SUPREME COURT OF QUEENSLAND

CITATION:	*Knight v CPSM Pty Ltd* [2021] QCA 199
PARTIES:	**MEGAN HAZEL KNIGHT** (appellant) **v** **CPSM PTY LTD** ACN 145 835 981 (respondent)
FILE NO/S:	Appeal No 2501 of 2021 DC No 4874 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2021] QDC 3 (Sheridan DCJ)
DELIVERED ON:	17 September 2021
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2021
JUDGES:	Morrison JA and Boddice and North JJ
ORDERS:	**1. The application to adduce further evidence is refused.** **2. Appeal dismissed.** **3. The appellant pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – DAMAGE AND CAUSATION – CAUSATION – AT COMMON LAW – FAILURE TO TAKE PRECAUTIONS, WARN, INFORM ETC – where the appellant was employed by the respondent as a personal care assistant at an aged care facility – where the appellant was exposed to the chemical Didecyldimethylammonium Chloride (D4) during her employment – where the appellant alleges that exposure to the chemical Didecyldimethylammonium Chloride (D4) caused her personal injury – whether the learned primary judge erred in dismissing the claim *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, applied
COUNSEL:	The appellant appeared on her own behalf O K Perkiss for the respondent
SOLICITORS:	The appellant appeared on her own behalf BT Lawyers for the respondent

[1] **MORRISON JA:** Ms Knight was employed by CPSM Pty Ltd (**CPSM**) as a personal care assistant on a casual basis, working at a facility known as Mount Coolum Aged Care.

[2] She commenced working at the facility in about 2010. CPSM had purchased the facility from the previous owner and Ms Knight, who had worked there for the previous owner, became an employee of CPSM.

[3] Ms Knight's duties included serving meals to residents and cleaning up after meal service. As with other carers, she worked in conjunction with the domestic staff and the cleaners, assisting those staff at mealtimes. That assistance included cleaning the dining tables and servery at the end of mealtime.

[4] Spray bottles containing a diluted chemical known as D4 were used during cleaning.[1] The pure form of D4 was classified as a hazardous chemical according to the Australian Safety and Compensation Council's criteria, and at the relevant time was the subject of a Material Safety Data Sheet, which had been issued on behalf of the manufacturer and supplier. That data sheet was on a wall displayed in the cleaners' room where the raw chemical was kept at the facility.

[5] The cleaners were responsible for diluting the D4 into spray bottles. The cleaners' rooms were located in the facility and each of several connected hostels. The spray bottles and other cleaning products were kept on cleaning trolleys, which were used by the cleaners as they moved around the facility.

[6] In about September 2013 Ms Knight began to experience intermittent headaches when D4 was used in her presence, or when she walked into areas where it had recently been used.

[7] In about March 2014 Ms Knight attended a meeting with the director of nursing, Ms Wright. During that meeting Ms Knight reported her symptoms to Ms Wright. At that meeting it was agreed that Ms Knight could continue to ask staff not to use D4 in her presence, and request that they warn her of any intention to use it.

[8] However, Ms Knight continued to work in areas of the facility where D4 was regularly being used, and her symptoms worsened.

[9] On 14 September 2014 Ms Knight lodged a workplace incident form, notifying CPSM of the circumstances and consequences of her exposure to D4. In the form Ms Knight reported that the incident was said to have occurred on 14 September 2014. The form also included her description of her symptoms and a brief account of her reporting them to other people at the facility.

[10] At a meeting between Ms Knight and management at CPSM, it was agreed that Ms Knight could return to work on certain conditions. She did so on 28 September 2014. With the financial assistance of CPSM she continued to seek medical diagnosis through to February 2015. At that time she suffered a back injury unrelated to her work at the facility. She attended work on 23 February 2015 and again on 2 March 2015, but could not complete those shifts. She remained unable to work because of that injury until 10 April 2015.

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1 The full name is Didecyldimethylammonium Chloride.

[11] She did not return to work with CPSM after March 2015 and has not been able to work since.

[12] Ms Knight commenced proceedings for damages for personal injuries against CPSM, basing her claim on a breach of the contract of employment as well as a breach of duty of care owed by CPSM to her.

[13] The alleged breaches of duty were particularised in the pleading as CPSM having failed to:

(a) keep the facility safe for the conduct of her work;

(b) ensure that D4 was safe for use at the facility, and not harmful to her;

(c) make reasonable enquiry by reference to the Material Safety Data Sheet, or otherwise, as to the safety and properties of D4;

(d) protect her from injury at the facility;

(e) ensure that she and other employees were instructed in the safe use of D4;

(f) make satisfactory arrangements to prevent the exposure or continuing exposure to D4;

(g) prevent other employees from using D4 in her presence;

(h) provide suitable protective clothing, gloves and masks for her use;

(i) ensure that any reasonable warning was given to her of the risks of exposure to D4; and

(j) warn her of the risks of her suffering skin and respiratory sensitisation to D4 as a result of her exposure to that chemical.

[14] The proceedings were heard at an eight-day trial at which Ms Knight represented herself. Her claims were dismissed.[2]

[15] Ms Knight challenges the outcome of the trial on a variety of grounds, but principally concerned with the contention that the learned trial judge should have preferred her evidence to that of others and should have preferred the evidence of the medical witnesses called by her.

[16] There are many grounds of appeal, some of them misconceived, with which I shall deal in due course. However, as will appear, the appeal must be dismissed for one paramount reason, namely the evidence did not establish a causal link between the use of D4 and the symptoms of which she complained. Ms Knight's challenge to that area of the learned trial judge's findings cannot succeed.

Approach of the trial judge

[17] The learned trial judge spent much of the reasons below in an examination of the evidence on factual matters. This included the evidence as to the reporting of Ms Knight's symptoms, the incident reporting system, staff training, the events after Ms Knight submitted her incident form, aspects relating to the chemical D4, and the extent of her injuries. It is not necessary to deal with all of those areas for the

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2 *Knight v CPSM Pty Ltd* [2021] QDC 3.

purposes of the appeal, but rather I intend to deal with those that have relevance to the grounds raised by Ms Knight.

Reporting of symptoms

[18] Having analysed Ms Knight's evidence at some length, the learned trial judge turned to individual topics for closer analysis. Each of these topics were examined for the purpose of making findings of fact. That analysis was preceded by her Honour's observation that:[3]

> "[104] Some of Ms Knight's evidence is supported by the evidence of other witnesses, but not much and most of it is contrary to the evidence given by other witnesses."

