# SUPREME COURT OF QUEENSLAND

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| **CITATION:** | *Campbell v CSR Limited & CSR Plane Creek Pty Ltd* [2002] QSC 266 |
| PARTIES: | **CHERYL ANN CAMPBELL**<br>(Plaintiff)<br>v<br>**CSR LIMITED**<br>(First Defendant)<br>and<br>**CSR PLANE CREEK PTY LTD**<br>(Second Defendant) |
| FILE NO: | S31/2000 |
| DIVISION: | Trial Division |
| DELIVERED ON: | 9 August 2002 |
| DELIVERED AT: | Rockhampton |
| HEARING DATES: | 20, 21, 22 May 2002 in Mackay |
| JUDGE: | Dutney J |
| ORDERS: | **Judgment for the plaintiff against the first and second defendants in the sum of $220,193.59.**<br><br>**Judgement for the plaintiff against the second defendant for the further amount of $7000.00.** |
| CATCHWORDS: | MASTER AND SERVANT – SAFE SYSTEM OF WORK - PERSONAL INJURIES - NEGLIGENCE – BREACH OF DUTY – BREACH OF STATUTORY DUTY – BREACH OF CONTRACT – DAMAGES – CONTRIBUTORY NEGLIGENCE – where plaintiff fell down a flight of stairs at work – where risk of injury reasonable foreseeable – where inexpensive remedial measures would have avoided the foreseeable risk – whether inadvertence or inattention on the part of the plaintiff contributed to the incident occurring<br><br>DANGEROUS PREMISES – OCCUPIER'S LIABILITY – BREACH DUTY OF CARE – where risk reasonably foreseeable – where inexpensive remedial measures would have avoided the risk |

STATUTES – INTERPRETATION – whether s253 *Workcover Queensland* Act 1996 operates to exclude a claim against an occupier where the employer is concurrently liable at common law - whether s312 *Workcover Queensland Act* 1996 is an example of a statutory exception to the prohibition in *Astley v Austrust Ltd*

*Workcover Queensland* Act 1996 s5(4)(a), s11(1), s253(1)(a) & (b), s312(1)(c)-(i), (4), s314(1)(a), (b), (c), (e), (f), (g), s315,
*Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, cited
*Girlock Sales Pty Ltd v* Hurrell (1982) 149 CLR 155, cited
*Bradshaw v McEwans Pty Ltd* (Unreported High Court, 27 April 1951, followed
*McLean v Tedman* (1984) 155 CLR 306, discussed
*Australian Safeway Stores Pty Ltd v Zaluzna* (1986-1987) 162 CLR 479, followed
*Karanfilov v Inghams Enterprises Pty Ltd* [2001] Qd R 273, discussed
*Bonser v Melnacis* [2000] QCA 13, cited
*Canterbury Municipal Council v Taylor & Ors* [2002] NSWCA 24, considered
*Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, discussed
*Astley v Austrust Ltd* (1999) 197 CLR 1, followed
*Martin v Mackay City Council* [2001] QSC 433, followed
*Karanfilov v Inghams Enterprises Pty Ltd* [2002] QSC 141, followed, not followed
*Hawthorne v Theiss Contractors Pty Ltd* [2001] QCA 13, considered

COUNSEL: D McMeekin SC, with him G Crow for the Plaintiff
P Corkery for the First and Second Defendants

SOLICITORS: Macrossan & Amiet for the Plaintiff
Moray & Agnew for the First and Second Defendant

[1] The plaintiff, Cheryl Ann Campbell fell down the internal stairs at the office of the Plane Creek Sugar Mill in Sarina on 3 March 1997. She was injured and has not worked since. At the time of the accident the plaintiff was 41 years old, having been born on 28 October 1955.

**The stairs**

[2] The accident occurred while Ms Campbell was descending the stairs from her office on the first floor of the building to the ground floor. The stairs themselves consisted of two flights with an intermediate landing. The upper flight consisted of eight treads and the lower flight of seven treads. The stairway was timber, possibly silky oak The photographs of the treads contained in Mr Kahler's report show obvious signs of wear in the central portion. Ms Campbell gave evidence that they were in a similar condition when she was injured. I accept that evidence. For a person descending the top flight the stairs had a balustrade on the right hand side 147mm wide and 47mm thick. It was 810mm above the nose of the tread. On the left hand side against the wall was a handrail. It was 810mm above the nose of the tread. Its cross-sectional dimensions were 45mm x 45mm with a curved upper surface. The handrail terminated vertically above the nose of the first tread.

