SUPREME COURT OF QUEENSLAND

CITATION:	*Andrews v Westpac Banking Corporation* [2012] QSC 22
PARTIES:	**TARA KIM ANDREWS**
	(Plaintiff)
	AND
	WESTPAC BANKING CORPORATION
	(Defendant)
FILE NO/S:	S316/10
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	16 February 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	1-3 February 2012
JUDGE:	McMeekin J
ORDERS:	**Judgment for the plaintiff in the sum of $271,240**
CATCHWORDS	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where liability admitted - where the plaintiff suffered injury to her lower back at work – whether that injury has permanent consequences – whether the plaintiff is prevented from pursuing sedentary employment – whether the plaintiff had a future at her previous place of work – where loss of earning capacity in issue – where damages in issue
	Civil Liability Act 2003 (Qld)
	Colmark (Australia) Pty Ltd v Hall [1998] QCA 105
COUNSEL:	G.C.Crow SC, S.Deaves for the Plaintiff
	W Campbell for the Defendant
SOLICITORS:	VAJ Byrne & Co Lawyers for the Plaintiff
	HWL Ebsworth Lawyers for the Defendant

[1] **McMEEKIN J:** The plaintiff, Tara Andrews, claims damages for personal injury suffered on 12 December 2006 in an accident at her workplace – a chair on which

she was sitting collapsed and she fell to the floor. She was then employed by the defendant, the Westpac Banking Corporation ("Westpac") as a customer service representative.

[2] Liability is admitted. I am required to assess damages.

[3] Ms Andrews was born on 5 July 1965. She was 41 when injured and is now 46 years of age.

The Issues

[4] Whilst it is clear that Ms Andrews fell heavily the incident seems to have been relatively innocuous. However the plaintiff contends for damages in excess of $1M. The defendant, on the other hand, submits the damages are properly described as *de minimis*. The different analyses reflect the differing assumptions adopted by the parties as to the assessment of the plaintiff's credit.

[5] The plaintiff submitted that the fall resulted in a significant back injury that has effectively totally destroyed her earning capacity. The defendant contended:

(a) The plaintiff suffered a soft tissue injury in the incident which recovered within weeks. All contemporaneous records were consistent with the recovery expected following a soft tissue injury;

(b) If there were any ongoing symptoms they were greatly exaggerated and were caused by an entirely separate mechanism, namely a car trip to the gemfields undertaken in March 2007;

(c) The plaintiff's credit suffered severely for two reasons:

(i) because of her attempts to "keep secret" the fact of the car trip just mentioned which, even on her own account, aggravated her symptoms;

(ii) because she failed to reveal to her employer, or her rehabilitation coordinator, that she was actively pursuing a damages claim, at least as early as 27 September 2007, and at a time when her workers' compensation claim was yet to be finalised and her employer was still actively seeking to return her to the workforce;

(d) The plaintiff's claimed happiness with her employment with Westpac was not borne out by contemporaneous records, principally those of her psychiatrist, and that she was unlikely to have continued in employment there, or any like institution, had the incident not occurred.

[6] The issues require a close examination of the plaintiff's background and of the histories obtained, and various opinions expressed, by the medical experts who have seen her.

The Background History

[7] The plaintiff had a number of known pre-existing conditions but no history of any lower back pain or problems. Those pre-existing conditions included multinodular goitre, lupus, and, most significantly, a bipolar disorder. The latter disorder was aggravated by excessive alcohol consumption. Unbeknownst to her the plaintiff also

had a pars defect in her spine that had the capacity to render her vulnerable to trauma.

[8] The plaintiff had worked for Westpac since 1988. By the time of the subject incident she was paid on what the defendant called the A2 scale. One of her managers in the latter part of her career, Ms McManus, had rated her highly and indeed had entrusted her to relieve into her position when she was temporarily absent. Ms McManus left the defendant's employment some time in 2005 and another manager took over. He did not rate the plaintiff so highly. Computer records (the defendant could not produce the actual assessments performed from the plaintiff's personnel file) show that the plaintiff was assessed as "ND" meaning "Needing Development" in 2005-2006.[1] The plaintiff disputed that there was any downgrading of her previously high rating in the years leading up to her accident but for reasons that I will come to I am satisfied that there was.

[9] There is no dispute about the incident. It is agreed that the plaintiff fell suddenly to the floor from the height of an office chair, that she fell onto her lower back, complained of the onset of symptoms contemporaneously including pain in the lower back and shooting down her left leg, then sought treatment immediately from her general practitioner and obtained physiotherapy as advised.

