SUPREME COURT OF QUEENSLAND

CITATION:	*Marshall v Queensland Rehabilitation Services Pty Ltd* [2012] QSC 168
PARTIES:	**DONNA ANN MARSHALL** (plaintiff) **v** **QUEENSLAND REHABILITATION SERVICES PTY LTD (ACN 058 559 603)** (defendant)
FILE NO/S:	12120 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	19 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 April, 1, 2 May 2012
JUDGE:	Philippides J
ORDER:	**There be judgment for the defendant on the plaintiff's claim**
CATCHWORDS:	TORTS – NEGLIGENCE – plaintiff employee claimed damages against defendant employer for injury to cervical spine alleged to have been sustained while moving a resident of an aged care facility in the course of her employment – where plaintiff sustained a disc protrusion – whether defendant employer knew or ought to have known of particular susceptibility of plaintiff to injury – whether defendant breached duty of care owed to plaintiff – whether breach caused injury *Bailey (by his next friend Bergin) v Baltoro Holdings Pty Ltd* (WASC Full Court, 25 September 1998, unreported) *Blackman v Commonwealth* (1978) 20 ACTR 33 *New South Wales v Fahy* (2007) 232 CLR 486; [2007] HCA 20 *Paris v Stepney Borough Council* [1951] AC 367 *Pitsiavas v John Lysaght (Aust) Pty Ltd* [1962] NSWR 1500 *Stitz v Manpower Services Australia Pty Ltd & Anor* [2011] QSC 268 *Stoker v Adecco Gemvale Constructions P/L & Anor* [2004] NSWCA 449

Waugh v Kippen (1986) 160 CLR 156

COUNSEL: JR Sewell for the plaintiff
R Morton for the defendant

SOLICITORS: Trilby Misso Lawyers for the plaintiff
McInnes Wilson for the defendant

[1] **PHILIPPIDES J:** The plaintiff, Donna Ann Marshall, claims damages against the defendant, Queensland Rehabilitation Services Pty Ltd, for negligence and breach of contract in relation to an injury alleged to have occurred on 27 July 2009 in the course of her employment as an assistant in nursing at the Carindale Brook Nursing Home, a residential aged care facility operated by the defendant.

Plaintiff's pleaded case

[2] The plaintiff's claim, that the defendant breached its duty of care to her, is advanced on two bases. These are outlined in her amended statement of claim as follows:

(a) the defendant breached its duty by failing to take reasonable precautions in response to the plaintiff's special vulnerability of which it was or ought to have been aware; and

(b) the defendant breached its duty by failing to provide the plaintiff adequate training, supervision and assistance to enable her to perform her duties safely on 27 July 2009 when the plaintiff sustained her injury.

[3] The special vulnerability claim is based on an allegation that, in February 2009, the plaintiff, in the course of her employment, experienced pain in her neck, left scapula and left arm (referred to as the "first injury" but for which no claim for damages is made) which she reported to the defendant and which required her being absent from work for a week: paras 4-5 amended statement of claim. It is alleged that the plaintiff was required to resume her normal pre-injury duties on her return to work, notwithstanding that she was not fit to do so, as the first injury had left her with a temporary vulnerability and susceptibility to further neck injury: paras 6-7. Furthermore, prior to requiring the plaintiff to resume her normal duties, the defendant did not conduct any risk or vocational assessments, inquiries or investigations to determine whether it was safe for the plaintiff to resume those duties: para 8.

[4] Additionally, the plaintiff pleads that on 27 July 2009, in the course of her employment, she was required by the defendant to transfer a male resident from a bed to a shower chair, with the assistance of one co-worker, using a sling and mechanised hoist: paras 10(a)-(c). The resident suffered from dementia and had a propensity to forcefully resist attempts to move him by grasping objects and occasionally striking out violently, which was known to the defendant: paras 10(d)-(e). The plaintiff and her co-worker rolled the resident over in the bed in order to place the sling underneath him. While they were doing so, the resident resisted by grasping the side of the bed, necessitating the use of force by the plaintiff to roll the resident, and resulting in the plaintiff experiencing a sharp pain in the neck and left shoulder: paras 10(f)-(g). It is further pleaded that, once the resident was placed in the sling, the sling was attached to the mechanical hoist and

raised off the bed, lifting the resident. While the resident was suspended in the sling, the plaintiff was required to manually manoeuvre the resident by grasping the hoist with both hands and pushing and pulling on the handles of the hoist to align the resident with the shower chair before he could be lowered onto it: paras 10(h)-(i). While doing so, the plaintiff experienced sharp pain in the neck, left scapular, left shoulder and left arm (the injury giving rise to the claim): para 10(j).

[5] The plaintiff alleges that the injury was caused by the defendant's breach of the duty in:

(a) failing to conduct any risk assessment or vocational assessment with respect to the plaintiff's return to work after the first injury;
(b) requiring the plaintiff to perform her usual pre-injury duties and hours between the first injury and 27 July 2009 when it was unsafe for her to do so;
(c) failing to provide the plaintiff suitable duties between the first injury and 27 July 2009;
(d) failing to provide the plaintiff adequate assistance to safely transfer the resident;
(e) failing to conduct any risk assessment with respect to transferring the resident from the bed to a shower chair using a sling and hoist;
(f) requiring the plaintiff to transfer the resident with the assistance of a single co-worker;
(g) devising and implementing an unsafe system of work;
(h) failing to take any, or any adequate, precautions for the plaintiff's safety;
(i) failing to warn the plaintiff of the risk of injury posed by the defendant's system of work;
(j) failing to provide any, or any adequate, instruction or training to the plaintiff in the safe method of transferring the resident; and
(k) failing to supervise, or adequately supervise, the plaintiff in the performance of the work: para 11.

[6] It is alleged that, as a result of the injury sustained on 27 July 2009, the plaintiff suffered a cervical disc protrusion at C6/7 and experienced radicular symptoms in her left shoulder, scapular, arm and hand, which are ongoing. She required a CT nerve root injection and physiotherapy and has sustained a permanent impairment of the cervical spine and impaired earning capacity.

Defence

[7] The defendant abandoned an argument that the plaintiff was not entitled to bring the claim against the defendant because of non-compliance with the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

[8] The defendant admitted that it owed a duty to take reasonable steps to protect the plaintiff from reasonably foreseeable risks but denied that it breached that duty.