[19] Ms Knight's evidence, in summary, was that from an early time she constantly complained to other staff about the use of D4 near her. This included co-workers on every shift; the RN on each shift; cleaners if they worked near her; and supervisors "all the time".[4]

[20] The learned trial judge set out the evidence from other witnesses relevant to Ms Knight's reporting of symptoms, including RN Thomas, director of nursing Ms Wright, head cleaner Ms Parsons and a director of CPSM, Mr Winterton. Relevant points noted by her Honour in the course of that analysis included:

(a) RN Thomas' evidence was to the effect that there were only a few occasions on which Ms Knight complained of being unwell or needed to go home, and there were a handful of conversations where Ms Knight reported suffering symptoms from her suspected reaction to D4;[5]

(b) that evidence was not consistent with the evidence of Ms Knight, to the effect that she made constant complaints about the use of the spray to the registered nurses, and that she made complaints consistently since September 2013;[6]

(c) on a similar note, Ms Parsons could recall one occasion when Ms Knight asked her not to use D4 as she was allergic to it; her Honour concluded that if Ms Knight had complained to the extent that she had said in evidence, it was unlikely Ms Parsons would not have recalled it;[7]

(d) Ms Wright was a qualified RN and director of nursing at the relevant time; she was responsible for managing the RNs, enrolled nurses and carers; she could recall a meeting with Ms Knight which was the product of being told by Ms Parsons that Ms Knight had asked Ms Parsons and other cleaners not to use D4 again; Ms Wright did not accept that she had received any reports until that time and also said that when she did her daily rounds of the hostel she did not observe Ms Knight to be unwell;[8] and

(e) Mr Winterton gave evidence that during his conversations with Ms Knight he did not observe any of the symptoms of which she complained, nor did he observe her in respiratory distress.[9]

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3 Reasons below [104].
4 Reasons below [53]-[59].
5 Reasons below [107]-[114].
6 Reasons below [117].
7 Reasons below [119].
8 Reasons below [123]-[126].
9 Reasons below [127].

[21] Based on that review of the evidence, and what her Honour had observed during the course of the trial, her Honour made these findings:[10]

> "[128] These witnesses gave their evidence frankly and objectively. There was no appearance of Ms Wright, RN Thomas or Ms Parsons seeking to protect their employer or the business from any blame.
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> [129] The inference is inescapable that, in giving evidence, Ms Knight exaggerated the extent of her symptoms and complaints to her co-workers or the RNs. It is also not probable that Ms Knight would complain to her fellow carers and cleaners about her situation to the extent that she alleges, and that those complaints did not escalate; either by her or others to senior management prior to March 2014."

[22] It is plain from her Honour's reasons that her assessment of this area of evidence, as with others, was affected by her assessment of the credibility and reliability of the witnesses she observed giving evidence.

Incident reporting system

[23] Ms Knight's evidence, in summary, was that her reports to RN's was as far as she was allowed to go in reporting incidents, and that she was not allowed to complete an incident form. She said that the RN's determined if an incident form was to be completed.[11]

[24] The learned trial judge commenced her analysis of this section of the evidence by observing that in the whole time Ms Knight said she was suffering various symptoms from D4, there was only one incident form lodged.[12] Her Honour then observed that Ms Knight's evidence was different from that given by other witnesses in relation to the use made by staff of incident reports. Her Honour then reviewed the evidence of RN Thomas, Mr Winterton and Ms Wright as to the system in place for incident reporting, including the forms that could be filled out, the awareness of staff as to how to report an incident and to whom it should be reported, the methods used for communication and instructions given to staff in relation to reporting incidents. In summary, their evidence was that there was an established system for reporting, using known procedures and forms and ways that those forms would be brought to the attention of management.

[25] Her Honour's finding in this area was:[13]

> "[147] It is improbable that a modern workplace would not have a reporting system as explained by Ms Wright, and it is unlikely that Ms Knight was unable to lodge an incident form. Ms Knight's evidence as to the reporting system and her not being allowed to independently lodge an incident form is simply not believable; it goes against the evidence of the other witnesses and against her own actions in ultimately completing

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10 Reasons below [128]-[129].
11 Reasons below [92]-[94].
12 Reasons below [130].
13 Reasons below [147].

> the Incident Form. Her evidence on this issue significantly affects the credibility of her evidence as a whole and was clearly directed to attempting to impose the knowledge of her symptoms on management at an early point in time."

Training

[26] Ms Knight's evidence had been that she received no training in respect of D4 and knew nothing about it. The evidence of RN Thomas, Ms Wright and Mr Winterton was to the effect that staff received training on chemical usage and handling though domestic staff (staff who worked in the kitchen, laundry and cleaning) received more intense training than the carers did.[14]

[27] A representative of the D4 supplier gave evidence that there were monthly service visits to the facility during which he would check that the dishwashers and dispensing units were all operational, and provide any necessary training. He would also ensure that the products that were used onsite were used correctly.[15]

[28] Ms Parsons gave evidence that staff received education on a regular basis, including training as to how to use the chemicals.

[29] As to the evidence concerning training, her Honour concluded:[16]

> "[166] Taking the evidence as a whole into consideration and the credibility of Ms Knight, I am not persuaded that Ms Knight did not receive any training on the safe use of chemicals, including D4."

Events after the incident form

[30] In this section of the reasons the learned trial judge examined the competing evidence as to the events following the incident form being completed. On the one hand was Ms Knight's evidence which had these components:[17]

(a) she received a letter from Mr Winterton in September 2014, confirming that she was not to attend the workplace until further medical advice could be sought, and more investigations made; CPSM offered to pay her reasonable medical expenses;

(b) she attended for medical treatment, after which she received a call to meet Ms Wright; at that meeting Ms Wright did not enquire about her health but told her she could return to work on normal duties, that she would lock away the D4 when on shift and Ms Knight was to continue to tell staff not to use D4 around her; Ms Wright told her it was her responsibility to keep herself safe and that her employment could be terminated if she did not do so;

(c) she returned to work but D4 continued to be used around her, and her symptoms worsened;

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14 Reasons below [153]-[159].
15 Reasons below [160].
16 Reasons below [166].
17 Reasons below [76]-[87].

(d) there was a particular altercation involving a young girl in the kitchen and concerning D4; there was an argument and Ms Knight said she called Ms Wright the next day to report the incident;

(e) she sent a number of emails to Mr Winterton concerning the fact that her hours had been reduced; there was a further meeting at which her employment conditions were discussed; and

(f) finally in February 2015 she received an email from Mr Winterton in which he said that, given her ongoing difficulties and his belief that there was nothing further they could do, he would require a full fitness clearance from Ms Knight.

[31] The evidence from Ms Wright and Mr Winterton in particular was to the effect that they responded appropriately to the incident form, did not put the onus on Ms Knight to look after herself, moved Ms Knight to a hostel where she would be the sole carer and have greater control over her environment, gave consideration to eliminating the use of D4, realised that changing D4 for another product was not going to be a solution as D4 was in many commonly used products, informed staff that they should not use D4 around Ms Knight, gave appropriate instructions to the staff to minimise the use of D4 where Ms Knight might be, sent a memo to staff directing them not to use the product around Ms Knight and responded appropriately when she raised her concerns.