[10] Ten days after the event the plaintiff reported to her general practitioner that her back was "better but still sore".[2] Her report to her rehabilitation officer was to much the same effect a week later.[3] The medical certificate issued to the plaintiff under her workers' compensation claim expired on 5 January 2007. During its currency the plaintiff was restricted from lifting over 5kgs, bending, squatting or twisting. While the plaintiff's evidence was not entirely clear it would seem that she had no days off work at this stage. Apparently the defendant's records reveal none. She continued to work without limitation of her duties. By the 17th January the plaintiff reported to Ms Richardson, the defendant's Occupational Health and Safety Officer, that she was "doing a lot better".[4] She saw her general practitioner on two occasions, on 31 January and 7 February 2007, about unrelated, and apparently relatively minor, matters. She made no mention of any continuing back symptoms.

[11] On the 13th February the plaintiff reported to her rehabilitation adviser that she was having pain from time to time. On the 23rd February, after a conversation with Ms Richardson, the plaintiff's workers' compensation claim was closed. The plaintiff insisted that this was done at her request. Ms Richardson records the plaintiff as reporting that she was still having symptoms from time to time but was "fine".[5]

[12] On 20th March 2007 the plaintiff consulted her psychiatrist Dr Zimmerman. She reported walking her dogs eight to ten hours per week. There is no mention of any back pain or discomfort.

[13] It was put to the plaintiff in cross examination, and she agreed, that in March/April 2007 she travelled out to the gemfields – a four and a half hour drive from Gladstone – that the trip aggravated her back and that shortly after she saw her

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1 Ex 23
2 T1-80/49; 2-33/5
3 T1-81/31
4 T1-81/48 – the quote comes presumably from the coordinator's notes and is not disagreed with
5 T1-85/30

general practitioner.[6] The doctor's notes record the following report of symptoms at a visit on 30th March 2007: "Low back still troubling her, tenderness, lower left, lower lumbar area…left lumbar area and over left sacroiliac joint."[7] There was apparently no mention of the long drive or any aggravation caused by it or anything else. This was the first attendance for any form of treatment since early January.

[14] After that time the plaintiff certainly complained more often of symptoms. Her account is that until that time the symptoms were present, to a degree at least, but she wished to make no great issue of them and get on with her life.

[15] The plaintiff attended on her general practitioner, Dr Nicolaai, on 17 April 2007 and he recorded: "Still low back pain most of time, thinks she will cope with work." He referred the plaintiff back to the physiotherapist and gave her a medical certificate, enabling her to obtain treatment. Again no certificate was issued for total incapacity or indicating any need for time off work.

[16] By the 3rd May 2007 the plaintiff says that she was having a lot of trouble at work. Her quantum statement records that she had "difficulty with the requirements … to stand … or to sit when attending customers as and when required".[8] The GP's notes record, on a visit that day, "low back was unbearable, especially at work".[9] The plaintiff ceased work on workers' compensation. She returned to work thereafter only from time to time and on part time programmes designed to assist her with the transition back into the workforce. She did not complete the modest hours requested. The plaintiff last attended at her workplace on the 31st March 2008. She resigned her employment on 16 September 2008 and received from the defendant's superannuation fund a permanent disability payout.

[17] During 2007 the plaintiff was referred to Drs Licina and Morris, both orthopaedic surgeons. She made no reference to the car trip to the gemfields or that it caused any aggravation of her back symptoms. Her explanation is that she did not think it relevant. Nor did she tell Dr Gillett of the trip and its consequences when she saw him on 18 December 2007. It would appear the only time that the plaintiff did report the effect of any trip to the gemfield to any treating practitioner was to Dr Agar-Wilson in January 2009 when she asserted that a trip in April had "wrecked" her back.[10]

[18] As to her present condition Ms Andrews is not inactive. She reports that she walks her dogs morning and night "as regularly as possible"; she attends a gymnasium run by her physiotherapist, she looks after accounts in, and runs occasional errands for, her husband's small jewellery business; she attends to her usual domestic duties breaking them up to suit her condition. Occasionally she has paid for help.

[19] The difficulty she sees with any commercial work is her reliability. She has good and bad days and cannot predict, she says, how she will be.

The Nature of the Injury Suffered

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6 T1-89/50; 1-91/32
7 T1-91/27
8 Ex 1 p2 para 16
9 T2-3/15
10 T2-37/45

[20] All medical practitioners agree that Ms Andrews suffered a soft tissue injury. Given the issues it is necessary to record the various findings in some detail.