[9] The defendant disputed that an injury was reported to it in February 2009 as alleged or that the plaintiff had a special vulnerability of which the defendant knew or ought to have known. The defendant contended that the plaintiff had failed to demonstrate that the defendant should have appreciated, in the face of a medical certificate obtained by the plaintiff and without further complaint from her, that she was at a heightened risk of injury from carrying out her normal duties.

[10] The defendant also denied that the plaintiff had suffered an injury on 27 July 2009, asserting that the plaintiff suffered from a pre-existing degenerative condition and had sustained the injury to her cervical spine on 22 July 2009. In its written submissions, it was also contended that the plaintiff failed to show that:

- there was any foreseeable risk to the plaintiff in asking her to shower the resident as alleged;
- it was relevantly unreasonable to ask the plaintiff to carry out that task;
- there were steps reasonably open to the defendant to remove, or reduce, the risk of injury but which steps the defendant failed to take; and/or
- that any such steps would have prevented the injury.

Evidence

Training

[11] The plaintiff commenced employment with the defendant at the Carindale Brook facility in May 2008. The facility consisted of two dementia wards and two high care wards. The plaintiff received a staff orientation workbook and induction from Ms Willis (the administration assistant). It was also explained to the plaintiff that any injury or incident at work was to be reported as soon as possible to the registered nurse in charge.

[12] The plaintiff was given instruction as to manual handling tasks concerning residents at the nursing home and signed a Manual Handling Competency form in that regard on 30 June 2008. The plaintiff was given further instruction in manual handling by Ms Kirk-Lauritsen, a physiotherapist, and again signed a competency form on 2 March 2009. The manual handling training on both occasions dealt with a variety of interactions with residents, including the use of a sling hoist and the procedure of "rolling" a resident. The manual handling guidance outlined how to communicate with a resident prior to such a procedure. It also provided instruction as to how to prepare equipment/environment, body mechanics and the correct execution of tasks. In relation to rolling a resident, it stated:

> "Body Mechanics
>
> - Carer on the side of the bent leg applies pressure to the residents HIP and SHOULDER. This carer should be in a walk stance, keeping their back in a neutral position at all times.
> - Carer on the opposite side guides the residents KNEE and ELBOW during rolling.
>
> Note- When performing a single assist roll, always roll the resident towards you, guiding at the hip and shoulder.
>
> …
>
> Safe Execution
>
> Carer controlling the hip and shoulder pushes the resident into the roll, while the other guides the resident into safe position."

[13] The plaintiff accepted that she was instructed that, when performing the task of rolling and lifting a resident using a sling, the bed rails were to be put down. The rails were of a type that collapsed on themselves in a concertina fashion and went well below the level of the mattress. The plaintiff was instructed to use her forearms to perform the rolling procedure.

[14] In respect of the instruction by Ms Kirk-Lauritsen, while the plaintiff could not specifically recall whether she was instructed not to use any force in manoeuvring a resistant resident, she accepted that that probably was the case. She was aware that the use of force was forbidden. She also accepted that she was told that if a resident resisted being moved she was to stop the procedure, make the person safe and come back later. Although she initially denied receiving any dementia training, the plaintiff accepted that she was given some instruction about dealing with people with dementia, including about the way such people could behave in an unpredictable manner, and had completed a questionnaire concerning dementia care on 17 June 2009. The plaintiff accepted that she was aware that such unpredictable behaviour included reaching out and grabbing people.

February 2009

[15] The plaintiff gave evidence that, prior to 27 July 2009, she had experienced symptoms of pain in her neck and that as a result she had some days off work. The plaintiff had told a number of doctors that that occasion had occurred in about June 2009 (as originally pleaded), but in giving evidence she stated that she had come to believe that it had occurred in February 2009 (as finally pleaded) because that was what her medical and employment records showed. The plaintiff's individual roster for the period 16 February 2009 to 1 March 2009 recorded that she did not complete her shift on 16 February 2009 and that on 17 February 2009 she was "sick with certificate" and also away sick for 18 and 19 February 2009. The plaintiff's explanation for the discrepancy in her recollection of when the episode resulting in her taking time off work had occurred was simply that she "just forgot".

[16] The plaintiff's evidence was that she experienced a "slight ache" in her neck. She described it as "just like I just slept on it wrong" and that it was "stiff, slightly sore, a little tight". In cross-examination, the plaintiff accepted that she had not suffered any injury in the course of performing work in February 2009 (as pleaded in para 4). She also maintained, contrary to what was pleaded, that she did not experience pain in her left arm in February 2009 but was unable to be clear as to whether she had also experienced shoulder pain.

[17] The plaintiff's evidence was that she spoke to the clinical manager about her neck and that she "just said it was sore". She could not initially recall the name of that person, but accepted in cross-examination that at that time that person was probably Judith Druce. Her evidence was that the clinical manager told her to take a week off work and that she was not allowed to come back unless she had a medical certificate. The defendant submitted that the plaintiff's evidence of having told the clinical manager about her sore neck should be rejected. It was pointed out that the particulars provided by the plaintiff's solicitors stated that the person to whom the report was made was "Ms Willis or the registered nurse (Jane)" and that it was only during the plaintiff's evidence that the clinical manager was in fact identified as the relevant person. The plaintiff said that the inconsistency arose because her memory on that matter had improved.

[18] The defendant did not seek to contradict the plaintiff's evidence by calling Ms Druce. Nor did the defendant seek an adjournment to investigate the plaintiff's assertion. Furthermore, as the plaintiff's counsel submitted, the plaintiff's evidence generally accorded with that of Ms Willis regarding the procedure followed when an employee of the defendant finished a shift early due to a medical condition.

Ms Willis' evidence was that, in such a case there would generally be a discussion between the worker and either Ms Willis, a registered nurse or the clinical manager as to why the worker was leaving early, and the worker would be informed that they were required to obtain a medical "clearance" before returning to work. On balance, I am inclined to accept the plaintiff's evidence that she mentioned her neck being sore to the clinical manager. I also find that she was required to provide a medical certificate prior to resuming work.

[19] The medical notes of Dr Law, general practitioner, record that the plaintiff attended on him on 17 February 2009 with a complaint of "left shoulder pain for about a week". Dr Law's evidence was that the plaintiff indicated it was "getting better now". She did not seek any treatment and said that she wanted a medical clearance to go back to work. No other history of shoulder pain, or any history of prior cervical pain was provided. Dr Law gave the plaintiff a medical certificate for a "medical condition", stating that she would be fit to return to work on 19 February 2009.

[20] I accept that on returning to work the plaintiff gave the medical certificate to Ms Willis. She made no report of any ongoing difficulty with her neck. And it was common ground that the defendant did not send the plaintiff to see anyone else, or assess her capacity to return to her normal duties, or put her on different duties.