[32] Her Honour's conclusions were expressed in this way:[18]

> "[198] Both Ms Wright and Mr Winterton gave careful considered evidence, making concessions where appropriate. There was nothing in their evidence which suggested they were trying to protect CPSM or themselves from any criticism. Each remained appropriately forthright when matters were put to them by Ms Knight in cross-examination which conflicted with their own recollection. They both appropriately accepted that they had no difficulty with Ms Knight otherwise as a worker.
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> [198] On the other hand, in addition to her exaggeration of her symptoms and complaints, Ms Knight gave evidence in relation to her economic loss claim and in particular her evidence as to the extent of her incapacity, which was simply not credible, and is inconsistent with her own documented life story. That evidence will be dealt with later. For present purposes it is sufficient to say that where the evidence called by the defence differed from that of Ms Knight, I prefer that evidence. This preference includes, but is not limited to the dispute, so far as there is one, in relation to the events after the Incident Form was submitted."

Expert medical evidence

[33] The medical evidence called at the trial can be separated into two compartments. First, there are the doctors who gave evidence about whether Ms Knight was

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18 Reasons below [198]-[199].

suffering from conditions caused by her exposure to the chemical D4. Specifically, the doctors dealt with whether she had been correctly diagnosed as suffering from Multiple Chemical Sensitivity (**MCS**) due to her exposure to D4. The second compartment consisted of the evidence from two psychiatrists as to whether Mr Knight was suffering from a psychiatric condition caused by her exposure to D4.

Evidence from Dr Oliver

[34] Dr Oliver, a physician with expertise in occupational and environmental medicine, was called by Ms Knight. Dr Oliver had made a diagnosis, first recorded in a report in March 2018, that Ms Knight was suffering from MCS caused by her exposure to D4 at the facility.

[35] The learned trial judge summarised the evidence of Dr Oliver, noting a number of features which led her Honour to ultimately reject Dr Oliver's evidence:

(a) Dr Oliver had not examined Ms Knight;

(b) in her report in March 2018 when she made her first diagnosis, Dr Oliver referred to telephone conversations with a Dr Gupta (a specialist GP who had treated Ms Knight and also made a diagnosis of MCS), and reports by Dr Gupta and Dr Higgins (Ms Knight's treating GP since May 2015);

(c) neither Dr Gupta nor Dr Higgins were called as witnesses in the trial, and Dr Gupta's reports were not admitted into evidence; the report of Dr Higgins was admitted into evidence, but not as proof of its contents;[19]

(d) in her March 2018 report Dr Oliver had referred to materials she had reviewed including emails from Ms Knight detailing her symptoms; those emails were not identified in the report but were provided after an adjournment; the emails detailed the symptoms Ms Knight claimed to be experiencing; at the time of providing the 2018 report, Dr Oliver wished Ms Knight "good luck in Court";[20]

(e) Dr Oliver gave a second report in 2019, confirming her diagnosis of MCS; however, the report did not justify, by reference to Ms Knight's history, symptoms or clinical course, the basis for her conclusion that Ms Knight fitted the criteria for MCS;[21]

(f) neither the 2018 nor 2019 report identified the symptoms relied upon for the diagnosis;[22]

(g) in her oral evidence Dr Oliver said the symptoms she relied on were headaches, fatigue, loss of concentration and breathing difficulties; however, it became apparent that Dr Oliver depended upon Ms Knight's self-report of those symptoms, without any testing or challenging of them by Dr Oliver;[23]

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19 Reasons below [235].
20 Reasons below [234].
21 Reasons below [236]-[239].
22 Reasons below [240].
23 Reasons below [241]-[244] and [251].

(h) Dr Oliver regarded D4 as a hazardous chemical and that inhalation of it posed a great threat to health; however, Dr Oliver did not refer to any literature or research to support that assertion;[24]

(i) during the course of her oral evidence it became apparent that Dr Oliver misapprehended the dilution rate of D4 in the form in which it was used; she understood the solution to contain five per cent of the product whereas the solution contained no more than 0.04 per cent of D4; notwithstanding that significant difference, Dr Oliver said it would not change her opinion, saying it would "not be unexpected that [Ms Knight] would have a reaction to more dilute product"; however, no attempt was made to explain the basis for that conclusion;[25] and

(j) Dr Oliver did not accept that D4 was commonly found throughout the world or used in general household cleaning products; that was contrary to the evidence of other witnesses, particularly those from the supplier of D4.[26]

[36] The learned trial judge rejected the evidence of Dr Oliver, in these terms:[27]

> "[251] The evidence of Dr Oliver did not impress. Whilst initially in 2018 Dr Oliver was wanting further details of Ms Knight's history to support the making of a diagnosis, Dr Oliver appears to have accepted and acted on the statements made by Ms Knight without challenging them. This is significant because of the doubts that exist in my mind as to Ms Knight's credibility.
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> [252] In any event, in diagnosing Ms Knight, Dr Oliver acted on reports by Doctors Gupta and Higgins which were not proven.
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> [253] In reaching her conclusion, Dr Oliver did not give any scientific basis for her conclusion about chemical sensitivity or the chemical D4. She appeared very interested in asserting a cause and was not careful in the way she reached her conclusion."

Dr Brandt

[37] The learned trial judge contrasted the evidence of Dr Oliver with that of Dr Brandt, who was also a specialist and consultant occupational environmental physician. His opinion, having examined Ms Knight and prepared his own report in 2016, and having had the benefit of Dr Oliver's reports, was that there was insufficient evidence to support a causal connection between intermittent low-level exposure to aerosolised droplets of diluted D4 chemical solution, and the subsequent onset and persistence of multiple varied non-specific symptoms.[28] Dr Brandt's opinion was that it was unlikely that Ms Knight's described pattern of exposure would have resulted in any degree of significant pathology beyond a temporary, self-limiting mucous membrane irritation of the upper respiratory tract. He considered that her work-related condition was likely to be stable and stationary.

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24 Reasons below [245].
25 Reasons below [246].
26 Reasons below [248].
27 Reasons below [251]-[253].
28 Reasons below [254].