[3] The stairway was lit at the time of the accident by wall mounted fluorescent lights the output of which was measured by Mr Hills, the mill safety officer, after the accident at 40 lux. The lights have since been replaced by a different style of light for reasons not connected with the plaintiff's accident but the output remains about the same or slightly less. Mr Kahler also took light readings when he inspected the stairs after the lights were changed from fluorescents to bulbs and came up with lower readings than Mr Hills. There is said to be an Australian standard for stairwell lighting but there was no evidence as to what it requires. By way of illustration, Mr Kahler also took light readings around the Mackay Court. The foyer outside the Courtroom gave a reading of 180 lux. The main stairway up to the courtroom gave readings between 13 lux and 35 lux. Three witnesses, Ms Patterson, Mr Chapman and Mr Donovan gave evidence that the stairs were dully lit which would be consistent with the stairs outside the courtroom.

[4] The treads themselves had rounded noses with the first tread from the top being quite worn. Mr Kahler gave evidence that the rounding of the edges of

the treads, particularly a wide radius rounding as was the case with these treads created its own dangers. The danger was created because the normal sight line of a person descending the stairs was to the extremity of the tread rather than to the edge of the flat portion. With a rounded tread, a person descending the stairs was more likely to overstep and slip.

[5] Mr Kahler was also critical of the balustrade. The broad flat design would make it difficult for a person who was slipping to take a "power grip" and prevent themselves from falling. Mr Kahler was also critical that neither the balustrade nor the handrail broke into the horizontal at either end. The purpose of doing so is to encourage users of the stairway to grip the rail before commencing to ascend or descend.

[6] The stairway was steeper than AS1657 – 1992 permitted. AS1657 applies to stairways intended to provide access to places normally used by operating, inspection, maintenance and servicing personnel. While both the goings and the risings were within the guidelines set out in the standard the combination was steeper than that for which the standard provided. It seems therefore that the stair case was probably somewhat steeper than what might ordinarily be confronted in the workplace. While the handrail and balustrade heights were within the range allowed by the standard they were both lower than the minimum required by the *Building Act* and the *Building Code of Australia* which specify a minimum height of 865mm.

[7] Despite his criticisms which were summarized above Mr Kahler conceded that the stairs did comply with the building code in all but two respects. These were the rail heights to which I have already referred and the absence of a non slip strip near the edge of the nosing. The treads of the stairs were coated with a lacquer type coating which was not said to have any particular non-slip characteristics. The treads were obviously worn in the central portion as appears in the photographs attached to Mr Kahler's report.

[8] Having listed the deficiencies this staircase would have if being erected in a workplace today I should note that it was constructed in the early 1970's and

is typical of many thousands of such staircases. There is no evidence as to whether it complied with any relevant standard or building code at the time the staircase was erected.

[9] The stairs were cleaned each afternoon from Monday to Friday between 4:00pm and 4:30pm. Ms Campbell gave evidence that the stairs could become quite dirty on occasion, particularly if it had been raining. There is no suggestion it was raining on the day of the accident.

**The accident**

[9] Ms Campbell was employed as a procurement officer at the Plane Creek Mill by the first defendant ("CSR") in February 1995. She was employed on a three year contract terminating in February 1998.

[10] Prior to being employed by CSR, Ms Campbell had worked for the Queensland Building Services Authority for about twelve months as an administration officer. For ten years before that she had worked with Hay Point Services at Hay Point first as a secretary but later as a purchasing officer.

[11] When she commenced employment with CSR Ms Campbell was involved in an induction process. In her case this was conducted by a Mr Penklis, who did not give evidence, and seemed to consist of completing and signing a questionnaire which confirmed that instruction had been given in a number of matters. The document later became exhibit 9. One of the matters the document states was the subject of instruction was "handrails and floor openings". The instruction is said in the form to have been given by Mr Hills. Mr Hills did not suggest he had in fact been involved in Ms Campbell's induction. I accept that Ms Campbell was not given any instruction in descending stairs or using handrails.

[12] After commencing employment Ms Campbell was allocated an office on the first floor of the office building. Among other things, the tea room was on the ground floor.