July 2009

[21] The plaintiff gave evidence that some five months later, on 22 July 2009, she experienced neck symptoms "like I slept on it wrong again". She said her neck "ached, but it wasn't really bad". The symptoms were similar to those experienced in February 2009. She continued work on 22 July and accepted that she would probably have performed tasks that included the transfer procedure involving the use of a hoist. The next shift worked after 22 July was on 27 July 2009.

[22] The plaintiff said that a "couple of days or a week" before 22 July 2009, she had been called into a disciplinary meeting with the clinical manager. The plaintiff explained that she was in trouble for not doing her work the way it should be done. As a result, the plaintiff was to be "buddied" up with a senior staff member. She accepted that her work might have slipped a bit.

[23] The plaintiff continued to perform her normal duties until 27 July 2009. It was not disputed that the plaintiff did not inform the defendant of suffering any symptoms in the period to 27 July 2009.

[24] The plaintiff's evidence was that, when she started work at about 6.30 am on 27 July 2009, her shoulder and arm were not hurting. Together with another assistant in nursing, Karen Moran, the plaintiff was involved in transferring a resident from his bed to shower him. The resident was 82 years of age and weighed about 61.5kgs. It was not disputed that he suffered from dementia and had a tendency, of which both the defendant and plaintiff were aware, to grasp objects such as the side of a bed, or people, if he was frightened or worried, but there was no suggestion that he did this in any sort of malevolent way.

[25] In order to shower the resident, a sling was required to be used. This necessitated the resident being rolled onto one side while lying in bed and then being rolled back

the other way so that the sling could be fully positioned. A mechanical hoist was then used to place the resident on a showering chair.

[26] The plaintiff gave the following description in evidence-in-chief as to what occurred in the transfer of the resident on the morning in question:

> "I've actually gone over the top of [the resident] to pull him over to come over to my way so we could put the sling underneath him, and I felt the sharp pain and everything in my neck and shoulder. I actually said to Karen that, 'My arm's sore.' And she said, 'Are you right?' And I said, 'Yup, fine. Keep going.' So I rolled him back down. We've got him all up and ready. Popped him on to the hoist, and then my arm just went. And it was so painful. And Karen said, 'Are you right?' And I said, 'No, but I'll help put [him] on to the shower chair for you.'"

[27] The plaintiff gave evidence that the resident had not been cooperative in respect of the transfer procedure being carried out. She said that he had grabbed on to the railing:

> "… as I'm trying to push him to actually put him back over on to the bed. Then he grabbed on to the mattress, and then we've had to use a little bit more force to actually get him over so that we could actually get him back over on to the other side so we could actually pull the sling out from underneath."

[28] She also said that, while she was rolling the resident towards her, he grabbed onto the railing and then onto the mattress. She was able to pull him over sufficiently so the sling could be put underneath him. She said:

> "I've actually gotten on to the handles, and you would take it out from underneath the bed. … You'd go and get the hoist, you'd put it in underneath the bed, and then you'd hook it up to the actual hoist. … You roll him one way and then you roll him back the other way to pull the sling underneath him so it's actually fully underneath him, and then you roll him back on to the back."

[29] The plaintiff also gave the following evidence in answer to questions from her counsel:

> "When you were rolling [him] back, did he do anything to make it more difficult?-- Grabbed on to the other side of the mattress as well.
>
> Okay. All right. Now, carrying on from then, you say he's now got the sling underneath him?-- Yes.
>
> Okay. What's the next thing you do?-- I went and grabbed the hoist, put it underneath the bed, and then Karen would've been on the other side, so we hooked the actual ... Hooked the sling on to the hoist, and then once he's up on that, you bring him up so he's hovered just above the bed.
>
> … Is the hoist mechanised in terms of lifting him up?-- There was – yes.

> Okay. So you just pressed a button?-- Just pressed a button.
>
> Okay?-- -----and he'd go up.
>
> And that raised him up, okay?-- And then once he's raised up you'd take the hoist out from underneath the bed, and then you'd manoeuvre it round – manoeuvre him around so he'd actually come into a part of his room where you could actually put him on to the shower chair.
>
> Just going back to you rolling him in the bed, you said you felt some pain then. Can you just tell her Honour exactly when it was during that procedure that you felt the pain?-- As I'm actually rolling [the resident] over towards me, I felt the pain in my left – in my left – in my shoulder and in my neck.
>
> … Once we've got it out the – once we've got the hoist out from underneath the bed, I've actually pulled it round to go round I think it was to this side. So as I'm pulling him round here, my arm, my neck and shoulder has just gone and the pain was just----
>
> Okay?-- ----- yeah, unbearable."

[30] The plaintiff's evidence therefore was that she experienced pain as she was "actually rolling [the resident] over towards [her]" so they could put the sling under him. She stated that the pain at that stage was "not really bad pain", although it was more painful than her previous symptoms. She described it as a "shooting" pain accompanied by a "heaviness" in her arm and neck which she had not experienced on either of the previous occasions.

[31] The plaintiff's evidence of the resident's conduct in resisting the transfer procedure was that when she was rolling the resident, the patient grabbed onto the mattress, so "we've had to use a little bit more force to actually get him over". When he was being rolled back to the other side, he again grabbed the mattress. In cross-examination, the plaintiff conceded that he did not grab onto her. The plaintiff stated that she only felt some "slight" pain when rolling the patient. It was when "moving the hoist" that she really experienced pain.

[32] The plaintiff said she tried to help shower the resident, but was in too much pain at that stage, so she went to make the bed instead, but was also unable to do that. While still in the resident's bedroom, Ms Moran asked the plaintiff if she wanted to go and see the physiotherapist who was there that day.

Ms Moran

[33] Ms Karen Moran gave evidence. She had only a vague recollection of the morning shift involving transferring the resident in question with the plaintiff. She could not recall the plaintiff making a complaint about suffering any pain in the process of transferring a resident. She did not assert that no complaint was made. Given her lack of clear recollection, her evidence was not of any real assistance.

The report made on 27 July 2009

[34] The plaintiff's evidence was that, immediately after the incident involving the resident, she went to see the registered nurse (who was from an agency) who shared an office with the physiotherapist. She told the registered nurse that she had hurt her neck and shoulder and "was in a lot of pain". She said that she told the physiotherapist that she was moving the hoist and that her arm "just went". She said she could not keep going and would go home. The plaintiff did not think she spoke to anyone else before leaving work that day. She could not remember speaking to Ms Willis.