[38] A summary of Dr Brandt's opinions included the following:[29]

(a) it was difficult, based on the medical and occupational history, and published toxicology information, to reconcile the degree and extent of ongoing physical symptomatology and disability of which Ms Knight complained, with Ms Knight's described exposure to D4 spray;

(b) there was no evidence that a chemical at that sort of described dose, given its toxicological profile (which he addressed at length in his written report) would result in immunological changes, or cause a physiological reaction that would lead to multi-organ dysfunction;

(c) as a result of the described exposure profile "it would be extremely unlikely for [Ms Knight] to have experienced any systemic absorption of this chemical resulting in toxic organ damage";

(d) from a documentation review "there was no objective evidence that she had developed respiratory sensitisation, and no documentation of a diagnosis of occupational asthma";

(e) the material reviewed showed there was no objective diagnosis by a doctor of a dermatitis issue;

(f) he was of the view that exposure had caused, in the worst case scenario, a self-limiting temporary mucous membrane irritation of the upper respiratory tract which would cease when exposure ceased;

(g) in giving his evidence he had considered a review article and literature review current at February 2019;

(h) MCS was a controversial condition being a subjective illness marked by recurrent, vague, non-specific symptoms, attributed to low levels of chemical, biologic or physical agents, without any objective alteration in function; and

(i) Dr Brandt did not consider MCS to have a distinct valid medical entity nor a reliable case definition or set of diagnostic criteria.

[39] The learned trial judge, having summarised Dr Brandt's evidence in the way set out above, accepted his evidence in preference to the opinion of Dr Oliver, stating:[30]

> "[265] In giving his evidence, Dr Brandt was a careful, considered expert, explaining in some detail the basis for the conclusion he had reached. In responding to questions raised by Ms Knight, he was prepared to review the material he had available to him in forming his opinion but remained firm in his conclusions. Whilst not a psychiatrist, he showed empathy for Ms Knight's ongoing illness, referring to the suffering and disabilities she describes, and said he felt there must be some psychological component to it. In other words, he did not adopt a partisan attitude."

Dr Solley

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29 Reasons below [256]-[264].

30 Reasons below [265].

[40] Dr Solley was called by Ms Knight as part of her case. He saw Ms Knight as part of the initial response to her incident form in September 2014. He examined Ms Knight and provided a report dated 26 November 2014 to her then treating practitioner.

[41] The learned trial judge concluded that Dr Solley's view was "not inconsistent with the opinion of Dr Brandt",[31] and made these points:

(a) he concluded that Ms Knight was probably hypersensitive to particular agents in the workplace, but agreed any sensitivity would be dependent upon the subjective complaints and that the complaints would have to be established and proven;

(b) he had no objective test to prove or disprove hypersensitivity to chemical fumes or vapour; he accepted it was possible that someone could say they were hypersensitive when in fact they were not; and

(c) if someone were hypersensitive then they should avoid the reagent causing the symptoms; once they stepped away from the reagent, or were removed from exposure, the reaction would stop.

The psychiatric evidence

[42] Ms Knight called Dr Matthew in her case, and the defence called Dr Shaikh. Each was a relevant psychiatric expert and had assessed Ms Knight (one week apart) in September 2017.

[43] The learned trial judge commenced an analysis of the psychiatric evidence with the observation that the difference in the history given by Ms Knight to each psychiatrist was of "significant concern".[32]

[44] Dr Matthew gave evidence, both in his report and orally, that Ms Knight's condition was "well represented by a diagnosis of a somatoform disorder", which meant that the current physical symptoms were without a physical cause. It was his view that there was an underlying adjustment disorder with depression and anxious mood, though he considered both of those conditions to be in partial remission.[33]

[45] In reaching his conclusions in the written report Dr Matthew relied upon the history provided by Ms Knight concerning the limitations arising from her physical condition, commenting that her level of functioning was poor. He referred to various instances such as spending considerable time in bed, days when she was unable to do much, withdrawal and loss of interest in things, being not able to sit at a desk, poor concentration, blurred vision and irritability. Dr Matthew considered that at times Ms Knight's descriptions of her condition were odd and described in a way different from that which most people would express. However, he did not consider them bizarre although they bordered on bizarre.[34]

[46] In his report and evidence in chief, Dr Matthew said it was outside his expertise to determine whether the physical symptoms were the result of exposure to chemicals. He explained that at the point where Ms Knight's temporary upper respiratory tract

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31 Reasons below [267].
32 Reasons below [271].
33 Reasons below [272]-[273].
34 Reasons below [278].

symptoms had resolved, her state of mind had become a significant cause of the ongoing symptoms.[35]

[47] In cross-examination Dr Matthew was shown a number of Facebook posts by Ms Knight, amounting to two lever arch files, and he was referred to Ms Knight's Health Diary and her extensive affidavit material in the proceedings as well as the work she had done in promoting her business. He was questioned as to the impact of her ability to prepare such material on his conclusions about the level of her impairment. Dr Matthew was granted a 25 minute adjournment so he could consider that material and his position. The change in his position was then reflected in the reasons below:[36]

> "[285] Upon resuming, Dr Matthew commenced by observing that his opinion had changed. He commented that what he had now seen changed his view 'quite profoundly'. In so concluding, Dr Matthew was careful and reflective as to the material he had been shown. He commented that he was mindful that Facebook is a tool of signalling the quality of your lifestyle to others and that it represents only a moment in time and that he accepted the history was that there were good days and bad days and that he hadn't seen every day.
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> [286] Being mindful of those limitations, Dr Matthew said that Ms Knight was fit for full-time work in her previous capacity and is not suffering a psychiatric illness. He stated that the physical findings and psychological functioning is not in keeping with the history obtained. He said, 'there was an unresolvable incongruity between the history that I obtained and the extra information he [sic] was provided, even taking into account those those earlier caveats.'"

[48] Dr Matthew thereafter maintained his view that Ms Knight did not suffer from a psychotic illness, however she did suffer from some psychological disturbance that did not amount to a psychiatric illness.[37]

Dr Shaikh

[49] The learned trial judge observed that the change in opinion by Dr Matthew meant that his opinion aligned with that of Dr Shaikh. His conclusion was summarised by the learned trial judge in this way:[38]

(a) there was nothing to suggest that Ms Knight had experienced an injury which had led to ongoing physical impairment or requirement for treatment;

(b) it was possible she may have had an adjustment disorder, but it had resolved;

(c) her history was "reflective of personality vulnerability", which he considered were likely related to a prejudicial childhood and also included "borderline and narcissistic traits";

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35 Reasons below [279].
36 Reasons below [285]-[286].
37 Reasons below [288]-[289].
38 Reasons below [297]-[300].

(d) the psychological phenomena experienced after her initial physical symptoms was "nothing but an expression of her frustration in response to her notion of her physical complaints not being acknowledge";

(e) she had a "destructive lack of insight which interferes with her judgement", and that had led to "somatic manifestation of various physical complaints, without identified pathology"; and

(f) she did not experience symptoms reflective of a psychiatric disorder and her day-to-day functioning was quite reasonable, with no evidence of impaired cognition.