[13] The accident occurred about 2:00pm on 3 March, 1997. Ms Campbell was going downstairs to get herself a cup of tea. She was carrying an A4 sized envelope and her cup in her left hand. She was descending towards the right hand side of the staircase with her hand right hand resting on the balustrade. Ms Campbell recalls feeling a slipping motion on either the first or second tread and then lost consciousness. The evidence suggests that Ms Campbell came to rest on the landing between the top and bottom flights of steps in a slightly tucked position with her head nearest the bottom tread of the top flight and her feet further away. She was still holding the envelope in her left hand and there were broken pieces of the cup scattered about.

[14] Ms Campbell said that the steps were dirty but there is contradictory evidence from other witnesses about this. Ms Paterson who was on the scene shortly after the accident said she observed nothing on the steps other than a skid mark, like a rubber mark, on the second or third step. Mr Moss, Ms Campbell's domestic partner, gave evidence that he was at the scene about twenty minutes after the fall and before Ms Campbell was moved and observed mud on the second step as if someone had scraped a boot on the edge. He said he drew this mud to the attention of someone called Bernie and a Royce Bishop. Mr Hills, the CSR safety officer, gave evidence that he inspected the steps immediately after the fall and could not see anything on the steps likely to cause a fall. When cross examined Mr Hills agreed that there was a rubber mark somewhat smaller than four or five inches long and half an inch wide on the second or third step. He denied the presence of any mud or that Mr Moss had drawn any such substance to his attention.

[15] Of these witnesses I prefer the evidence of Ms Paterson. She no longer works for CSR and seemed the most objective of the witnesses. Ms Campbell and Mr Moss have an obvious interest in the matter. Mr Hills to me seemed to be loyal to CSR to the point that I doubted his capacity to be objective. In the

result I find that the stairs were clear of obvious contaminant save for the "skid mark". I cannot determine on the evidence whether this was present before the fall or caused by the fall. At the time of the fall Ms Campbell was wearing relatively new, brown, synthetic soled shoes.

[16] Prior to the accident Ms Campbell had successfully descended the stairs many times each day. On one occasion about three or four months prior to the accident on 3 March, 1997 Ms Campbell had caught her foot on the overhang of the tread causing her to stumble and spill her tea. That was while she was ascending. The stumble was not related to anything on the stairs. Other witnesses gave evidence of having slipped on different occasions. None of the earlier mishaps could be said to be significant and none were reported to Mr Hills or, as far as the evidence went, to anyone else.

[17] There was evidence relating to a quote to repaint the parquetry foyer below the stairs and the stair treads. Whether this was obtained because of the condition of the foyer, the stairs or both it not disclosed. It seems to me to be a red herring because Mr Kahler's evidence which I accept is that the paint quoted on would not have improved the safety of the floor. The repainting appears to have been for aesthetic rather than safety reasons.

**Liability of first defendant**

[18] CSR is sued as Ms Campbell's employer. The duty imposed on the employer is to take reasonable care not to expose the employee to unnecessary risk of injury.[1]

[19] In my view, the risk of slipping on a staircase is obvious. This risk is increased where the staircase is dimly lit and relatively steep. There is no doubt in my mind that even if the various stumbles referred to in evidence had not been reported to the employer the employer was nonetheless under a duty to take appropriate steps to minimize the risk. In this case it does not seem to

[1] *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 23.

me to matter very much whether the staircase conformed to the provisions of the 1996 Building Code. That Building Code could hardly apply to a staircase erected in the 1970's. Likewise, it seems to me that Australian Standard AS1657 has little real relevance. It does not relate directly to this type of staircase. It is not submitted on behalf of Ms Campbell that regulation 65 of the *WorkplaceHealth & Safety (Miscellaneous) Regulations* 1995 applies, presumably because of the limited scope of the definition of "access" in sub-regulation (2).

[20] I am not persuaded that the failure on the part of the first defendant to instruct Ms Campbell on the correct method of walking up and down the stairs is sufficient to render it liable. Walking up and down an ordinary internal staircase such as this one is such a basic concept that unless I am bound by authority (no such authority being cited) I would not find that an employer who failed to tell a competent adult how to do so was negligent.

