SUPREME COURT OF QUEENSLAND

CITATION:	*Wells v Abbotsleigh Citrus* [2006] QSC 355
PARTIES:	**CHRISTINE JANE WELLS** (Plaintiff) v **ABBOTSLEIGH CITRUS PTY LTD** (Defendant)
FILE NO:	S193/2004
DIVISION:	Trial Division
DELIVERED ON:	3 November 2006
DELIVERED AT:	Rockhampton
HEARING DATES:	28, 29 and 30 August 2006
JUDGE:	Dutney J
ORDERS:	**1) Judgment for the plaintiff in the sum of $392,350.98**
CATCHWORDS:	DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURY – QUANTUM – Where plaintiff's injury suffered at work – Where liability admitted if injury occurred at work – Where plaintiff has a poor work history, a history of alcohol abuse and mental illness – Whether award should be discounted accordingly. DAMAGES – MEASURE OF DAMAGES – Whether plaintiff entitled to damages for gratuitous services
LEGISLATION:	*WorkCover Queensland Act* 1996 (Qld) s. 315
COUNSEL:	Mr R Morton for the plaintiff Mr R Whiteford for the defendant
SOLICITORS:	Morton & Morton for the plaintiff McInnes Wilson for the defendant

[1] The plaintiff claims to have been injured on Monday, 14 January, 2002, cleaning a piece of equipment known as a "Post Harvest Machine". A post harvest machine in the context of this case is a piece of equipment through which citrus fruit undergoes a three stage cleaning process following harvest.

[2] Boxes of fruit are placed on a hydraulic lift and hoisted up to a set of rails. The rails pass through three tunnels. In the first, the fruit is sprayed with water under pressure to remove dirt and other detritus from the picking process. In the second, the fruit is immersed in ozone rich water and finally, in the third, dipped in a chemical fungicide solution. The fruit boxes then pass out of the machine and are hydraulically lowered to the ground for removal by forklift.

[3] The plaintiff claims to have been injured cleaning the fungicide tunnel.

[4] The defendant's case is that the plaintiff was not injured at all while cleaning the fungicide tunnel, but hurt herself gardening at home on the previous day.

[5] Other defences were pleaded but all were subsequently abandoned. It is now conceded that if the plaintiff was injured on Monday 14 January, 2002, the defendant will be liable.[1]

[6] The defendant's case was based on the evidence of Ms Scott. During the latter part of 2001 and the first 10 months of 2002, the plaintiff and Ms Scott lived together in an intimate relationship.

[7] The relationship ended acrimoniously and my impression was that a significant degree of personal antipathy still exists.

[8] Ms Scott's evidence was that she remembered a Sunday early in 2002 during which she and the plaintiff were gardening. At some time between 4 pm and 5 pm, Ms Scott was mowing in the back yard and the plaintiff was pruning some trees in the front yard. Ms Scott observed the plaintiff walk around to the back yard from the front:

> "Is there anything that you can recall about how she was walking as she came around [from the side of the house] ? – She had a hand – I can't recall whether it was one hand or two hands but she was clasping her back and walking like gingerly towards me.
>
> Okay. Did you speak with her? – I asked her what was wrong. She said she hurt her back or – I can't exactly remember what words she said but it was basically that she'd hurt her back while she was trimming the trees."[2]

[9] Ms Scott suggested a hot shower and provided the plaintiff with a wheat pack. The plaintiff took two Panadeine Forte.

[10] The following morning Ms Scott described what happened as follows:

> "Can you recall the next morning? -- Yeah, she got up at 5 o'clock or …

[1] Transcript pages 283 – 284.
[2] Transcript page 215.

> Did you get up? – or probably a little bit earlier. I can't remember exactly what time, but she always got up really early 'cause she used to drive out to, um, Abbotsleigh and then come home on the Friday afternoon. So she – she got up, she was – she like said that, but she said her back was very sore and I suggested her ringing in and staying home, but she said that she'd be right and see how she goes."[3]

[11] According to Ms Scott the plaintiff arrived back home from work mid morning on the same day and said in a menacing tone that she had injured her back at work.

[12] Ms Scott's evidence was that after a month or two the plaintiff returned to all her normal activities although Ms Scott observed the plaintiff wince after casting a fishing line and get up slowly and hold her back after sitting for an extended period. Ms Scott has had virtually no contact with the plaintiff since October 2002.