Dr Morris

[21] Dr Morris was called by the defendant. He contended that soft tissue injuries usually heal within a few weeks. At his examination in May 2007 the plaintiff exhibited several signs that were inconsistent. Dr Morris concluded that "the degree of pathology that she is demonstrating and the degree of symptoms appears excessive. Examination showed a large number of inconsistencies, with non-organic signs, and it appears to me that she is maximising her complaint."[11]

[22] Dr Morris further concluded; "I have labelled her injury as a soft tissue injury to the back, which means a ligament strain, and I believe that, on top of that, she has a psychological condition which is maximising her degree of symptoms to benefit her claim."[12] As a result Dr Morris concluded that Ms Andrews was "fit to resume her pre-injury duties at the present time" noting that her work involved sitting and standing and that a change of posture would help her.[13]

Dr Licina

[23] Ms Andrews was referred to Dr Licina by her general practitioner. Her first consultation was on 19 July 2007. He too concluded that her problem was "of soft tissue origin". He recorded that there was "no significant abnormality on examination". Whilst a CT scan of the lumbar spine showed bilateral pars defects he considered that they were of long standing and while they might have been aggravated by the fall there was no evidence to support it. An MRI scan was entirely normal. There was no evidence of fracture or disc injury or nerve pressure. He suggested that Ms Andrews attend rehabilitation at the Wesley Hospital undertaking the multidisciplinary functional restoration program. In August 2007 he thought that she would be able to return "gradually" to work and "can see no reason from an orthopaedic point of view why she could not return to normal duties with time".[14]

[24] Dr Licina was subsequently provided with a report from the Wesley Rehabilitation Program after the plaintiff's attendance there. He was asked by Ms Richardson to provide an updated report. In that report, and without further seeing the plaintiff, he provided the following opinions:[15]

(a) The plaintiff's physical condition would allow her to return to a graduated return to work program;
(b) There was no structural abnormality that the plaintiff needed to protect or any activity that she needed to avoid in her return to work program;
(c) What restrictions there were would depend upon Ms Andrews' pain;

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11 Ex 11 p5 para 8
12 Ex 11 p5 para 10
13 Ex 11 p6 para 13
14 Ex 15 p3
15 Ex 16

(d) There were no specific tasks that Ms Andrews would not be able to undertake nor any further treatment that was necessary;

(e) He could find no evidence of any structural abnormality and considered that any soft tissue injury should have resolved;

(f) He concluded that there was "significant non physical impediments to her return to work". The exercise physiologist had reported that "motivation for rehabilitation was poor". The occupational therapist advised that "return to work in the short term was unlikely because significant feelings of anger towards the employer". A psychologist "felt that successful return to work was unlikely because of significant injustice issues that were difficult to resolve". In summary "other clinicians have identified barriers to her successful return to work that are not associated with any structural abnormality of the spine."

[25] Dr Licina saw Ms Andrews again in May 2008. She was then complaining of "constant low back pain to the left of the mid line with some radiation to the sacral and coccygeal region. The pain radiates down the left leg on the lateral aspect of the thigh and calf and into the lateral aspect of the foot."[16] On his examination Dr Licina reported that the plaintiff "sat comfortably throughout the interview and moved freely. She stood with normal spinal contours". She was mildly tender in the midline at the lumbar and sacral junction. Her lumbar range of movement was reasonable with mild loss of range at all extremes. There was no muscle wasting, no neurological abnormality and no weakness. There was no sensory loss. Dr Licina maintained his opinion that Ms Andrews had suffered a soft tissue strain. He opined that "it is unusual that Ms Andrews's condition has not responded to the passage of time and appropriate rehabilitation".[17]

[26] Dr Licina concluded that the plaintiff had suffered a permanent impairment. He was plainly uncertain as to how to further assess that impairment. He suggested that a 5% permanent impairment was "most appropriate" if he was restricted to using the WorkCover table of injuries but suggested that the AMA Guides to the Evaluation of Permanent Impairment were of more use and he would classify the plaintiff as having "minor impairment". He summarised that condition as "specific injury, muscle guarding and non verifiable radicular complaints".[18]

Dr Gillett

[27] Dr Gillett saw the plaintiff at the request of her solicitors, as I have mentioned, in December 2007. The history and complaints were consistent with those given to Doctors Morris and Licina. His examination does not seem to me to be greatly different from that of Dr Licina. He specifically recorded "Waddell signs of abnormal illness behaviour are negative".[19] Dr Gillett differed in his diagnosis from Doctors Morris and Licina in that he thought there had been an aggravation of the spondylolysis at the L5/S1 level causing it to become symptomatic. He reports that the "pars changes" were long standing, that there was no spondylolisthesis, that the bone scan report showed no increased uptake at the 5/1 level (the factor which

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16 Ex 17 p1
17 Ex 17 p3
18 Ex 17 p3
19 Ex 3 p4

seems to have led Dr Morris to conclude there was no aggravation of the spondylosis) and the MRI scan confirmed no disc or protrusion or pathology.