[35] However, Ms Willis said that she recalled the plaintiff seeing her and telling her that she was going to finish work early. The plaintiff said that she had injured her shoulder, but it had happened some days earlier. Ms Willis said she asked the plaintiff whether she had completed an incident report form and reported the matter to the registered nurse. She said the plaintiff indicated she was in the process of doing so. I am inclined to accept Ms Willis' evidence that the plaintiff spoke to her and that the plaintiff said she had injured herself some days earlier; it is consistent with the Staff Accident/Incident Report signed by the plaintiff.

[36] The Staff Accident/Incident Report was completed on 27 July 2009 by Ms Renwick (the registered nurse), and signed by the plaintiff (as required on the first page) prior to her leaving work. On the first page, the registered nurse signed an acknowledgment that an incident had been reported to her at about 8.30 am and a notation was also made that the physiotherapist had been consulted. The symptoms of the plaintiff's injuries were noted on that page as being left shoulder blade constant pain, radiating down left arm, pins and needles left thumb and fingers, pain aggravated by movement of neck/shoulder. Also on that page, was a notation of the incident having occurred on 22 July 2009 at 11.00 am at the Lane ward during the morning shift. Further details were recorded as follows:

> "… felt pain in (L) shoulder blade during shift, worsened over days off/weekend. Now unable to move neck/shoulder without pain, pain radiates down left arm and p and n (pins and needles) in left thumb/fingers."

[37] In evidence-in-chief, the plaintiff stated that what was recorded in the extract was a combination of the events of 22 and 27 July 2009. The first part of the notation related to 22 July and was a reasonably accurate account of her situation on 22 July (except that she did not consider that the pain had worsened) and that the balance of the notation was an accurate description of her symptoms on 27 July. When cross-examined as to whether she told Ms Renwick that she had been in pain since 22 July, the plaintiff responded that she had told her, "I'd had time off on the 22nd, because I had a sore arm". When further challenged as to whether she had in fact had time off on 22 July, the plaintiff seemed to retreat to asserting she could not remember what she had said. She accepted she could well have told Ms Renwick exactly what was on the form.

[38] On the second page of the Staff Accident/Incident Report, which was not signed by the plaintiff, in answer to the question "was there a witness", the "No" box had been ticked. Also on that page under the heading "for office use only" were various questions which were required to be completed by the clinical manager. One topic

concerned the matter of "investigation". It recorded that there had been no report of an incident on 22 July 2009; a matter that was not contested.

Versions given to doctors and recorded on claim forms

[39] On 28 July 2009, the plaintiff saw Dr Liebenberg, a general practitioner. Her consultation notes record that the plaintiff reported that she had hurt her neck and that it had happened at work "this morning". It was not disputed that insofar as that was a reference to 28 July 2009 it was erroneous. The notes recorded that the plaintiff had had "slight pain" in her neck for a week and that "after showering patient she had felt severe pain in her left arm". The plaintiff denied that she said the incident occurred after showering a patient, but accepted that she told the doctor that she had experienced neck pain from 22 July.

[40] Also on 28 July 2009, the plaintiff completed an application for workers' compensation, answering various questions concerning the "injury details". In response to the question as to when the injury happened, the plaintiff inserted the date as 22 July 2009. In response to the question whether the injury happened over a period of time, the "yes" box was ticked and then crossed out and the "no" box was also ticked. The date 22 July 2009 was inserted as the date when she first experienced symptoms ("neck and shoulder"). The description of how the injury occurred was that it occurred when hoisting a resident from bed. (There was no statement made that the resident resisted or grabbed the side of the bed.) The plaintiff inserted 27 July 2009 as the date when she had reported the injury and that she had reported it to the registered nurse and physiotherapist. As to whether she had previously suffered similar injury, the plaintiff ticked the box indicating "no", but then added the notation "about 2 months ago same thing. Neck and shoulder." In giving evidence, the plaintiff stated that that answer was incorrect, explaining that she was in pain at the time she completed the report. She also maintained that the previous occasion she had suffered pain was February 2009 and that the pain she experienced then was only like a stiff neck and not like the pain experienced on 27 July 2009.

[41] On about 26 August 2009, the plaintiff saw Dr Watson, who noted that the CT scan indicated a large disc protrusion at the left C7 nerve root and performed a C7 nerve root injection. He recorded that the plaintiff was lifting a patient in a hoist when she developed left-sided neck ache with radiation, referring to the injury as occurring on 16 July 2009. The plaintiff was also referred to Dr Coroneos on 19 October 2009, who recorded in his report that the plaintiff's symptoms occurred before "the exacerbation on 16/7/09", which had occurred when using a sling and a hoist. The plaintiff was at a loss to explain the reference to 16 July 2009 and did not recall mentioning that date as when she was experiencing pain.

[42] The plaintiff saw Dr Kable on 18 February 2010. His report contained an account that the plaintiff was moving a resident in a nursing home with the assistance of a hoist and whilst she was manipulating the hoist with the handles felt severe pain in the left side of her neck and shoulder and down the outside of the left arm. As with Drs Watson and Coroneos, the plaintiff made no mention to Dr Kable about the resident resisting being rolled. She said that was because she "didn't think it was relevant" to mention that she felt pain when rolling the resident, since it was when using the hoist that she "really got the pain". Dr Kable recorded that the plaintiff had had a "similar pain" for "some four weeks" previously (which would place it in

June 2009) which settled quickly with rest. The plaintiff's evidence was that that was probably a reference to the February 2009 episode.

[43] On 12 May 2010, the plaintiff saw Dr Campbell, neurosurgeon. In his report, he recorded that the plaintiff stated she was involved in a work accident on 22 July 2009 when she was transferring a client from a bed to a shower chair using a hoist. He recorded that it was while lifting, bending, twisting and reaching to perform that task that she noted the sudden onset of neck pain, left upper limb pain and left hand numbness. He opined that the accident on 22 July 2009 was consistent with causing a left C6/7 disc protrusion. He noted under "Past Medical History" that in June 2009 the plaintiff developed a one week history of neck pain and left upper limb pain whilst lifting at work which required one week off work. He further opined, "An accident a month before the subject accident caused neck pain and left upper limb pain indicating pre-existing pathology". In cross-examination, the plaintiff stated that she was unable to be sure what she told the doctor, but accepted that she probably told him that she had neck pain a month before 22 July 2009, but denied that she in fact had arm pain until 27 July 2009. In re-examination, the plaintiff said she was not sure what she told Dr Campbell and could not remember what she actually said to him.