[21] These observations do not, however, resolve the present case. I was impressed by the evidence of Mr Kahler. I accept his evidence in relation to the increased risk of falls where the treads have rounded edges. I accept also that the stair case lighting was relatively dim and the stairs relatively steep. On the balance of probabilities I am satisfied that Ms Campbell slipped on the stairs and the probable cause was overstepping. This is consistent with her evidence that she slipped on the first or second stair and the presence of the skid mark on the second or third stair. The skid mark extended some inches back from the edge of the tread. This is about where I would expect to find it if the maker had slipped from the edge of the tread above onto the back portion of the tread as she commenced to fall. Its location towards the centre of the staircase is also consistent with about where Ms Campbell would be placing her feet if she were resting her right hand on the balustrade. In the absence of a foreign substance on the stairs likely to have caused a slip, or any suggestion Ms Campbell deliberately injured herself, or performed any unusual or

dangerous activity on the stairs, the conclusion that she overstepped is the only plausible explanation for the event which fits the available evidence.[2]

[22] The fact that Ms Campbell had successfully negotiated the steps on hundreds, if not thousands, of previous occasions suggests there must have been a degree of inadvertence or inattention on her part on this occasion.

[23] The extent of the employer's duty in these circumstances was stated by the High Court in *McLean v Tedman*[3] as follows:

> "*The employer's obligation in this respect cannot be restricted to the provision of a system which safeguards the employee from all foreseeable risks of injury except those which arise from his own inadvertence or negligence. There are many employment situations in which the risk of injury to the employee is negligible so long as the employee executes his work without inadvertence and takes reasonable care for his own safety. In these situations the possibility that the employee will act inadvertently or without taking reasonable care may give rise to a foreseeable risk of injury. In accordance with settled principle the employer is bound to take care to avoid such a risk."*

[24] Here the risk of someone falling on the stairs was an obvious one notwithstanding that if the stairs were negotiated with a reasonable level of attention they were unlikely to present a problem. The stairs could have been made significantly safer by the simple and inexpensive method of capping the toes of the treads with a non-slip edging at a cost according to Mr Kahler of about $450.00 including labour. This involved no structural alteration of the

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[2] See Stephen J in *Girlock Sales Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161-162 where he set out a passage from an earlier decision of the High Court in *Bradshaw v McEwans Pty Ltd* (Unreported High Court, 27 April 1951) as follows:

> *"You need only circumstances raising a more probable inference in favour of what is alleged ... where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture ... All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."*

stairs and overcome the problem both of the relatively slippery surface and the rounded tread edges. In this case, on the balance of probabilities, it would have prevented the injury to Ms Campbell. The balustrade on which Ms Campbell's right hand was resting at the relevant time was not of such a design or height that it might have been used to prevent the fall once she had commenced to stumble or slip.

[25] The failure to adopt an obvious and inexpensive remedial measure to avoid a foreseeable risk is, in my view, a breach of the statutory and contractual duty to provide a safe system of work. Such a failure also amounts to a breach of the common law duty of care owed by an employer to an employee.

**Liability of Second Defendant**

[26] The second defendant ("Plane Creek") is sued as the occupier of the building. The fact of Plane Creek being the occupier was admitted on the pleadings. An application at the outset of the trial to withdraw the admission was abandoned by counsel for Plane Creek. A Mr Mackay gave evidence in support of that application. Some reference has been made to his evidence in the written submissions. His evidence was not, however, evidence in the trial. Counsel for the plaintiff was not given an opportunity to cross-examine him. No application was made to have his evidence treated as evidence in the trial. I have not considered Mr Mackay's evidence in determining this action.

[27] The duty owed by an occupier of premises to lawful entrants is to take reasonable care to avoid foreseeable risk.[4] In this case the same reasons which made it reasonable for an employer to ensure that non-slip edgings be placed on the treads apply to an occupier. The stairs were in a commercial context. They were relatively dark and steep. The danger of tripping or slipping was obvious. The cost of making the stairs safer by applying the edgings was negligible. I am satisfied that the duty owed by the second defendant was breached.

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[3] (1984) 155 CLR 306 at 312.
[4] *Australian Safeway Stores Pty Ltd v Zaluzna* (1986-1987) 162 CLR 479 at 488.

[28] During the course of the argument I raised a query as to whether the provisions of s253 of the *Workcover Queensland Act* 1996 ("the Act") operated to exclude a claim against an occupier where the employer was concurrently liable at common law. That appeared superficially to be the conclusion reached by McPherson JA in *Karanfilov v Inghams Enterprises Pty Ltd*[5] at 282. Having considered the matter I do not think that is the case. At 282, his Honour was excluding the claim against the occupier on the assumption that the worker had not met the requirements of s253(1)(a) and (b) of the Act. These related to the need to obtain a notice of assessment from Workcover. The example being given was one where a "worker" was seeking to avoid the obligations under the Act by suing a concurrent tortfeaser. There is no suggestion here that Ms Campbell has not obtained a notice of assessment or otherwise complied with the requirements of the Act. She must have done so in order to bring the claim against the employer. If it were alleged she had not it would be a matter that would have had to have been pleaded. It is thus unnecessary for the purposes of determining liability to consider whether there is any inconsistency between the position discussed by McPherson JA in *Karanfilov* and the implied assumption underlying *Bonser v Melnacis.*[6] In the latter case the Court was concerned with whether a third Party sued by an employee who had not satisfied the requirements of the Act could claim contribution against an employer.