[13] Ms Scott was not able to give the date of the incident in the yard other than that it was after Christmas and before 28 January.

[14] The plaintiff's evidence was that on the Sunday preceding her alleged accident, fishing friends David and Jude Bailey visited about 4 pm to show the plaintiff their new boat. Ms Scott was working in the yard but the plaintiff was upstairs on the deck talking with her friends and drinking beer. The plaintiff denied doing yard work at all and said that she left that to Ms Scott.[4]

[15] On the following morning, the plaintiff left home about 5 am. The journey to Abbotsleigh took about fifty minutes. Before going to the farm, the plaintiff stopped at the home of a Mr Reick where she would normally spend the week and drop off her clothing and some beer she took to drink after work.

[16] The plaintiff then went to work and commenced immediately to clean the post harvest machine.

[17] She was in the chemical tunnel in a cramped position when the hose became stuck. She twisted to flick it free and then pulled it hard. She felt a pain in her back and heard a crack. She stood for a while and then resumed cleaning.

[18] The plaintiff said that her back was painful but she went into the orchard with some other staff to poison weeds. She returned to Mr Reick's house after work. She reported her back pain to Mr Reick who was her supervisor at work.

[19] When she awoke on the Tuesday the plaintiff said that her back felt better but a few minutes after getting out of bed the pain returned. Despite this she attended at the workplace and did some poisoning work on a quad bike. Another worker needed a section of steel piping. The plaintiff went to a shed and picked up the pipe. She gave the pipe to the worker but was unable to continue working thereafter because of the pain. It was almost smoko so the plaintiff went to the office and reported her condition. She then drove back to Bundaberg and contacted a doctor.[5]

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[3] Transcript page 217.
[4] Transcript page 81.
[5] Transcript pages 84 – 85, 86 – 87, 89 – 90.

[20] The plaintiff gave evidence that the job at Abbotsleigh was the best job she had had up to that point in time. It involved some element of responsibility which she had not had before. It offered variety and the opportunity to work outside, which was what she preferred.[6]

[21] It consider it unlikely that if the plaintiff had in fact been injured on the Sunday and attended at work on the Monday only for the purpose of making a fraudulent claim, she would have continued at work throughout Monday and returned for part of Tuesday. Ms Scott did not dispute that the plaintiff did in fact have a painful injury.

[22] I accept that the plaintiff did not return to Bundaberg until the Tuesday. This part of the plaintiff's evidence was not seriously challenged.

[23] Another possible explanation for the plaintiff's attendance at work on the two days after Ms Scott said she was injured is that the plaintiff injured herself on the Sunday and attended work on Monday and Tuesday to try and work through the injury but was unable to do so. This seems less likely. If the plaintiff was in pain on the Monday morning before she left Bundaberg it seems more likely she would have simply taken a day off work to see if the injury settled. She could not have known that the injury would become chronic at that stage.

[24] In view of her evidence concerning her attitude to the job, which I accept, it seems unlikely to me that the plaintiff would have formed any intention to claim a permanent injury and work towards a disability pension by early Monday morning.

[25] Another explanation for Ms Scott's evidence might be that she is simply mistaken concerning the details of another unrelated event and has combined that with some recollections concerning the plaintiff's return from work after being injured. Ms Scott was not asked to recall any of the matters about which she gave evidence until she was contacted by WorkCover about the time of her first statement, which records that it was taken on 8 June 2005.[7] This was three and a half years after the events being recalled and about three years after the end of her relationship with the plaintiff.

[26] In the result and bearing in mind my observations of the plaintiff and Ms Scott I accept the plaintiff's version of what occurred.

[27] In view of my acceptance that the plaintiff was injured at work while cleaning the post harvest machine, liability is accepted by the defendant.[8] Having regard to the evidence of Mr Luxton who provided such training as the plaintiff received in relation to cleaning the post harvest machine, the concession made by the defendant was both proper and inevitable.[9]

[28] The extent of the plaintiff's present disability was disputed.