[44] The plaintiff saw Dr Fraser, orthopaedic surgeon, at WorkCover's request on 23 July 2010. In his report, Dr Fraser also recorded the incident occurring on 22 July 2009. He reported that the plaintiff stated that her left arm was aching when she went to work that day and, in the course of hoisting a patient, she felt an increase in pain in the left arm.

[45] On 11 March 2010, the plaintiff signed a Notice of Claim for Damages (pursuant to s 275 of the *Workers' Compensation and Rehabilitation Act* 2003) which was completed by her solicitors. The event resulting in injury was identified as occurring on 22 July 2009 at 7.00 am when "the claimant was in the process of moving a patient" and that it was witnessed by a co-worker named "Karen". It was only by letter dated 9 April 2010 from the plaintiff's solicitors, in response to a request for further details of the incident, that it was asserted for the first time that the incident occurred when the resident resisted the sling being placed beneath him, by holding onto the side of the bed, at which time the plaintiff experienced pain.

Medical evidence

[46] The medical evidence of Drs Watson, Coroneos, Campbell and Fraser was unanimous in concluding that the plaintiff had sustained a disc protrusion at C6/7 causing compression of the left nerve root, resulting in radicular symptoms in the left arm and hand. The plaintiff received treatment with rest, painkillers, anti-inflammatory medication, a rehabilitation program and a CT guided nerve root injection. The medical evidence was that the plaintiff's condition rendered her permanently unsuited to work requiring heavy manual tasks or repetitive use of the left arm.

[47] At the date of his examination on 18 February 2010, Dr Kable observed that the plaintiff was still experiencing pain in the neck with radiation to the left shoulder and some pain in the left hand. CT and MRI scans of the cervical spine showed some pre-existing degeneration. Dr Kable concluded that the left C7 disc prolapse was an aggravation of pre-existing cervical spine degeneration. He did not consider

that the plaintiff would be able to return to work in a capacity which required any heavy lifting or straining. He observed that the plaintiff was a slightly built woman and from a clinical perspective that made her more susceptible to cervical injury while doing work she was engaged in.

[48] When the plaintiff saw Dr Campbell on 12 May 2010, she had not yet re-entered the workforce due to the severity of her symptoms. He observed that at 10 months post-injury the plaintiff had reached the point of maximal medical improvement and that her symptoms had become chronic. There was an increased risk of arthritis and future surgery might be required. He considered that there was a pre-existing pathology, on the basis of a prior incident which he understood occurred in June (a month before the accident) and which had caused neck and upper limb pain. Dr Campbell's clinical findings were that the plaintiff fell within DRE category III of AMA 5 and assessed a 15 per cent permanent whole person impairment, of which he apportioned 10 per cent to pre-existing pathology as reported by the plaintiff, resulting in a 13.5 per cent impairment due to the incident involving the transfer of the resident. He accepted that the apportionment for pre-existing pathology would probably be increased to 20 to 30 per cent if the symptoms related to the earlier episode had not resolved as the plaintiff had reported to him.

[49] Dr Fraser opined that the plaintiff had sustained an aggravation of a pre-existing C6/7 disc protrusion. He considered that it was possible that there would be further degeneration requiring surgery, but he attributed that to the pre-existing degenerative injury. In his report, Dr Fraser stated that the condition fell within AMA 5 DRE Category II, which provides a range for permanent whole person impairment of 5 to 8 per cent and assessed the impairment at 8 per cent. However, he agreed in cross-examination that his findings on examination were consistent with the descriptor as assessed by Dr Campbell of DRE category III (15 to 18 per cent). Dr Fraser considered half the impairment should be apportioned to the incident in question and half to the pre-existing protrusion. Dr Fraser's reasoning for this opinion was that he would not expect to see any degeneration in radiological films taken of a woman of the plaintiff's age; a view which was rejected by Dr Campbell.

[50] Dr Campbell accepted that the degenerative condition could be more relevant where the plaintiff had experienced pain in the left arm prior to 27 July 2009 and depending on the intensity of the pain. On behalf of the plaintiff it was submitted that the plaintiff's evidence was that, while she experienced relatively mild neck and left shoulder pain on two occasions prior to 27 July 2009, she had never had radiculopathy symptoms in the left arm until the incident on 27 July 2009. The plaintiff's application for compensation (in which she referred to previous neck and shoulder pain but not left arm pain), and the records of Drs Liebenberg and Law provide support for the plaintiff in this respect.

The special vulnerability claim

Relevant principles

[51] In *New South Wales v Fahy* (2007) 232 CLR 486 at 519, Kirby J stated the relevant principle concerning the duty owed by an employer to an employee with a special vulnerability as follows:

> "Although an employer may not always have to take active steps to acquaint itself with special or unique weaknesses or predispositions to injury and damage on the part of particular employees, where the employer becomes aware that there is such a susceptibility, or should be so aware in the ordinary course of reasonable conduct, special precautions need to be taken by it, to fulfil the duty of care that is inherent in the employment relationship." (footnotes omitted)

[52] Authorities such as *Paris v Stepney Borough Council* [1951] AC 367 establish that an employer owes a duty to each employee as an individual and must take into account any special weakness or peculiarity of the worker of which it knows. But, as Thomas J observed in *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29 at 36, those authorities deal with actual knowledge by an employer of the particular vulnerability of the employee, and do not deal with the question of an employer's duty to obtain such knowledge.

[53] In *Finn*, Thomas J and Williams J (with whose judgments McPherson JA agreed) each dealt with that additional question. Thomas J held that unless some fact, circumstance or state of affairs existed which should put an employer upon special inquiry, there is no duty at common law to interrogate either prospective or existing employees as to their health and medical history: see *Bailey (by his next friend Bergin) v Baltoro Holdings Pty Ltd* (WASC Full Court, 25 September 1998, unreported), *Blackman v Commonwealth* (1978) 20 ACTR 33, *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449. Williams J at 41, referred to the following comments of Manning J in *Pitsiavas v John Lysaght (Aust) Pty Ltd* [1962] NSWR 1500 at 1504, noting that it was too broadly stated, insofar as it should be limited to situations where the employer had knowledge or the means of knowledge of the susceptibility, but otherwise considered it to be good law:

> "In my opinion there is no basis for imposing upon the employer the additional burden of taking care not to expose a particular employee to risks resulting from his inherent weakness. His duty is to act with reasonable care to protect his employees from unnecessary risk. He is not required to inquire into the question as to whether each labourer employed by him may be unfit for the work involved by reason of some constitutional defect or weakness."