[29] However, it will be necessary to revisit the matter in relation to damages.

**Contributory Negligence**

[30] Plane Creek alleges that negligence on the part of the plaintiff has contributed to her injuries. The particulars of negligence provided in paragraph 15 of the amended defence are failure to use the left hand handrail, fail to keep a proper lookout and failing to have regard to her own safety when descending the steps.

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[5] [2001] Qd R 273
[6] [2000] QCA 13.

[31] On the findings I have made, Ms Campbell was using the balustrade provided but it was not of suitable design as to enable her to break her fall. In any event, just as I would not regard failing to instruct an adult to use a handrail on an ordinary staircase as negligent on the part of an occupier, I would not regard the attempt of an adult to descend an ordinary staircase without holding the rail to be contributory negligence.

[32] I have already found that inadvertence or inattention almost certainly contributed to the accident. The inadvertence and inattention was momentary in the sense adverted to in *McLean v Tedman*[7]. This does not preclude a finding of contributory negligence if the danger is sufficiently obvious that such inadvertence or inattention amounts to negligence.[8] In this case the same matters which made the danger obvious to the occupier, namely, the dull light, the steepness of the stairs, the worn treads and the lack of any non-skid surface would have been equally obvious to Ms Campbell. She must be taken to be aware that she needed to exercise a degree of care and attention when descending the stairs. In circumstances where no unusual feature of the staircase at the relevant time contributed to the accident or increased the risk, the carelessness of Ms Campbell must be regarded as a contributing factor for which she must accept liability. This approach is consistent with the approach of the majority in *Bankstown Foundry Pty Ltd v Braistina*[9] where their Honours said:

> *"A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risk. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage."*

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[7] supra
[8] see *Canterbury Municipal Council v Taylor & Ors* [2002] NSWCA 24 at [162] – [165].
[9] (1986) 160 CLR 301 at 310.

[33] In my view Ms Campbell has been guilty of carelessness amounting to negligence in descending the stairs and I apportion her degree of responsibility as 20%.

[34] The first defendant relies on the provisions of ss312 and 314 of the *Workcover Queensland Act* 1996 to reduce the plaintiff's damages. In particular the first defendant relies on a failure to comply with instructions relating to the use of handrails (314(1)(a)), failure to use handrails in the way instructed (314(1)(b)) and a failure to use the handrail provided to reduce the exposure to injury (314(1)(c). For each of these that is made out the damages to which Ms Campbell is entitled against the first defendant must be reduced by 25%.

[35] Having found that no instructions were given, it follows that s314(1)(a) and (b) have no application. I have found that Ms Campbell was using the balustrade provided at the time she fell. It was plainly impracticable to use both the balustrade and the handrail since they were on opposite sides of the staircase and both were apparently provided for the same purpose. I therefore find that s314(1)(c) is not made out.

[36] The first defendant further relies on the provisions of s312(1)(e), (f) and (g) in that Ms Campbell failed to use the handrail or keep a proper lookout, that the event was not solely the result of inattention , momentary or otherwise on the worker's part and that she failed to use the handrails in the manner instructed.

[37] I have already dealt with the failure to act as instructed.

[38] The question of inattention should be dealt with in the same way as it was when raised by the second defendant. The cases to which I have referred, particularly *Canterbury Municipal Council v Taylor,*[10] distinguish mere inattention from negligence even where the negligence consists of momentary inattention. I consider the plaintiff to have contributed 20% to her own injuries.

[10] [2002] NSACA 24 at [162] – [165].

[39] Since I have found the first defendant liable in contract it remains to consider whether it is possible to reduce the damages awarded on the basis of the contribution I have found.[11]

[40] In *Martin v Mackay City Council*[12] I concluded that s312[13] was an example of a statutory exception to the prohibition in *Astley*. Since then, Atkinson J has reached a different conclusion in *Karanfilov v Inghams Enterprises Pty Ltd.*[14] In light of her Honour's judgment I should reconsider whether the approach I have previously taken is correct.