[28] Dr Gillett thought that the plaintiff would remain much as she presented. As to her capacity to work he opined: "She is disadvantaged in the open labour market. She is about to undertake a return to work program and her back condition will impact upon her work in relation to prolonged sitting, standing, bending, lifting and twisting activities. In her work in the Westpac Bank it is my view she will need occupational therapy assessment of her work environment to maximise her abilities in [sic] function in that work with her ongoing back complaints."[20]

[29] Dr Gillett thought that the plaintiff's complaints were consistent with his diagnosis. He thought that standing in one position would cause her problems and that she would need to be able to change postures on a frequent basis. He had been advised of her work practices at the bank and said "in general terms she will have some limitation associated with that and will need to modify her posturing tasks on a regular basis to accommodate the bank work. She will require a good ergonomic environment."[21]

[30] Dr Gillett also expressed the opinion that the symptom of radiation of pain to the left leg that the plaintiff reported was consistent with his diagnosis of the pre-existing pars defect becoming symptomatic. As I have mentioned that symptom was recorded as having been reported on the day of the fall from the chair.

[31] Dr Gillett concluded that the plaintiff had a 7% impairment of the whole person and that reflected permanent aggravation of a previously asymptomatic spondylolysis of L5/S1.

Dr McGree

[32] In October 2008 the plaintiff's general practitioner, Dr McGree, supported her application for total and permanent disability "for any work which she is suited by education, training or experience". He expressed the opinion that she had a ligamentous injury of the lumbar spine that would not improve and that she was not able to perform duties involving "sitting, standing, walking, bending, lifting".[22]

Dr Agar-Wilson

[33] The final practitioner to give evidence was Dr Agar-Wilson, now a retired pain specialist. As I have mentioned he saw the plaintiff in January 2009 for treatment purposes. He described the plaintiff's report of symptoms as "confined to the left hand side, her buttock, lateral aspect of the thigh, calf and radiates to her little toe. It is present all the time although its intensity varies. She is able to walk about an hour a day before the pain is produced. She can sit for an hour and half before having to move."[23] The plaintiff informed Dr Agar-Wilson that her pain interfered with her ability to dress, shower, perform her housework, and engage in recreational activities such as walking the dog and going out. It also adversely affected her ability to relax, sleep and engage in sexual activity.

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20 Ex 2 p6 para 6
21 Ex 2 p6 para 8
22 Ex 6 p3 para 6
23 Ex 4 p3 para 2.1

[34] The only observations out of the ordinary on examination seem to be that the plaintiff had 75% of the normal range of flexion of the trunk and her straight leg raising was restricted to 45% in both limbs. The doctor recorded that the plaintiff demonstrated no Waddell's signs.

[35] Dr Agar-Wilson concluded that the plaintiff had mechanical low back pain with "some symptomatic leg radiation". The doctor thought this was based upon the L5/L6 facet joint and based that conclusion on her self reporting that she had 2 to 3 days relief from a targeted injection into that joint. The doctor commented that he believed that the plaintiff's complaints were consistent with his diagnosis. As to her prognosis: "Her prognosis of returning to her pre-injured status I believe to be poor. I do think however some improvement can be gained if pain levels can be reduced even marginally and if physiotherapy techniques can get a chance to succeed. Also if Ms Andrews gained confidence in her back she could do quite well. I think she might also need some psychological support to help her through the stress over her loss of fitness and the perception that she has not been treated well by the Bank or the Insurance industry."[24]

[36] As to her employability Dr Agar-Wilson considered it "very difficult to comment" but accepted that the plaintiff had "limited endurance sitting, standing or walking and thus any employment would have to involve a degree of flexibility from a physical point of view."[25] He did not consider himself qualified to comment any further. Dr Agar-Wilson also assessed a permanent disability of 5% based on the AMA tables.

[37] Dr Agar-Wilson has seen the plaintiff on seven occasions. He has injected her spine on two of those occasions in procedures he referred to as a "lumbar spinal block".