The trial judge's findings as to a causal link to the injury

[50] The learned trial judge concluded that, based on the medical evidence, Ms Knight had not suffered a chemical sensitivity to D4 which could be linked to the present symptoms of which she complained:[39]

> "[303] The evidence does not support the conclusion that at the time Ms Knight worked at the Facility that she suffered chemical sensitivity as a consequence of the use of D4. There is no expert evidence capable of persuading this court that the low levels of exposure which occurred in this case could have resulted in the symptomology alleged by Ms Knight. In any event, as I have said, I do not accept that Ms Knight suffered from the symptoms she alleges and certainly not to the extent she alleges.
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> [304] I am prepared to leave open the possibility that expert opinion could prove that certain individuals might be hypersensitive to low levels of exposure to the chemical, but the expert opinion in this case was not of that quality, and, in any event, that evidence might be affected by the individual's own reporting as to the result of that exposure. As I have indicated, I do not accept Ms Knight's evidence as to the consequence of her exposure.
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> [305] I found both Dr Matthew and Dr Shaikh to be considered and careful experts and I accept their opinions that Ms Knight has no psychiatric or psychotic disorder.
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> [306] I do not accept the opinion of Dr Oliver that Ms Knight is suffering from MCS as a result of her exposure to D4 at the Facility, preferring the considered, nonpartisan evidence of Dr Brandt that Ms Knight had a self-limiting condition which has now fully resolved.
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> [307] On the basis of the evidence I accept, Ms Knight had and has no ongoing impairment, partial or total, preventing her from working."

Application to adduce further evidence

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39 Reasons below [303]-[307].

[51] Ms Knight has sought leave to adduce further evidence pursuant to r 766(1)(c) of the *Uniform Civil Procedure Rules 1999* (Qld). That rule provides that the Court of Appeal may, on special grounds, receive further evidence as to questions of fact. Further, r 766(2) provides that further evidence may be received without special leave in any case as to matters that have happened after the date of the decision appealed against. In that context "special leave" means that there are "special circumstances" that support the grant of leave.[40]

[52] A summary of the evidence sought to be adduced appears in Ms Knight's submissions on that issue.[41] The first category is said to be medical information that was not available at the trial and comprises:

(a) an administrative report published in late April 2019 by the National Health and Medical Research Council (**NHMRC**) as to Myalgic Encephalomyelitis/Chronic Fatigue Syndrome; the date of publication of the report is 30 April 2019;

(b) an advisory committee report to the NHMRC Chief Executive Officer, dated 30 April 2019;

(c) the response by the CEO of the NHMRC to the advisory committee's report; published on the NHMRC website and spanning between 30 April 2019 and 18 October 2019; the responses relate to the expenditure by the Australian Government as to medical research in the area of Myalgic Encephalomyelitis;

(d) documents relating to an ongoing project at Griffith University led by Professor Marshall-Gradisnik, to identify ME/CFS biomarkers to develop a diagnostic test; evidently the project is ongoing;

(e) a similar project called the Anchor Project announced in September 2019;

(f) the international consensus criteria published on the NHMRC website, concerned with Myalgic Encephalomyelitis;

(g) a report by the taskforce on environmental health in Ontario, of which Dr Oliver was a member; the report is dated December 2018 and concerned with an action plan to improve care for people with ME/CFS; and

(h) an article referred to by Dr Oliver in her testimony at the trial.

[53] The second category concerns medical witnesses, including their reports. Ms Knight submits that at the trial she was in extreme financial hardship and unable to afford subpoenas for certain witnesses, but she now can. That is for four witnesses who are:

(a) Dr Richards who was her GP for many years; he was uncontactable at the time of the trial but Ms Knight has now contacted him and he could give evidence by video link;

(b) Dr Solley; Ms Knight says Dr Solley is willing to appear again;

(c) Dr Higgins and Dr Gupta; Ms Knight says that she was without the fees necessary to bring those GPs to the trial, but a friend "is now organising

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40 *Re Stockton Iron Furnace Co* (1879) 10 Ch D 335 at 348.

41 Supplementary AB 1 p 3.

a crowdfunder for me so that I may afford the fees to bring these witnesses to court so that they may verify my medical records"; and

(d) Dr Robertson, an independent forensic consultant specialising in pharmacology and forensic toxicology; Ms Knight says she has located him and he is willing to review, teleconference, prepare a report and give testimony by phone.

[54] The third category are witnesses in relation to matters concerned with Ms Knight's workplace and as to her character:

(a) RN Thomas; this witness appeared at the trial but her affidavit was not tendered; Ms Knight says she is available to testify again;

(b) Ms Giarrusso; this person was unavailable during the trial for medical reasons and therefore was not called; she is an RN who was a supervisor at the facility and worked with Ms Knight; and

(c) Ms Keily; this witness provided a character reference and witness statement in 2017, but was not called at the trial as a result of Ms Knight's preference to call witnesses who were CPSM employees.

[55] Other aspects of the evidence that Ms Knight seeks to adduce concern the costs she has incurred since trial, and a health diary covering a summary of events after the trial.

[56] As Ms Knight's oral argument was developed on appeal, it became apparent that in reality what she seeks is a new trial at which she can call the evidence she wishes to adduce. Though it was not made particularly clear by Ms Knight, I consider the appropriate course is to proceed on the basis that the new trial is urged as an alternative to outright success on the appeal. Thus, the application to adduce further evidence should be seen in that light.

[57] In my view the application to adduce new evidence should be rejected. There are a number of reasons for that conclusion.

[58] First, the reports and studies to which she refers do not, on the face of them, advance her case. They are simply examples where the area of Myalgic Encephalomyelitis is being studied. None of them can be seen to be referrable to Ms Knight in the absence of some witness saying why that is so. Nothing of that kind is offered.

[59] Secondly, in the case of two of the medical documents, Dr Oliver was involved in them or referred to them. Therefore, to the extent that they were relevant one can assume that Dr Oliver would have raised it. It is not proposed that Dr Oliver give evidence again.

[60] Thirdly, the proposal to call or recall other medical witnesses is misconceived. Ms Knight had an eight-day trial and the opportunity to call such witnesses as she could, on all topics. It may be that she was under financial constraint, and it is true that she was representing herself at the trial. However, the principle of finality is against the prospect of having a rolling series of trials, where one becomes the dress rehearsal for the other. Reopening the evidence on an appeal is usually reserved for very special and exceptional cases;[42] having a second try at the trial does not fit that category.

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42 *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023, at 1031; *Avraam v Constello Constructions Pty Ltd* [1984] 1 Qd R 538 at 541; *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137.

[61] The desire to call Dr Richards falls into that category. He could not be contacted at the trial and therefore was not called. That is one of the vicissitudes of litigation. By contrast Dr Solley was called. The opportunity for him to give evidence has passed. Finally, the proposal to call Dr Higgins and Dr Gupta is misconceived. They were not called as witnesses at the trial and whilst Dr Higgins' documents were admitted into evidence it was not on the basis that they were proving the truth of their contents. It may be that financial hardship was the reason behind Ms Knight not calling those two doctors. But the trial has passed. It was conducted on the basis that their evidence was not adduced. There is no basis to now call them.