[41] In *Karanfilov*, Atkinson J made reference to some remarks by Thomas JA in *Hawthorne v Theiss Contractors Pty Ltd*[15] where he observed:

> *"Claims of the present kind are almost invariably brought in the alternative upon both breach of contract and negligence, and since Astley contributory negligence has become a virtual dead letter because of the plaintiff's ultimate right to elect to proceed in contract."*

[42] Thomas JA's remarks were a comment on the practical consequence of *Astley* in the context of a discussion on causation. They were not and appear not to have been intended to be a considered opinion on the effect of s312 of the *Workcover Queensland Act* 1996.

[43] Having considered Atkinson J's reasons for coming to a different conclusion to that to which I had previously come I remain of my original view as to the effect of s312. If, as the Court of Appeal said in *Bonser v Melnacis,*[16] the legal liability of an employer referred to in the definition of damages in s11(1) includes a liability in contract, "damages" in the Act must include damages for

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[11] See *Astley v Austrust Ltd* (1999) 197 CLR 1 which precludes the reduction of an award of damages in contract by reason of contributory negligence.
[12] [2001] QSC 433
[13] since the time of this accident and the accidents referred to in *Martin* and *Karanfilov* s312 has been substituted by a different provision. For the full text of the relevant parts of s312 see *Martin* para [31] or *Karanfilov* para[96].
[14] [2002] QSC 141.
[15] [2001] QCA 223 at [11].

breach of contract. When s312(4) talks of the court reducing the claimant's damages for failure to prove a matter mentioned in s312(1)(c) to (i) it must include damages for breach of contract. I cannot see how that result can be different even if, as Atkinson J assumes, the legislator was mistaken as to the position at common law in that regard when the legislation was enacted. To my mind the important part of s312 in this context is not the introductory words of sub-section (1) which refer to a claimant being "entitled to recover damages not reduced on account of contributory negligence" but sub-section (4) which provides:

> *"If the claimant fails to prove any of the matters mentioned in sub-section (1)(c) to (i), the court must-*
> *(a) dismiss the claim; or*
> *(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury."*

[44] In my view s312 as it existed at the relevant time requires a reduction in damages where, as here, a failure to prove a relevant paragraph of sub-section 312(1) is found.

**Quantum**

[45] Ms Campbell was knocked unconscious in the fall to the landing. Following the fall Ms Campbell was removed by ambulance to Sarina hospital and then to Mackay where she was treated as an inpatient. A CAT scan did not reveal any problem but Dr Reimers, a neurosurgeon later diagnosed a soft tissue injury to the root of her neck. Ms Campbell was discharged with a cervical collar and analgaesics. She was discharged from the Mackay hospital on 5 March, 1997. By the time Ms Campbell presented at outpatients on 19 March, 1997 she was already expressing the fear that she would never recover and would become addicted to valium.[17] Ms Campbell was readmitted to the Mackay hospital on 8 July 1997 for a ketamine infusion to treat chronic pain and discharged on 9 July.

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[16] [2000] QCA 13 at [10]

[46] Ms Campbell's pain continued and she received regular treatment. In 1998 she was prescribed anti depressant medication by her general practitioner but discontinued this because it "made me feel as if I was in a fog". She was persuaded to try Zoloft in late November 2000. As the dosage increased there was some improvement.

[47] At trial Ms Campbell complained of constant neck pain radiating into the right shoulder. She says she experiences severe headaches from one to three times a week. She complains of pins and needles intermittently in her right hand. She has low back pain aggravated by remaining seated for lengthy periods or heavy chores. Ms Campbell has some loss of vision in her left eye.

[48] The medical evidence concerning Ms Campbell was mixed. She plainly has a psychiatric condition which has responded to the Zoloft. Whereas formerly she was diagnosed as suffering a mood disorder, that had decreased by the time of Dr James report of 6 October, 2001 to a mild adjustment disorder.

[49] The orthopaedic evidence identified some Waddell signs. These were insufficient in Dr White's opinion to persuade him that the complaints were not genuine. Dr Parker noted that he thought Ms Campbell was verging on clinical hysteria when he saw her. This is all consistent with a psychiatric condition.