[38] Dr Agar-Wilson was asked about the significance of "Waddell signs". He accepted that they were signs of inappropriate pain behaviour but suggested that they were a sign that the patient was "somewhat distressed" and should not be taken, at least necessarily, as an indication of malingering.[26] He accepted in the cross examination that they are indicative of an exaggeration albeit not a conscious one. He accepted that it tended to indicate that a psychological component was involved.[27]

[39] Dr Agar-Wilson too explained the significance of the pars defect, which is a developmental defect, in terms which I think were consistent with the explanation of the other experts: "they're pretty strong, it's just not solid as bone but it's not far off. But just allows a bit of play and that gives them – nothing dangerous – but gives them more back ache and more mechanical back pain problem. Because they play on the various spinal components that shouldn't be there."[28] In his view many things might set off symptoms of a previously asymptomatic condition such as "falling, twisting, exercising, tennis, you name it…"[29] He thought people with a condition were more likely to get the mechanical pain that he had diagnosed in the plaintiff if they had such a pre-existing condition.

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24 Ex 4 p5 para(6)

25 Ex 4 p5 para(9)

26 Where the transcript reads, in relation to this topic, the doctor's concluding answer as being "it's a notional thing" I believe the answer should read "it's an emotional thing" – see T2-35/40

27 T2-37/10-15

28 See T2-39/32

29 See T2-39/50

The Journey to the Gemfields

[40] The defendant has put at the forefront of its submissions the impact on the plaintiff of the journey that the plaintiff undertook to the gemfields on a date that is unknown but probably in late March or early April.

[41] Dr Agar-Wilson was cross examined on this point and said: "People with chronic back pain do complain about car journeys and they tell me, as a regular thing, that every hour or so they have to get out and walk around a bit and get back in the car. It's a fairly common complaint --- car journey and back pain."[30]

[42] When asked whether a long motor vehicle trip could cause a person with the pars defect that the plaintiff has to become symptomatic he replied "well, it wouldn't help".[31]

[43] Dr Gillett too was asked to consider the potential impact of the journey to the gemfields. The crucial issue he thought was whether the plaintiff still had pain between the fall caused by the collapse of the chair and the journey. His view was that the plaintiff had a pre-existing back condition which was vulnerable to becoming symptomatic if appropriate forces were applied to it. The force involved in the incident of the collapsing chair was one such potential force. As I understand his evidence so were the forces that might come on to her spine through the car trip. Whether such a trip was likely to result in sufficient force to make an asymptomatic condition symptomatic he thought would depend upon the road and car conditions.[32] The doctor made it clear that he would not normally expect car travel to cause such a condition to become symptomatic. He thought there would need to be some form of force or roughness such as might result from a defective seat, or striking a pot-hole or speed bump, or the like.[33] A continuum of symptomatology from the collapsing chair incident onwards would be indicative of a permanent aggravation of the pre-existing condition being caused by that incident. Absent such a continuum then whatever injury may have resulted from the collapsing chair could well have resolved by the time of the car trip.

[44] There was no evidence that the trip to the gemfields involved any unusual forces coming on to the plaintiff's spine. Whilst the cross examiner assumed the journey was over rough terrain the plaintiff appeared to deny it.[34] Indeed there is no evidence that the journey was other than on a normal bitumen road. Nor is there any evidence that any seat in the vehicle was defective or the car itself defective so as to produce undue vibration.

[45] The plaintiff's de facto husband of some 10 years was called and asked about this journey. He maintained that the plaintiff first needed to have a break from the journey and get out and walk around when only about 45 minutes into the journey, near Gracemere. Again there was no suggestion of any undue forces coming onto the plaintiff to that point in time. I place little reliance upon the husband's evidence. He was plainly extremely aggressive towards the cross examiner, and for no particular good reason at least so far as the manner and scope of his questioning was

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30 T2-38/55
31 *Ibid*
32 See T2-61/15-55
33 See T2-63/30-45
34 See T2-6/15

concerned. He seemed considerably confused as to whether there had been one journey to the gemfields or more than one since the subject incident, something one would think he would well remember. I thought generally he came to defend the plaintiff's case as best he could and in doing so lost his objectivity.

The Pursuit of Damages

[46] There remains the defendant's submission that a significant factor that needs to be weighed in the balance when assessing the plaintiff's credit is her failure to disclose the fact that she consulted solicitors and was considering a damages claim during 2007 and at a time when her workers' compensation claim was yet to be finalised and when her employer was expending money on her rehabilitation in an effort to get her back to work.