[29] Following her injury, the plaintiff underwent a lengthy period of rehabilitation with a view to her possible return to work. By the middle of 2002 when rehabilitation

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[6] Transcript page 80 - 81
[7] See exhibit 42.
[8] Transcript page 283.
[9] Transcript pages 200 – 201 where Mr Luxton conceded that the way of cleaning the machine which he demonstrated to the plaintiff was not good practice.

stopped, the plaintiff said her back pain appeared to be worse than when she started. She was beginning to get pain in her right buttock and down her right leg as far as the knee. More recently, the pain has extended to both buttocks and all the way down her right leg. She takes Celebrex, Panadeine Forte, Endone, Mogadon and Tramol on a fairly regular basis.

[30] The plaintiff has not worked since the injury and is presently in receipt of a disability pension.

[31] The orthopaedic evidence was divided as to whether or not the plaintiff's low back pain was caused by derangement of discs in her lower spine which had aggravated degenerative changes or she had suffered only a musculo-ligamentous injury.[10] Notwithstanding Dr Dickinson's observation that the plaintiff demonstrated Waddell signs during his examination, each of the doctors was satisfied that the plaintiff suffered pain in her lower back. It was also generally accepted that the plaintiff's accident was at least a contributing factor to her present condition. Having regard to the duration of the pain I accept that it is chronic. I also accept on the balance of probabilities that whatever the underlying cause of the present condition is, it was triggered by the accident and would not otherwise have manifested itself in the present symptoms.

[32] Mr Hoey, an occupational therapist, gave evidence that painted a bleak picture of the plaintiff's prospects of a return to work. This difficulty in returning to work was explained in Mr Hoey's oral evidence as being the result of the plaintiff being de-conditioned for work as a result of a long absence and the reluctance of employers to take on a worker who has had a worker's compensation claim. Evidence from Ms Scott that the plaintiff had at times carried a slab of beer since the accident was not inconsistent with Mr Hoey's observations and strength tests. I accept Mr Hoey's evidence.

[33] The plaintiff has no particular job skills. Her preference has always been for outdoor work and because of her lack of qualifications this has always been of an unskilled and heavier nature. The medical evidence, which I accept, is that this type of heavier outdoor work is no longer appropriate for the plaintiff.

[34] Against this, the plaintiff's work history prior to the accident was poor. If regard is had to a document tendered on behalf of the plaintiff as exhibit 21, the plaintiff was unemployed between 1993 and 1999. Exhibit 26 on the other hand suggests that during that period she worked as a farm labourer and as a deck hand on a fishing boat. Neither occupation appears to have been particularly remunerative. The trawler work was for a relatively short period and the farm work was seasonal. The plaintiff worked for Bundy Bag Company for periods in the 1999 and 2000 financial years and was placed by BACAS Training LTD in the 2001 financial year. The plaintiff worked for the defendant for about a year before she was injured.

[35] The plaintiff was born on 28 October 1962 and is now 44 years of age.

[36] The plaintiff attended Kepnock High School to age 15 and was an average student.

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[10] Drs Pentis and Boys favoured the former cause of the condition, Dr Dickinson favoured the latter.

[37] The plaintiff had various mental health issues during the 1990s and was treated on a number of occasions for self harm. This took the form of drug overdoses and cutting. A psychiatrist, Dr Appel, assessed her in 1990 as suffering from significant alcohol abuse in the setting of a personality disorder with prominent traits and emotional instability. She appears to have had no episode for about 2.5 years prior to the accident. This improvement was attributed by the plaintiff to the cessation of her troubled relationship with her father.

[38] The defendant was placed in receivership in June 2003. It entered into voluntary administration in July 2003 and was placed in liquidation in October 2003.

[39] The farm business itself has continued despite the insolvency of the defendant, although under different control. The evidence does not disclose whether employees of the defendant before the receivership were retained after the receivership or what the plaintiff's prospects of continuing employment were.

[40] Having regard to all these factors I consider the plaintiff's lost earnings to date should be significantly discounted from the amount she was earning from the defendant at the time she was injured. The defendant has adopted 20% which I consider appropriate if regard is also had to the fact that the base amount used in the calculation is the amount the plaintiff was earning nearly five years ago. This discount reflects the uncertainty of retaining employment with the defendant or on the farm beyond June 2003, the plaintiff's health issues, the plaintiff's poor work history and lack of skills as well as the apparent improvement in her working patterns from 1999.

[41] For the future I consider that the plaintiff retains a residual working capacity. Having regard to her chronic back pain, lack of employment skills, period out of the workforce as well as the matters referred to in relation to past employment, I assess the plaintiff's lost capacity for the future at two thirds of her capacity at the time she was employed by the defendant.