[54] In *Stoker v Adecco Gemvale Constructions P/L & Anor* [2004] NSWCA 449, Santow JA (with whom Sheller JA and Mason P concurred) affirmed that the relevant question was, as formulated in *Finn*, whether there was any fact or circumstance which should have alerted a reasonable employer to any need for special further inquiry into the medical condition of the employee.

Determination

[55] The special vulnerability claim was advanced on the basis that, in the circumstances of the defendant knowing that the plaintiff was returning to physical work following experiencing neck pain in February 2009, it was unreasonable for the defendant to require the plaintiff to return to her pre-injury duties without conducting any risk or vocational assessment or making other inquiries as to her fitness to resume pre-injury duties. It was contended that there were sufficient facts and circumstances to alert the defendant to a need for special further inquiry into the

medical condition of the plaintiff, and the defendant was required to take special precautions to discharge its duty of care.[1]

[56] The evidence given by the plaintiff was not that she sustained any injury at work in February 2009, but rather that she had experienced a sore or stiff neck, "like she had slept badly" which caused her to have a few days off work. At its highest, the evidence was that the plaintiff told the clinical nurse that she had a "sore neck". She was required to obtain a medical clearance before returning to work, which she did. Thereafter, she performed her work until 27 July 2009. As the plaintiff's counsel conceded, there was no evidence that, when the plaintiff returned to work, she reported any continuing or further neck condition.

[57] I do not consider that there was anything in those circumstances which did or should have alerted the defendant to the plaintiff having a special vulnerability to spinal injury, or that there was a need for special further inquiry. This was not a case where the defendant was alerted to a history of neck or cervical spine pain. The plaintiff simply reported an isolated occasion of having a sore neck, which required no treatment and only a few days rest, and returned to work with a medical certificate that she was fit to do so.

[58] Even if it could be concluded that there was a need for further inquiry as to the plaintiff's medical situation, there are other difficulties in the plaintiff's case. In *Stoker*, it was held that the employer should have been alerted to the need for further inquiry as to the medical history of the employee (who had disclosed in employment application forms that he suffered from back problems, including back pain and back strain). Santow JA observed that that was not, however, the end of the matter, noting at [84]:

> "… It must not be forgotten that the principle arising out of *Paris v Stepney Borough Council* applies to the question of what level of risk is reasonably to be anticipated by an employer having knowledge of the worker's condition. It does not relieve the appellant as plaintiff of demonstrating that the system of work did contain an unreasonable risk for a person with his or her characteristics. The failure to make inquiries does not automatically mean that the employer has breached its common law duty of care to the employee. That result would only follow where the inquiries would have revealed to the reasonably prudent employer such information as would have prompted it to conclude that the risk to the particular employee was such that it was unreasonable to require him to perform the particular task in question."

[59] Santow JA held at [86] that had the employer made inquiry in that case, medical information would have discerned:

> "… the existence of a degenerative spinal condition and perhaps by inference susceptibility to back pain and injury but also … that such a condition had not hitherto prevented [the employee] from working

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[1] This was said to be particularly so, given Dr Kable's evidence that the plaintiff's slight stature rendered her more vulnerable in any event, a matter which it was said must have been known to the defendant as the plaintiff was under the supervision of registered nurses and physiotherapists with the requisite specialist knowledge. I do not consider that that additional point advances the plaintiff's case. As the defendant's counsel pointed out, that was not a matter pleaded against the defendant as a basis for its liability.

> full duties as a trades assistant in the construction industry. Furthermore, nothing would have appeared as to the seriousness of the degenerative spinal condition, or its current prognosis. … That knowledge in and of itself certainly does not determine the question of whether it was unreasonable of [the employer], cognisant of his greater risk, to assign to [the employee] the task of operating the hoist, or whether [the employer] should have taken some reasonable steps which would have guarded against the risk.
>
> The real question is whether this job of operating this hoist contained an unreasonable risk of injury to a person with a back problem. It is at this point that [the employee's] claim again confronts what is to my mind the overarching difficulty with his claim and the present appeal. Common sense aside, there is just insufficient evidence for the Court to make the necessary finding upon which negligence is predicated. …
>
> It is of course trite law that the existence of a reasonably foreseeable risk though necessary, is not determinative of negligence. There is simply no evidence to suggest that the kick-plate and chain operation was one such that it would be unreasonable for an employer to require a worker in the position of [the employee] to perform it. How can the response of the reasonable employer be ascertained in accordance with the calculus in *Wyong Shire Council v Shirt* (supra) at 47-8? That is to say, how can the magnitude of the risk or the degree of probability of its occurrence be assessed in relation to the particular task, let alone all the other relevant factors?
>
> Even if [the employer] were entirely cognisant of [the employee's] condition and symptomatology, nothing appears from the medical evidence or any other evidence to substantiate [the employee's] claim that it was unreasonable to expose a person with a degenerative back problem to this risk of injury in this task. This is so whether the particular risk is conceived as a pure risk of back injury or the risk of making an asymptomatic pre-existing condition becoming symptomatic. Furthermore, I am not prepared as a matter of common sense and without further evidence to draw the conclusion that the particular employment of operating the hoist was unsafe for [the employee]."

[60] Those observations are apposite in the present case, particular the allegations of breach of duty, other than paras 11(a) to (c), dealt with below. As for the allegations made in paras 11(a) to (c), which can conveniently be considered together, for the reasons already stated, in the circumstances of this case, I do not consider that there was any relevant breach in failing to conduct any risk assessment or vocational assessment. The plaintiff had a medical certificate which cleared her for work and made no complaint of continuing symptoms on her return. On her evidence, there were no symptoms from February until 22 July 2009. I accept the defendant's submissions that, even if the employer had made inquiries, it was not evident that it would have been told of any matter raising concern. In this regard, I also note that Dr Fraser considered the information in Dr Law's medical record too sparse to say whether the symptoms complained of in February 2009 had anything

to do with the condition complained of by the plaintiff in July 2009. Dr Campbell did not venture a clear opinion on that matter.

[61] I also accept the submissions made by counsel for the defendant that there was no evidence about what a risk assessment or vocational assessment should have revealed and there was thus no causal relationship shown between the alleged failure and the suffering of the injury. In the circumstances, I do not consider that a reasonable employer could have appreciated that it was unsafe for the plaintiff to return to her usual duties. Further, there was nothing in the evidence adduced by the plaintiff to suggest that the system of work she returned to was not safe. As discussed below, there was nothing to show that the tasks represented an unreasonable risk of injury to a "normal" employee: see *Waugh v Kippen* (1986) 160 CLR 156.