[62] Dr Robertson is in a different category. He is an expert located by Ms Knight subsequent to the trial being concluded. Once again, the principle of finality is against having a second or sequential trial at which evidence is improved or replaced. There is no basis for his evidence to be adduced.

[63] Fourthly, the non-expert witnesses that Ms Knight proposes to call do not fit into a category whereby leave to adduce their evidence should be given. RN Thomas gave evidence at the trial. The fact that her affidavit did not go into evidence is one of the incidents of the way the trial was run. Ms Giarrusso was unavailable during the trial. Though she may be available now, that does not solve the problem confronting Ms Knight, namely that she had her opportunity to conduct a trial and did so. Ms Keily, on the other hand, was a witness who did not give evidence, but as a consequence of Ms Knight's preference as to who to call. A deliberate choice having been made, there is no basis for her evidence to be adduced.

[64] The final category concerns costs and events since the trial and are not admissible.

[65] Fifthly, to gain leave to adduce the evidence it must be demonstrated that the evidence, if led, would probably have an important influence of the result.[43] That has not been shown here.

[66] No special circumstances can be shown to warrant the grant of leave in respect of any category of evidence sought to be adduced. That application should be refused.

Grounds of appeal - consideration

[67] The notice of appeal contains a number of grounds attacking, in general terms, the learned trial judge's preference for the evidence of some witnesses over the evidence given by Ms Knight. Those grounds confront the principles with respect to the appellate procedure laid down in *Fox v Percy*.[44] Where facts are undisputed an appellate court will often be in as good a position as a trial judge to decide what inferences should be drawn from those undisputed facts. However, where trial decisions are affected by the judge's impression about the credibility of witnesses, an appellate court must respect the advantages of the trial judge who is able to see the witnesses whereas the appellate court is not. The mere fact that a trial judge necessarily reaches a conclusion favouring the witnesses of one party over the witnesses of another does not, and cannot, prevent the performance by the Court of Appeal of the functions imposed on it by statute. However, in some particular cases it may be that incontrovertible facts or uncontested testimony demonstrate that the

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43 *Westpac Banking Corporation v Jamieson* [2015] QCA 50; [2016] 1 Qd R 495 at [216].

44 (2003) 214 CLR 118, at 126-129 [25]-[31].

trial judge's conclusion is erroneous, even when it is based on credibility findings. Thus, the High Court said:[45]

> "[28] Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
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> [29] That this is so is demonstrated in several recent decisions of this Court. **In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable' or 'contrary to compelling inferences' in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion.** Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process."

[68] It will be apparent from the recitation of the competing evidence and the learned trial judge's findings in paragraphs [17] to [32] above that the findings are based on, to one degree or other, findings as to the credit of Ms Knight and other witnesses. In particular, the findings as to Ms Knight's evidence were that little reliance could be placed on it. In those circumstances to succeed on this appeal Ms Knight would have to be able to demonstrate that the findings were contrary to incontrovertible facts, glaringly improbable or contrary to compelling inferences.

Ground 1

[69] This ground contends that there was an error in failing to find that a letter from CPSM to Ms Knight on 19 September 2014 showed that Mr Winterton and

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45 *Fox v Percy* at [28]-[29]; emphasis added; internal citations omitted.

Ms Wright gave false testimony at the trial when they said they did not meet with Ms Knight on 17 September 2014, three days after the incident form was filled in.

[70] The ground of appeal is misconceived. Each of Ms Wright and Mr Winterton said they could not recall a meeting such as she suggested.[46] The relevant letter[47] commences by saying it is in response to the incident form and "our following conversation". Item 4 then records that Ms Knight told Mr Winterton she would be attending her own personal GP, and CPSM offered to cover the costs.

[71] The letter does not negate the evidence of Ms Wright or Mr Winterton. Each recalled that there was a meeting, just not at the time and place Ms Knight deposed.[48]

Ground 2

[72] This ground has no merit. It contends that there was an error in preferring the evidence of CPSM's witnesses when the evidence otherwise established that Ms Knight suffered from the conditions and disabilities of which she had given evidence. This is nothing more than argumentative.

Ground 3

[73] This ground contends there was error in "discerning the reporting structure, specifically in regards to Emily Thomas". The error is said to be revealed in the finding by the learned trial judge that Ms Knight was reporting directly to RN Thomas as CPSM's supervisor on shift.

[74] The learned trial judge recorded the role of RN Thomas in a way that conforms to the evidence of Ms Knight. Thus, Ms Thomas was care coordinator and Ms Knight's supervisor between November 2012 and May 2014.[49] At that time she changed roles to being a night RN. Ms Thomas said she could not recall when Ms Knight started to raise issues with her but did recall that on four or five occasions Ms Knight reported feeling unwell and needed to go home. When such a thing occurred RN Thomas reported it to her senior, Ms Wright.[50] Thus the trial judge did not find, as is contended by Ms Knight, that the reporting was directed to Ms Thomas at all times.

Ground 4

[75] This ground contends an error by preferring the evidence of Ms Wright concerning a meeting with Ms Knight in March 2014. This relates to three points:

(a) Ms Wright said she would let staff know about Ms Knight's difficulties with D4 but only spoke to one cleaning supervisor;

(b) Ms Wright said she did not put out a memo for general staff, whereas Ms Thomas expected that one would have been issued; and

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46 Reasons below [169] and [178].
47 AB 385.
48 Reasons below: Ms Wright [168]-[169]; Mr Winterton [175]-[177].
49 Reasons below [108].
50 Reasons below [112]-[113].

(c) Ms Wright directed Ms Knight to keep reporting to RNs, and that she would be kept aware of the issue by that method, but never followed it up.

[76] The learned trial judge observed that the evidence of Ms Wright and Ms Knight was largely consistent insofar as it concerned the meeting in March 2014.[51]

[77] The argument does not surmount the problems identified in *Fox v Percy*. Ms Wright's evidence was that after the March 2014 meeting, when she did her daily rounds of the hostel she did not observe Ms Knight to be unwell, there was nothing obvious and no obvious signs of an allergy.[52] The meeting had been prompted because the head cleaner had received a request from Ms Knight, asking her and other cleaners not to use D4. At the meeting it was agreed that Ms Knight would continue to ask staff not to use D4 in her presence, and she could ask staff to warn her if they intended to use it.[53]

[78] The essence of ground 4 is that Ms Wright's failure to follow-up in a different way had some causative effect. That was not established on the evidence, and whilst it might be the case that Ms Knight continued to be affected by the use of D4, she eventually lodged the incident form and particular steps were then taken by CPSM. There is nothing in the medical evidence which would support the proposition that any failure on the part of Ms Wright in the period between March and September 2014 had a causative effect.