[47] I accept the defendant's submission that the plaintiff's behaviour in this regard was out of the ordinary. However I am not persuaded that her early determination to seek legal advice and to potentially pursue damages should reflect on her credit in terms of her reporting of her symptoms. I think an explanation for the plaintiff's conduct lies in her anger towards her employer, an anger which was noted by a number of the practitioners who dealt with her during the 2007 year. I suspect that this anger was fuelled by Dr Morris' views that the plaintiff was "maximising her complaint" and that there was "an element of exaggeration in her claim".

Was the Injury Short Lived?

[48] To summarise then, the defendant points to the following matters as demonstrating that whatever injury the plaintiff suffered it was short lived;

(a) At the highest for the plaintiff she has suffered only a soft tissue injury;

(b) There is no objective evidence to support a diagnosis beyond that arrived at by Dr Morris i.e. a ligamentous strain;

(c) Such an injury should in the normal course resolve within a matter of weeks;

(d) All contemporaneous records suggest that the normal healing process occurred here. The plaintiff reported improvement in her symptoms over the weeks following the subject incident to a number of people. She had limited treatment consistent with no great level of symptoms. Her failure to report symptoms to her general practitioner when she did visit about other unrelated matters and her request to Ms Richardson to close her WorkCover claim strongly suggests that her symptoms had substantially resolved as one might expect;

(e) There is no evidence independent of the plaintiff to demonstrate a continuum of symptomology as Dr Gillet said would be necessary to support an inference of permanent injury and the matters just mentioned suggest there was not;

(f) There was a potential independent cause for any further complaint of symptoms, namely the long car journey to the gemfields, particularly in the context of the pre-existing pathology in her lumbar spine;

(g) The plaintiff plainly related the flaring of her symptoms to that car trip given her report to Dr Agar-Wilson in January 2009;

(h) The plaintiff's failure to mention the car trip and the flaring of her symptoms to her general practitioner, to Ms Richardson, or to any of the three specialists who saw her in 2007 is remarkable and strongly suggests that the plaintiff was endeavouring to conceal the matter knowing that an accurate

history would throw in doubt any connection between her flaring of symptoms and the original subject incident.

[49] These submissions are not without force. However in my judgement they should be rejected for the following reasons:

(a) It is common ground that the plaintiff had a pre-existing condition which rendered her vulnerable to trauma;

(b) The trauma of the fall from the chair was of a type and sufficient to trigger symptoms;

(c) The plaintiff reported pain not only in her back, which one might expect, but also radiating to her leg following the collapsing chair incident. Dr Gillett considered that to be a symptom consistent with an aggravation of the pre-existing condition. No practitioner said it was not;

(d) Absent some abnormal force coming on to her spine there seems no reason why the car trip would trigger symptoms in the plaintiff's spine assuming full recovery from the fall. There is no evidence of any such untoward force;

(e) While the plaintiff did not mention any continuing back symptoms to her general practitioner on 31 January or 7 February 2007, the significance of this is considerably undone by the fact that subsequently she told the defendant's employees who were responsible for her rehabilitation that she was continuing to have pain from time to time (on the 13th of February and the 23rd of February 2007);

(f) That recording of a continuation of symptoms occurred coincidently with her request to close her workers' compensation claim, hence the closure of the claim itself does not lead to the inference that there were not symptoms continuing at the time;

(g) The inference that the defendant seeks to draw from the failure to advise her general practitioner, or any of the specialists, of the car trip and the flaring of symptoms following the car trip, presupposes an understanding of her condition that I very much doubt the plaintiff would have appreciated. I think it highly likely that the average person who had suffered a sudden fall on to their spine with symptoms continuing for nine or ten weeks thereafter (at least until Ms Richardson's last recording of symptoms being experienced from time to time on 23 February on this analysis) would be surprised to think that a journey in a car resulted in a new and different injury should they experience symptoms of back pain during such a journey. This is particularly so if only a matter of a few weeks had passed, which is the supposition, if the journey took place in late March before the visit to the medical practitioner on 30 March;

(h) A complaint of aggravation of symptoms during the long car journey is a common place for those with an existing symptomatic back condition so her report is hardly out of the ordinary;

(i) In the final analysis the resolution of the issue of whether the plaintiff continued to have symptoms up until the long car journey depends on an acceptance of her word that it was so. As best these things can be judged the plaintiff came across in her evidence as genuine and credible.

[50] On balance I am satisfied that there was a necessary continuation of symptoms that Dr Gillett spoke of as justifying drawing the inference that the fall from the chair was having a continuing effect as at the time of the long car journey and that but for the fall from the chair it was unlikely that the car journey would have caused the pre-existing condition to become symptomatic.