The pleaded injury on 27 July 2009

[62] In relation to the injury sustained by the plaintiff, her evidence as to how it was sustained lacked clarity and was at times inconsistent with the pleaded case. The lack of coherence in her evidence was reflected in the confusing accounts she gave to the reporting doctors.

[63] It can immediately be observed that, as to the plea that the plaintiff experienced sharp and unbearable pain when manually manoeuvring the resident with the mechanised hoist, it was not alleged (and there was no evidence) that there was at that stage any resistant conduct by the resident. Nor was it alleged that there was anything about the procedure of manipulating the hoist itself that was liable to cause the plaintiff to sustain injury. In seeking leave to amend the pleading, counsel for the plaintiff conceded as much.

[64] Although it was pleaded that the resident in question had a propensity to forcefully resist attempts to move him including by occasionally striking out violently and grabbing forcefully onto objects, the plaintiff did not assert in evidence that the resident in fact struck out at her, or that he grabbed onto her when she was engaged in moving him. Her evidence was that the resident's conduct in resisting his transfer to the shower chair by grabbing onto the mattress required her to exert "a little bit more upper strength" and did not suggest that it involved "having to force" him, but rather that minimal pressure was required.

[65] The defendant submitted that the evidence indicated that the plaintiff had the injury complained of prior to coming to work on 27 July 2009. In this regard reference was made to the evidence of what the plaintiff told Dr Liebenberg on 28 July 2009 (about having suffered pain for a week before the incident) and what Drs Campbell and Fraser recorded in terms of the plaintiff's report that she sustained the injury on 22 July. It was also said to be consistent with the plaintiff's own identification of 22 July 2009 as when she was injured (on the application for compensation and s 275 notice and the incident report form which related the onset of symptoms prior to 27 July 2009) and her report to Ms Willis.

[66] There are certainly discrepancies in the evidence as to whether injury was sustained on 22 and/or 27 July 2009. The plaintiff gave evidence that she was experiencing pain on 22 July 2009. She clearly connected the injury sustained to the symptoms experienced on 22 July 2009. But I also accept that an event occurred on 27 July

2009 when the resident was being moved that aggravated her condition. On balance, I consider that the disc protrusion was sustained on 27 July 2009, given the plaintiff's evidence as to the nature and intensity of her symptoms prior to that period. However, by 27 July 2009, the plaintiff was particularly vulnerable to such injury. That was not known and not able to be known by the defendant who remained unaware of the symptoms she had been experiencing on and after 22 July 2009 until 27 July 2009.

[67] In the circumstances, I am satisfied that the disc protrusion injury was sustained on 27 July 2009, although the onset of the symptoms leading to that injury commenced on 22 July.

[68] The defendant contended that, even accepting the plaintiff's evidence at its highest, that she was injured on 27 July 2009 in the course of moving the resident in question, the plaintiff could not succeed in her claim. It was submitted that there was no evidence to show that any risk of injury from carrying out any relevant task (rolling a resident or manoeuvring the hoist) was such that it carried with it any foreseeable risk of injury. Further, because the forces involved in those tasks are unknown it was not possible to say that there was any foreseeable risk. Nor was there evidence that a reasonable employer had available to it any method of carrying out the tasks (rolling a resident or manoeuvring the hoist) which would have removed or reduced the risk of injury. The defendant submitted that the plaintiff had not demonstrated that there was an unreasonable failure to take such steps as may have been practicably and reasonably available to the employer to remove or reduce the risk of injury which caused the injury.

[69] The defendant relied on the following statements of McMeekin J in *Stitz v Manpower Services Australia Pty Ltd & Anor* [2011] QSC 268 as apposite in the present case:

> "[55] As I have said there was no evidence led as to the level of force imposed on the spine by any of the identified risks. In my experience that is invariably proved, as indeed it needs to be, as it is fundamental to the assessment of whether a reasonable employer should respond to the risk. Virtually any activity in life is accompanied by some risk. Hard manual labour obviously carries with it the risk of manual handling injuries. But it has never been the law that an employer must remove all risk of injury. And appeals to general principles such as that the standard of care expected of an employer is high does not fill the evidentiary gap.
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> [56] As French CJ and Gummow J said in *Kuhl v Zurich Financial Services Australia Ltd* —
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> > 'To satisfy the element of causation … it would be necessary to identify the action which, on the available evidence, the trial judge could conclude ought to have been taken; **that action, if failure to take it is to be accounted negligent, must be such that the foreseeable risk of injury would require it to be taken, having regard to the nature of that risk and the extent of injury should the risk mature into actuality**; **and it would be necessary that the trial judge could conclude as a matter of evidence and inference that, more probably than not, the taking of that action … would**

> **have prevented or minimised the injuries the plaintiff sustained**.' (my emphasis)
>
> [57] If the forces involved were at a level not likely to injure a man of normal fortitude then the fact that those forces could have been reduced so as to be even less likely to injure such a man does not establish a need to act. A failure to take such measures does not connote negligence in an employer." (footnotes omitted)

[70] It may be said that there was a foreseeable risk of cervical injury to an employee engaged in the transfer procedure of dementia residents who had a propensity to engage in resistant behaviours, including by grabbing onto objects. However, proceeding on the basis that the pain the plaintiff experienced occurred when rolling the resident who had grabbed onto the side of the bed, the plaintiff's own evidence did not suggest that any significant force was required to be used or that the force was such as would have injured a person of normal constitution and no evidence was adduced to the contrary. The difficulty with the plaintiff's case was that there was no evidence that it was unreasonable for the defendant to require the plaintiff to engage in the transfer procedure in the circumstances that pertained. Nor was there evidence that in the circumstances an unsafe system of work was involved. The various breaches of duty of care in paras 11(d) to (k) were not the subject of separate submissions by counsel for the plaintiff. Rather in making submissions, counsel for the plaintiff focused on three areas addressed in the written submissions arising out of those paragraphs; these concerned the lack of adequate training, adequate supervision and adequate assistance provided by the defendant.

Training

[71] It was the plaintiff's contention that, given that the plaintiff was required as part of her duties to transfer, with the use of a sling and hoist, residents with dementia who demonstrated unpredictable, uncooperative and resistive behaviour, a reasonable employer would have specifically trained the plaintiff to perform that activity safely. It was acknowledged that the plaintiff admitted receiving general training and assessment with respect to the use of a sling and hoist, including rolling a resident in bed in order to position a sling. The plaintiff denied being provided any training with respect to the particular difficulties and risks posed by undertaking that activity with a person who demonstrated the behaviours exhibited by the subject resident.