[50] Dr Likely, a psychiatrist drew attention to a number of significant features including Ms Campbell's predisposition to depressive disorders and the likelihood she had suffered from them before the fall, particularly as a result of the death of her mother when she was a child.

[51] Video evidence was tendered showing Ms Campbell at a dog show. I do not consider anything on the videos is indicative of fraud or exaggerated symptoms. The activities Ms Campbell is filmed undertaking are all activities

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[17] see first entry in Mackay hospital records, exhibit 29.

within her acknowledged limitations and none involved prolonged fixed posture or heavy work.

[52] On balance I accept that Ms Campbell subjectively suffers from the matters she complains of. She is on balance likely to suffer some level of pain and discomfort permanently. Objectively, the severity of the symptoms seems inconsistent with the level of injury but the defendants must take Ms Campbell as they find her.

[53] I assess damages for pain and suffering at $40,000.00 of which 25,000.00 is for the past.

[53] The plaintiff was employed by CSR on a contract at the time of her accident. The contract had approximately a year to run. Ms Campbell was paid $623.00 net per week. Ms Campbell's work history set out in paragraph 13 of her quantum shows a good history of employment in administrative and clerical occupations. There were no periods of unemployment. There is no reason to believe that but for the accident Ms Campbell's work patterns would have changed. Even if she had not been offered an extension on her contract by CSR work of the type Ms Campbell was qualified for and experienced at is regularly available as appears from exhibit 12. The fact that she had obtained a number of positions including one in the public service demonstrates that Ms Campbell was competent in the job interview situation and thus reasonably likely to find suitable work. I propose to allow her $623 per week since the accident discounted by 10% for contingencies. I do not think the reluctance on the part of Ms Campbell to take anti-depressant medication has had any significant effect on the past loss of earnings. Ms Campbell's history of treatment has been of gradually increasing dosages of Zoloft since late 2000. If she had undertaken a full treatment programme earlier she might have expected a resolution of much of her disability earlier than she now will but probably not before the present time. Any delay in treatment is more likely to be reflected in future loss of earnings. Ms Campbell did attempt a return to work at CSR after the accident. She remained only a few hours and her reason for not persisting is not convincing. Nonetheless it is consistent with the

diagnosis of a major depressive disorder. I suspect it was this condition rather than anything on the part of CSR which resulted in the failure. In neither case, however, do I regard the failure to complete the return to work programme to be a failure to mitigate on the part of Ms Campbell. I find that the mood disorder/adjustment disorder rendered her unfit for employment up to the time of trial.

[55] For the future the evidence is mixed. Dr White and Dr James both consider Ms Campbell should return to work, albeit in a position allowing flexibility of movement and relatively low stress. If one compares this description with the type of occupations Ms Campbell has undertaken in the past it might be the equivalent of an AO2 public service posting rather than AO3 or AO4 that she was used to. The difference in pay is about $6,000.00 to $8,000.00 gross per grade per year. The net difference would be about $100 to $200 per week depending on whether the drop was one or two grades. I propose to allow $150.00 per week for 13 years with a 15% discount for contingencies.

[56] Future medical expenses are claimed at the rate of $29.54 per week. These include a monthly visit to a general practitioner, a packet of Zoloft per month, 6 Panadeine forte per week and 3.5 Zantac per day. The plaintiff seeks these costs for the rest of her life. I am not persuaded that this is realistic. On the basis that the plaintiff's problems are largely psychological and likely to be treated over a relatively finite period I propose to allow the costs for three years in the sum of $4,312.00 using the 5% tables.

[57] There is a claim for past domestic assistance in the sum of $48.00 per week representing 4 hours at $12.00 per hour. This claim is made only against the second defendant. As the assistance was voluntary it is not recoverable against the first defendant because of the provisions of the *Workcover Queensland Act*.

[58] In order to determine this claim against the second defendant it is necessary to decide whether "damages" in s315 of the Act means damages only against the

employer or also includes damages against a third party where there is concurrent liability.

[59] This question is not resolved by the Court of Appeal's decision in *Bonser v Melnacis*[18] nor by the decision of the Court of Appeal in *Karanfilov.*[19] The former case assumed the co-existence of the causes of action without argument on or discussion of the point. The Court was not asked to determine the validity of the action against the third party. The latter case was concerned with whether the definition of damages in s11 covered the position of someone not mentioned in s253(1) who sought to make a claim against the employer for injury to a worker.