[51] It seems to me probable that the plaintiff had continuing symptoms as she claims, that they were at a low level and intermittent through February and March 2007 but aggravated by the long journey as she reported, eventually, to Dr Agar-Wilson. These aggravated symptoms interfered with her capacity to perform her duties to her satisfaction and lead to her perception of increasing and debilitating problems

Impact on Employability

[52] It is one thing to find that the plaintiff had continuing symptoms causally related to the subject incident but quite another to find that those symptoms were at a level that had a devastating impact on her capacity to earn a living. It is in my view impossible to avoid the conclusion that the plaintiff's perception of her difficulties is substantially in excess of any objective evidence.

[53] Save for her general practitioner no medical practitioner has been prepared to support a claim that the plaintiff was effectively totally and permanently disabled from her employment. Those specialists who have had more to do with her – Dr's Licina and Agar-Wilson – each in their own separate ways suggested that psychological issues were playing a part. Dr Agar-Wilson who had most to do with her commented that if Ms Andrews "gained confidence in her back she could do quite well". Even so, the highest that he could put her case was that whilst she had a limited endurance for sitting, standing or walking that meant that her employment would need to involve "a degree of flexibility". Drs Gillett and Licina, in my view, have said much the same thing. Those opinions are a very long way from the notion that the plaintiff has suffered a complete destruction of her earning capacity.

[54] Each of the practitioners, save Dr Morris, thought that the plaintiff had a permanent impairment related to the subject incident. They expressed this in percentage terms as a 5-7% impairment of the whole person. This must be taken in context. As Dr Licina says, the impairment was "minor".

[55] That the plaintiff has symptoms to some degree, and that they are variable and that they limit her ability to adopt any prolonged postures such as sitting or standing, or require her to be careful when bending, lifting or twisting can be accepted. What I cannot accept is that such restrictions totally preclude sedentary employment.

[56] Indeed the glimpses that one has of the plaintiff's life through her description both to the court and to the practitioners makes plain that she is reasonably active. I have set out most of the evidence above. I should report my own observations of her. She was cross examined for some five hours over two days. She appeared to sit comfortably for most of that time. From time to time she got to her feet but on each occasion only momentarily. By that I mean only for a few seconds. Her initial sitting tolerance was consistent with her reports to the medical practitioners. She stood more often as the day wore on. On the second day of the trial I have made a note that she first stood up about 18 minutes into her evidence. Again, this was only for a moment. Ms Andrews responded to the questions she was asked without any apparent difficulty or confusion. That is, I could not detect that pain was in any way interfering with her ability to concentrate. Indeed apart from the occasions where she stood up there was no apparent appearance of pain – as Dr Licina recorded she appears to sit comfortably and move freely.

[57] I made no observation of the plaintiff other than in the witness box.

[58] I observe too that a person capable of walking for an hour or more, sitting for an hour and a half and attending to her household duties albeit in her own time, all activities which the plaintiff has consistently reported that she is capable of, is a person well capable of sedentary employment.

[59] I have no reason to doubt that the plaintiff perceives her situation as dire but there is no objective evidence to support that, indeed what evidence there is, is against it.

Future at Westpac

[60] The plaintiff's case was based on the assumption that but for the accident caused injury she would have continued in her career at Westpac or a like institution. I am not satisfied that that assumption is a valid one.

[61] In support of that assumption the plaintiff pointed to her very long career at Westpac – some eighteen years by the time of her injury. As well she had achieved at a high level, at least according to her former manager. The limited records produced by the defendant suggest that in terms of achieving the goals that the bank had set for her she was capable of doing so.[35] However, I think it evident that prior to the subject incident all was not well with the plaintiff in terms of her view of her career at the bank.

[62] I have already mentioned that the incoming manager in 2005 had rated Ms Andrews' performance as "needing development". The banks records show that the plaintiff did not meet any of the objectives laid down for her in the second half of 2005.[36] She had returned to her previous form in the first half of 2006 but her performance was much worse in the second half of that year. I gather from Ms Richardson that the performance objectives post injury brought into account her limited capacity to attend at her workplace and so are of little assistance.

[63] I mentioned earlier that I preferred the defendant's evidence as to the downgrading of Ms Andrews' performance to her claim that there had been no such downgrading. The evidence from Ms Cullen and Mr Rudolph[37] did tend to support the plaintiff although Ms Cullen's emphasis on the plaintiff's rapport with customers,[38] which struck me as more marked than the transcript might suggest, carried with it the implication that her rapport with staff members may not have been similarly described. I am conscious too that the defendant failed to call the manager, Mr Jarman, who had been responsible for this downgrading. But for the evidence that I am to come to I would have thought that omission critical. Only Mr Jarman knows why it is that he rated Ms Andrews' performance so poorly. Thus it is not known whether the downgrading was related to Ms Andrews' abilities with customers, with other members of the staff, or to some other factor that impacted upon the bank's interests.