Ground 5

[79] This ground centres on a suggested error concerning the evidence of RN Thomas and that of Mr Winterton. RN Thomas gave evidence that she was aware of Ms Knight's "health challenges" and that CPSM knew of them, whereas Mr Winterton said he knew nothing of the health challenges prior to the incident form.

[80] There is no necessary inconsistency. RN Thomas gave evidence that she could recall a number of conversations where Ms Knight's suffering of symptoms was reported to her.[54] That it did not escalate to the point where Mr Winterton had knowledge of it may be explained by the fact that neither Ms Wright nor Mr Winterton observed any of the symptoms of which Ms Knight complained.[55] This was the case notwithstanding that CPSM had an incident reporting system which utilised incident forms in conjunction with informing the RN in charge on the shift. When such an incident form was used by Ms Knight it came to Mr Winterton and Ms Wright's attention directly.

Ground 6

[81] This ground, once again, contends an error based on Ms Knight's account of the meeting on 17 September 2014. The difference is narrow. The learned trial judge found that on 19 September Ms Knight attended upon her GP, at the request of CPSM. Ms Knight now wishes to say that that was a request conveyed verbally on the evening of 17 September 2014. The fact that neither Ms Wright nor

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51 Reasons below [29] and [124].
52 Reasons below [126].
53 Reasons below [29].
54 Reasons below [114]-[115].
55 Reasons below [126]-[127].

Mr Winterton could recall that meeting does not create a conclusion that there was an error in the trial judge's reasoning process. Ms Knight did attend her GP on 19 September 2014. When the request was made is peripheral, as CPSM accepted that it made that request.

Ground 7

[82] There is nothing in this ground as it merely argues that the evidence of Ms Wright should not have been accepted simply because there was a difference in evidence between Ms Knight and her regarding a meeting on 25 September 2014. To refer to such a dichotomy does not advance a case to the point of concluding that the barriers in *Fox v Percy* have been overcome. Ms Wright could not recall that meeting though she could recall a discussion during the period in which Ms Knight said she wanted to lock D4 away.[56] As a consequence of that conversation measures were taken to move Ms Knight to a different employment location.

Ground 8

[83] This ground contends that there was an error in failing to "fully discern the duties of the carers in [CPSM's] hostels". The contended error centres around the role of RNs in one hostel as opposed to the other two, and the administration of medication. It is completely peripheral to any relevant issue in the appeal, or the trial.

Ground 9

[84] This ground contends that there was an error by preferring the evidence from CPSM when Ms Knight was required to enter a room where D4 was mixed, on a regular basis during her shifts at the Wattle Hostel.

[85] The ground is misconceived. It relates to the finding by the leaned trial judge that cleaners' rooms were located in the nursing home and "in each of the hostels".[57] Ms Knight's ground concerns the fact that there were no cleaners' rooms in three of the hostels. That is not relevant to any issue at the trial or on the appeal. There was no dispute at the trial that in the place where Ms Knight worked cleaners were required to use D4 and mix the diluted solution in the cleaners' rooms.

[86] Part of this ground concerned the evidence surrounding how dispensers were used to fill cleaning buckets with the D4 solution and whether there was a possibility that a stronger solution could have been created by accident. Those were issues examined at length at the trial, and in detail in the learned trial judge's reasons.[58] Nothing in this ground gives reason to doubt the analysis of the evidence or the learned trial judge's findings as to the use of D4 and the training of staff in relation to that use.[59]

Ground 10

[87] This ground contends that there was an error by the learned trial judge by failing to have regard to the availability of personal protection equipment. It attacks the

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56 Reasons below [172]-[173].
57 Reasons below [27].
58 Reasons below [96]-[103] and [149]-[165].
59 Reasons below [317]-[323].

finding[60] that Ms Knight had not proved a failure on the part of CPSM to provide suitable protective clothing, gloves and a mask. That had been alleged in the amended statement of claim, but gloves were available at all times and masks were available on request. Ms Knight contends that because masks were only available on request, she was not free to choose to wear one and protect herself. The point is nonsensical. There was no suggestion that if she had asked for a mask, that she would not have been given one or could not have used one. There is no merit in this point.

Ground 11

[88] This ground turns upon evidence given by Ms Knight that in the incident form she said she had been greeted with the response by other staff that they did not know about the use of D4 in her presence. The point made by Ms Knight is that Mr Pandey, a supervising RN, was the person who had responded "I didn't know" when Ms Knight confronted him about the use of D4. However, Ms Knight's evidence was the subject of a series of adverse credit findings, and Mr Pandey was not called as a witness at the trial. This point goes nowhere in terms of establishing relevant error.

Ground 12

[89] This ground contends that there was an error because CPSM's witnesses were preferred to Ms Knight in relation to her reports of her complaints that D4 was affecting her. In essence, what is contended is that following her many verbal complaints, it must have been clear that the system of keeping her away from D4 was not working. These are matters which were dealt with comprehensively by the learned trial judge in relation to the events after the incident form was filled out and CPSM's response once the issue was known. This ground merely advances another argument, rather than identifies incontrovertible evidence, glaring improbabilities or compelling inferences of the kind identified in *Fox v Percy*. The ground has no merit.

Ground 13

[90] This ground contends an error because the evidence established the lack of any system to record "the multitude of verbal complaints the plaintiff made to staff, RN's, CNS and management". The learned trial judge had the evidence of RN Thomas and Mr Winterton, as well as that of Ms Wright, in relation to incident reporting.[61] Her Honour's conclusions are not demonstrated, at least by this ground, to be defective in any way.

Ground 14

[91] This ground also contends that there was an error on the part of the learned trial judge because the evidence established that there were no modifications to the system of work, or Ms Knight's duties, whatsoever in order to find a solution to her complaints about the effect of D4 upon her. The ground simply argues about the evidence without demonstrating why the learned trial judge's findings were not open. In particular, this ground does not grapple with the evidence accepted by the

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60 Reasons below [337].

61 Reasons below [130]-[147].

learned trial judge from Ms Wright, that extra measures were put in place following receipt of the incident form, by way of location and rosters and that following the receipt of Dr Solley's report CPSM focused on Ms Knight not being required to use D4, and informing other staff that D4 should not be used around her.[62]

Ground 15

[92] This ground has no merit. It seeks to argue that the findings by the learned trial judge were not open because Mr Winterton made attempts between March 2015 and June 2015 to offer a payout to Ms Knight so that she would cease employment. That has nothing to do with any issue at the trial or on appeal.

Ground 16

[93] This ground does not advance the appeal. It seeks to argue that the evidence of RN Thomas was that she knew D4 was having an affect on Ms Knight, and that Mr Winterton and Ms Wright knew as well, and before the incident form was submitted. That was in contrast to Mr Winterton's testimony which was to the effect that he knew nothing of the issues before the incident form was lodge. This simply contends that there was a discrepancy in the evidence that should have affected the outcome, but it does not attempt to demonstrate that it is of the sort of incontrovertible facts, glaring improbability or compelling inference that would attract the application of *Fox v Percy*.

