a correct approach to deal collectively with "cooking, cleaning, washing, washing up, yard work, mowing, vacuuming, driving, feeding pets and the like", as his Honour did. In this case, cleaning services (which would rationally include vacuuming) were the only type of service of which it could not be said unequivocally that they were "gratuitous" services; instead, they fell within the "hybrid" category referred to by Chesterman JA in *Foster & Anor v Cameron*. The Endeavour Foundation is correct in saying that it was only in respect of those services that Mrs Weaver was entitled to damages.

[57] It was submitted for Mrs Weaver that if that were the conclusion, an allowance for cleaning at 5 hours per week at $65.00 per hour for two years was, in any event, a fair and reasonable finding open on the evidence; and that would be higher than $30,000. The evidence was certainly scant as to how much cleaning Mrs Weaver needed assistance with. An invoice from the cleaning firm she had engaged showed that it had cleaned for her on two days in one week, working shifts of three and two hours; which might give rise to an inference that in any given week, of the eight hours assistance claimed, five hours were needed in respect of cleaning. Some assistance for that fragile inference is obtained from the activities described in the quantum statement; one could, on a broad-brush approach, infer that cleaning chores comprised about two-thirds of the tasks with which Mrs Weaver required assistance. If one were to moderate the award accordingly, it would make a difference of about $10,000.00; 2.7% of the total award of $369,000.00. A variation of those proportions would not, in my view, justify interference with the judgment: *Elford v FAI General Insurance Company Limited*.[9]

Orders

[58] I would allow the appeal, set aside the judgment at first instance and enter judgment for the appellant. The parties should have leave to make submissions on costs within 14 days of the delivery of this judgment.

[59] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[60] **MARGARET WILSON J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons for judgment.

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9 [1994] 1 Qd R 258 at 265.