[72] The plaintiff did receive some instruction in respect of the care of dementia residents. Further, while she had no specific memory of the matter, the plaintiff did accept under cross-examination that she probably received instruction from Ms Kirk-Lauritsen, the physiotherapist, to the effect that if a resident resisted the process of being rolled she was to stop that procedure. There was no evidence as to what particular additional instruction or training ought to have been given that was not given, nor in what specific respects the instruction and training given was deficient. Nor was there evidence as to how such instruction or training would have prevented the injury. The allegation of negligence is not made out.

Supervision

[73] In relation to the question of supervision and assistance, the plaintiff's case, as ultimately pressed in submissions, was that the defendant had identified problems

with the plaintiff's work and the clinical manager had resolved to provide a "buddy" for the plaintiff, being a senior staff member who was to supervise and assist the plaintiff to improve. It was contended that on 27 July 2009 the plaintiff was not paired to work with a senior staff member but with Ms Moran. It was contended that, having identified problems with the plaintiff's work, a reasonable employer would have provided the supervision in the support of a senior staff member and that a failure to implement that proposal in the circumstances was a breach of duty. However, the evidence given by the plaintiff was simply that she had been in trouble for not doing her work properly. It was not apparent at all that there were any safety issues arising in relation to the complaint made of the plaintiff's work. There is no substance in this allegation of negligence.

Assistance

[74] It was also contended in submissions on behalf of the plaintiff that the risk of injury posed by the resident's resistant and uncooperative behaviours could have been obviated simply and the incident avoided, had the defendant devised and implemented a care plan, requiring three workers to attend the resident for transfers. It was submitted that the defendant's failure to identify the risk, and respond by changing the care plan accordingly, was a breach of duty which was causative of the incident resulting in injury. It was submitted that the assistance that should have been provided was one that "would have allowed one worker to hold or to distract the resident's hands to prevent him grabbing the bed and bed rails, while the other two workers rolled the resident to place a sling".

[75] The plaintiff had the use of a hoist which was capable of lifting the resident and had the assistance of Ms Moran. There is no evidence to show that a risk assessment would have revealed that the task should have been done in any different way or what that way might be or that it would have prevented injury. No evidence was called to show that it was unreasonable to effect a transfer as occurred with two people who were trained for the task. Nor was there evidence adduced on behalf of the plaintiff that there was any safer way to carry out the task. The proposition that three workers were required to assist in the transfer procedure was simply one advanced by the plaintiff's counsel in submissions and there was no evidence that the postulated system was one that could have alleviated the risk of injury, let alone one that ought reasonably to have been implemented. Nor was it evident that the postulated system would not have involved placing the third co-worker, engaged in holding or otherwise guiding the resident's hands, at risk. Further, as the defendant submitted, the cost implications of having a third person present were not the subject of evidence and such that the court could come to a view whether it was unreasonable for the employer to fail to have a third person present. In the circumstances, I do not find this allegation of negligence made out.

Quantum

[76] Notwithstanding the conclusion I have reached on the issue of the defendant's liability to the plaintiff, it is appropriate that I will deal with the quantum components of the plaintiff's claim as a matter of completeness.

General damages

[77] The plaintiff contended for $70,000 for general damages, on the basis of the evidence given by Dr Campbell and bearing in mind that, if the plaintiff may require decompression surgery, her impairment could increase to 25 to 28 per cent. The defendant submitted that $30,000 (with interest on $25,000) was appropriate on the basis that the plaintiff had suffered an aggravation of a pre-existing condition. Dr Campbell assessed the plaintiff's permanent whole of person impairment as 13.5 per cent (after a 10 per cent reduction for pre-existing degeneration), and accepted that a reduction of up to 30 per cent might be warranted if the degeneration was more extensive and ongoing. Dr Fraser assessed the impairment in the range of 8 per cent. Given my finding that the disc protrusion suffered by the plaintiff was not a pre-existing condition, but that there was some significant pre-existing pathology, I consider the impairment was in the range of 8 per cent. Taking into account that the plaintiff's condition has stabilised, I consider that $50,000 would be sufficient for pain and suffering and loss of amenities of life, with interest on $35,000.

Past economic loss

[78] The net workers' compensation statutory benefits paid to 19 March 2010 were $16,189. It was the defendant's contention that that was all that was appropriate for past economic loss as there was nothing in the evidence to show that any loss of income beyond that period (19 March 2010) was attributable to injury.

[79] For the plaintiff it was submitted that a reasonable period of recuperation should be allowed for. The loss of income claimed from 27 July 2009 until 19 October 2010, when the plaintiff secured employment as a casual bar attendant, was $37,216. Thereafter, for about 22 weeks until 16 March 2011, when she was promoted to duty manager, her income was about $75 per week less than her pre-accident income ($1,650). A claim for $38,866 for past economic loss with employer superannuation contributions at 9 per cent, being $3,498, was made, together with interest of $3,498.

[80] There was no evidence specifically that the plaintiff was unable to work for the whole of the period to October 2010. However, the report of Dr Campbell indicated that the plaintiff had not been able to re-enter the workforce as at 12 May 2010 because of her injury. It is appropriate that some allowance beyond 19 March 2010 be made, but I do not consider that an exact mathematical calculation is called for. I consider a global award of $40,000, including superannuation contributions and interest would be appropriate.

Future economic loss

[81] The plaintiff is currently employed earning more than she did in her previous employment with the defendant. There is some restriction in the tasks she can do (she does not lift kegs of beer) but she has the ability to delegate tasks. She remains at some risk in terms of employability in the open market, but in assessing future economic loss, it is also relevant to bear in mind the plaintiff's pre-existing pathology. For the plaintiff, it was contended that an allowance of $250,000 was appropriate. The defendant submitted that $25,000 would be generous under this

head. Taking a global approach, I would allow $50,000, including for superannuation.

Other components

[82] I note the WorkCover expenditure was $6,143.15 and the *Fox v Wood* component was $2,088, which would be included in an assessment of damages. The HIC refund was $2,004.

[83] Some allowance for future surgery is appropriate, which must take into account the pre-existing degenerative condition. I would allow $5,000.

Order

[84] The plaintiff has failed in her claim against the defendant. There will be judgment for the defendant on the plaintiff's claim. I will hear submissions as to costs.