Ground 17

[94] This is an extensive ground arguing that the learned trial judge erred by failing to have regard to Dr Oliver's expert evidence. The learned trial judge explained in considerable detail why it was she rejected the evidence of Dr Oliver: see paragraphs [34] to [39] above. There is simply no basis to contend that her Honour's rejection of Dr Oliver was not open for the reasons she gave.

Ground 18

[95] This ground has no merit. It is the converse of ground 17, which contended that Dr Oliver's evidence should have been accepted. This ground contends that Dr Brandt's evidence should have been rejected. The learned trial judge gave comprehensive reasons as to why that evidence was accepted, and those findings cannot be shown to be in doubt.

Ground 19

[96] This ground is misconceived. It seeks to contend that the evidence from the manufacturer of D4, that it was safe because the ingredients were the same as Pine O Kleen, should have been rejected because Ms Knight provided a photo of a bottle of Pine O Kleen on a supermarket shelf, and the label stated the active ingredient was something other than D4. That evidence can hardly be called proof that would negate the evidence given by a witness from the very manufacturer of that product. There is an obvious problem with the proposition, given that the photograph was not necessarily of that product at the time of the incident of which Ms Knight complains.

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62 Reasons below [174] and [188]-[191].

Ground 20

[97] This ground is misconceived. It seeks to argue about the minutiae of the evidence from Ms Wright about her work habits, and the likelihood of her being able to observe Ms Knight on a daily or even weekly basis. Contentions such as that do not advance the appeal.

Ground 21

[98] This ground also is misconceived. It centres on the failure of the learned trial judge to have regard to Dr Gupta. He was not called, and his reports did not go into evidence.

Ground 22

[99] This ground seeks to attack the finding in paragraph [325] of the reasons below, to the effect that a breach of duty could not be found concerning the suggestion that CPSM ought to have prevented Ms Knight from being exposed to D4. Her Honour held that there was no breach because:

(a) D4 was safe for use in the form it was used, and it was reasonable to use it; and

(b) there was an absence of evidence from those managing the facility of any relevant knowledge of either the problems that Ms Knight said she was experiencing, or any problem with D4.

[100] The finding in paragraph [325] has to be read in context. It concerns the allegation in the amended statement of claim that CPSM ought to have prevented Ms Knight from being exposed to D4, including prior to when she first noticed symptoms in September 2013, and after March 2014 when she met with Ms Wright. Her Honour goes on to say that the position changed with the meeting between Ms Knight and Ms Wright.[63] What follows in the reasons is an analysis and findings concerning the changes that were made such as:

(a) the agreement for Ms Knight to continue to request staff not to use D4 around her;

(b) that she should continue to not use the spray herself;

(c) she could leave the room to avoid being present if the spray was being used;

(d) the rosters would be changed; and

(e) reporting would be through the RNs, but that did not preclude Ms Knight reporting directly to Ms Wright.

[101] The reasons continue with an analysis of the responses by CPSM and the difficulty in finding that D4 caused sensitivity of any magnitude, or that Ms Knight suffered from it.

[102] The contentions advanced under ground 22 do not disturb those findings.

Ground 23

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63 Reasons below [326].

[103] This one-sentence ground is simply an allegation that the weight of the evidence before the learned trial judge should have justified an order in favour of Ms Knight. It does not advance matters further than any other ground.

[104] For these reasons the grounds of appeal fail.

Consideration – impact of the medical evidence

[105] In order to succeed on her claim Ms Knight had to establish not just a breach of duty but that the breach was causative of loss. The medical evidence and her Honour's findings in respect of it present an insuperable barrier to Ms Knight succeeding on that aspect of the case. There are several reasons for that conclusion.

[106] First, the only medical expert to link the use of D4 to any of the conditions suffered by Ms Knight was that of Dr Oliver. As referred to above, there were reasons why the learned trial judge rejected her evidence. Amongst them were the findings that Dr Oliver lacked impartiality, her report depended at least in part upon medical evidence that was not adduced at the trial, and it conflicted with the evidence of Dr Brandt.

[107] Secondly, the learned trial judge gave detailed reasons as to why she accepted the evidence of Dr Brandt in preference to that of Dr Oliver. Before this Court Ms Knight was not able to demonstrate any error in her Honour's reasoning in that regard. Dr Brandt's opinion, on which the learned trial judge acted, was that there was no causative link between the use of D4 chemical and any of the symptoms of which Ms Knight has complained in the proceedings. More specifically, he rejected Dr Oliver's diagnosis of MCS.

[108] Thirdly, insofar as there was a psychiatric aspect to Ms Knight's symptomology, the medical evidence excluded reliance upon it. Dr Shaikh (called for the defence) concluded that there was no psychiatric condition that could be linked to the symptoms said to have derived from the impact of D4 use in the facility. Dr Matthew (called by Ms Knight in her case) reversed his opinion during the course of his evidence and reached a conclusion that was not inconsistent with that of Dr Shaikh. Not surprisingly the learned trial judge concluded that there was no psychiatric condition that impacted upon the claim.

[109] Fourthly, once Dr Oliver's evidence was rejected and Dr Brandt's evidence was accepted, there was a solid foundation upon which the learned trial judge could conclude that causation had not been proved. Her Honour did make that finding, and it cannot be demonstrated to be an error.

[110] The consequence is that even if Ms Knight could prove a breach of duty in a form that would advance her case, it would fail at the point of proving causation. That position applies even if Ms Knight could successfully attack the findings rejecting her evidence and preferring that of the witnesses for CPSM. In other words, an essential component of succeeding in the claim simply cannot be proved. The findings by the learned trial judge in that respect cannot be shown to be an error.

Conclusion and orders

[111] In the result, the consequence is that the appeal must be dismissed.

[112] I propose the following orders:

1. The application to adduce further evidence is refused.
2. Appeal dismissed.
3. The appellant pay the respondent's costs of the appeal on the standard basis.

[113] **BODDICE J:** I agree with Morrison JA.

[114] **NORTH J:** I agree with the reasons of Morrison JA and the orders proposed.

[115] It was open to the trial judge to hold that the appellant had not proved a breach of the duty of care her employer owed her. The findings quoted by Morrison JA demonstrate why that was so and why, as Morrison JA observed, "the evidence did not establish a causal link between the use of D4 and the symptoms of which [the appellant] complained."

[116] For the reasons given by Morrison JA the appellant's challenge to the findings made by the trial judge fails. I agree, for the reasons given by his Honour, that the application to adduce further evidence should be refused and that each of the grounds of appeal are either misconceived or lack merit.