[60] In my view, s315 of the Act does not apply to a claim against a third party even where the employer is jointly liable. The *Workcover Queensland Act* is intended to regulate claims against employers who are insured under the statutory fund. That it is to be read to restrict only claims against employees required to insure under the statutory fund is consistent with the exclusion from the definition of damages in s11 of the Act of claims for which the employer is separately insured under another Act.[20] Restricting the operation of the limitations contained in the Act to the placing of limitations on claims against employers enables the decisions in *Bonser, Karanfilov* and *Hawthorne v Theiss Contractors Pty Ltd*[21] to be reconciled and to meet the objectives of the legislation as expressed in s5(4)(a).

[61] The evidence as to the need for domestic services is scant. In the quantum statement the evidence is confined to paragraph 133 the relevant part of which states only that "my partner Keith Moss has performed most of the domestic tasks which were ordinarily performed by me and a contract cleaner prior to being injured". The tasks identified are mopping, vacuuming, hanging heavy

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[18] supra
[19] [2001] Qd R 273.
[20] Section 11(2) provides:
"A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under –
(a) another Act; or
(b) a law of another State, the Commonwealth or of another country.

clothes on the line and other heavier domestic chores including lawn mowing and gardening work. The evidence in chief went little further. At page 42 of the transcript Ms Campbell indicated that she had attempted mopping and vacuuming but not hanging out washing. When she attempted these activities is not identified. Whether there was more than one attempt or whether it was more recently than 1997 is not identified. This establishes the fact that at the time she attempted those tasks she did attempt she was unable to perform them. I accept that on the basis of this evidence some assistance would be required. However, I understand the basis on which damages for domestic services are awarded is not because the plaintiff does not do chores she formerly did, but because the plaintiff cannot now perform the tasks herself. I am not satisfied that any specific amount has been established. In the circumstances and in the absence of more acceptable evidence I propose to allow a global sum of $7,000.00.

[62] A claim is made for future domestic services against both defendants. This claim is made on the basis of Ms Campbell's evidence that she proposes employing a cleaner for four hours a week when she is able to afford it. Ms Campbell employed a cleaner before her accident. The same deficiencies which affect the evidence in relation to past domestic services affect the claim for the future. I cannot conclude that the provision of such services is necessary. The best evidence is contained in the reports of Dr Likely and Dr Chalk but this evidence is years old and suggests resolution of the psychiatric problems will resolve or reduce the physical incapacities. Until then there is likely to be at least some "need". Justice Atkinson has recently determined that damages under this head can be claimed[22] where the cost is one for which the plaintiff will be liable to pay. That is, where the service is provided by a commercial service provider. Her Honour's construction of s315 in this respect is in my view, the correct one. Nonetheless I am not able to say in circumstances where a cleaner was employed before the injury, discontinued for financial reasons and reinstated when finances again make that course viable, that the whole of the subsequent cost of employment is accident

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[21] [2001] QCA 223

[22] see *Karanfilov v Inghams Enterprises Pty Ltd* [2002] QSC 141 at [74] to [82].

related. I propose to allow one third of the cost of the cleaner for the same three year period I have allowed the medication. I have done this on the basis that Ms Campbell's psychiatric problems should have resolved by then and there is no reason on the evidence why she could not perform those duties herself even if they involved some discomfort. This amounts to $2,336.00.

[63] On the basis outlined above the damages awarded against the first and second defendants are as follows:

| | |
|---|---|
| Pain, suffering and loss of amenities | 40,000.00 |
| Interest on $25,000 at 2% for 5 years | 2,500.00 |
| Past economic loss 623 x 281 weeks x 90% | 157,556.70 |
| Interest on past economic loss ($87,144.7) @ 5% | 21,786.17 |
| Future economic loss | 64,005.00 |
| Past loss of superannuation @ 7% | 11,028.97 |
| Future loss of superannuation @ 9% | 5,760.45 |
| Future medical expenses | 4,312.00 |
| Future domestic services | 2,336.00 |
| Special damages paid by Workcover | 6,402.63 |
| *Fox v Wood* | 6,823.00 |
| **TOTAL** | **322,510.92** |
| Less 20% contribution | 64,502.18 |
| **BALANCE** | **258,008.74** |
| Less Workcover refund | 37,815.15 |
| **JUDGEMENT AMOUNT** | **220,193.59** |

[64] In addition to this sum, as against the second defendant Ms Campbell is entitled to the sum of $7000.00 representing 80% of the sum for past domestic assistance together with interest at 5% for 5 years.