[42] The only evidence of current incomes in the field in which the plaintiff was working is in the report of Therapy Solutions[11] where the weekly wage of an agricultural plant operator is given as $476.00 and a service station attendant at $387.90. I accept that the figure used by counsel for the plaintiff in his calculations of $450.00 is appropriate considering the lapse of nearly five years since the plaintiff worked for the defendant.

[43] There is a claim for past and future care. In relation to this, the plaintiff has lived with friends or in a caravan on properties belonging to friends since the end of her relationship with Ms Scott. When the caravan is on the property of friends it is on a property where those friends also live. The friend's house provides all the amenities required apart from a bedroom. The exception is a period when the plaintiff lived on a property where the friends also lived on the property in a caravan.

[44] The services for which payment is claimed are in the nature of domestic services such as cooking, washing and cleaning of the caravan. The plaintiff's evidence was that on occasions when her pain was bad the owner of the property would cook her meal or do her washing or on a couple of occasions, help clean her caravan. The

[11] Exhibit 2 page 22.

plaintiff has lived in a caravan since about Christmas 2003 apart from an unidentified period when she lived at 41 James Street with friends.[12]

[45] Section 315 of the *WorkCover Queensland Act* 1996 ("the Act") prohibits the award of damages for gratuitous services provided to the injured worker of a type ordinarily provided by a member of the worker's household and for which the worker would not ordinarily be liable to pay.

[46] The first issue is whether the services provided to the plaintiff were provided by a member of the plaintiff's household.

[47] For the period from January 2002 until December 2003 when the plaintiff was living with Ms Scott and at James Street, I am satisfied that the services were provided by a member of the plaintiff's household. For that period I am satisfied that s 315 of the Act prohibits damages being awarded for them.

[48] Whether the services were provided by a member of the plaintiff's household when she was living in a caravan is open to debate. However, in this case it is unnecessary to resolve that issue. The plaintiff claims past care for 230 hours at a rate of $18.10 per hour. For the future the plaintiff claims 3.5 hours a week. The evidence does not support such a claim. I am satisfied that the time claimed by the plaintiff is exaggerated. For example the time for washing claimed was an hour or two. I doubt that it would take more than a few minutes to do the washing for a single individual in a week. The plaintiff conceded that, except on bad days, she could do her own cooking and her own general cleaning.[13]

[49] Having regard to this evidence, the amounts conceded by the defendant of $3,744.00 for the past and $10,000 as a global sum for the future appear to me to be appropriate whether or not the Act permits recovery of those damages.

[50] There is a debate about future medication. The plaintiff's evidence supported an expenditure of $3 to $4 per week. This is the amount the plaintiff actually pays at present. Because she is a disability pensioner her pharmaceutical rate is reduced. When she receives an award of damages her pension will be suspended for a period assessed by the department. During that period the plaintiff will have to pay the full rate for pharmaceuticals. There is no evidence as to what that rate is or the period over which it is payable. Mr Whiteford for the defendant calculated damages under this head at $5,000. Mr Morton for the plaintiff calculates an amount of $12,816. The difference is 7,816. In the scheme of things, this is not a large amount and I propose to allow the mid point between the two calculations.

[51] Out of pocket expenses are agreed between the parties.

[52] In the result I assess damages as follows:

Pain and Suffering	60,000.00
Interest on $25,000 x 2% x 250/52	2,403.85
Past Economic loss ($387 x .8 x 250)	77,400.00
Interest (77400 – 50,965.90 x 5% x 250/52)	6,354.35
Future economic loss (21 yrs (686) x 2/3)	205,800.00

[12] Transcript pages 102 – 105.
[13] Transcript pages 104 - 107

Superannuation at 9% (Past and Future)	24,968.89
Out of pocket expenses	978.50
Interest at 5%	235.22
Past Care	3,744.00
Future Care	10,000.00
Fox v Wood	1,445.00
Other expenses	7,991.35
Future Medication	8,908.00
SUB-TOTAL	410,229.16
Less WorkCover refund	17,878.18
TOTAL	**392,350.98**

[53] I give judgment for the plaintiff against the defendant for the sum of THREE HUNDRED AND NINETY-TWO THOUSAND THREE HUNDRED AND FIFTY DOLLARS AND NINETY-EIGHT CENTS ($392,350.98)