[64] However there are a number of factors that support the defendant's submission. First, the level of detail in the disclosed records supports the contention that it accurately reflects some base data. And that detail would, on its face, support a

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35 See Ex 23 – "ND rating – 0 objectives met $0 bonus paid". Cf. first half of 2006 ranked 12th of BSRs in QLD and met 120% of her plan $881.60 bonus paid

36 See Ex 23

37 Ex 2

38 T2-69/25; 2-70/20

downgrading. Secondly, the plaintiff appears to accept the detail provided for the years where she is not downgraded to "ND". If error has crept in then it has been remarkably selective. Thirdly, and most significantly, independent evidence of the plaintiff's reported comments and lifestyle through the time of these assessments, to which I now turn, tends to suggest that a downgrading was very likely.

[65] What is clear from the evidence is that the plaintiff did have problems with at least two staff members. What is also clear and of more significance, is that she was quite unhappy at her workplace, despite her present belief to the contrary. So much is plain from her discussions with Dr Zimmermann.[39] I am conscious that she had reported matters to Dr Zimmermann at a time when her previous manager had rated her highly but it seems evident that that previous manager was quite sympathetic to the plaintiff and very supportive of her. It is difficult to avoid the inference that her leaving had a substantial impact on the plaintiff's attitude to her workplace. In April of 2005 the plaintiff reported to Dr Zimmermann that she had "some issues with work". She reported that she had knocked a hole in a wall, at home presumably, whilst drinking. In May of 2005 she reported to him that she was "managing work" and that her manager who had been "very supportive" of her had left. In June of 2005 she reported to the doctor that she was upset that she had not been paid a bonus that she had expected to get. There are continual references to her drinking to excess. In July of 2005 Dr Zimmerman records that she had "dropped the issues of her appraisal at work". That, of course, strongly suggests that there was a problem, from the plaintiff's perspective, with her appraisals. In November he notes that she was "stressed at work". Her next appointment was the following March of 2006 where the doctor records; "hates work- more aggressive re bullshit at work. Has issues with a particular co-worker. The manager has poor people skills". That her attitude to work was of some significance is confirmed by Dr Zimmermann reporting to the general practitioner that the plaintiff was "stressed at work" following this attendance. In April of 2006 the plaintiff referred herself to the Gladstone Mental Health Service. There was a reference at that time again to excessive alcohol intake and with using a wine bottle as a weapon on her partner. It would appear she saw Dr Zimmermann on the 11th of April, the following day, and informed him that she was enjoying her work. It is evident that this enjoyment was short lived. Dr Zimmermann recommended that she go off anti-depressants but on the 16th of May she reported to him that she became irritable when off them. On 19 July 2006 Dr Zimmermann has recorded; "things are terrible. Has multinodular goitre – voice terrible. Things are terrible at work. Boss is not good dealing with staff. Tara had an argument with a female friend at work. Very difficult to make decisions. Not meeting sales targets. Has applied for jobs. Increased alcohol consumption". On the same day Dr Zimmermann wrote to Dr Nicolaai, the general practitioner, and said; "she is very unhappy with her work, which is not all her fault" and "she may consider alternative employment". The next attendance on Dr Zimmermann is post accident.

[66] The only other relevant features of her history are that the plaintiff was admitted to the New Farm clinic in September 2006, as she "was having a few issues with [her] medication and… wanted to get [her] self right".[40] And on the 24th of November 2006 the plaintiff attended at the Gladstone Hospital accident and emergency

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39 See Ex 12

40 T1-10(55)

department with a laceration to the palm of her left hand. She refused to say how the laceration occurred.[41]

[67] The cross examination suggests there is a record in the New Farm clinic notes of the plaintiff "yelling and abusive towards co-workers"[42]. The plaintiff denied giving any such history although I note that the other details of the history given are consistent with the plaintiff's reporting to Dr Zimmermann.

[68] Given the reports that the plaintiff made to Dr Zimmermann, her excessive drinking, and her admitted difficulties with other members of the staff it would be surprising if a manager did not have the view that the plaintiff might "need development". More significantly it is evident that the plaintiff was far from content with her position at Westpac.

[69] Further it is difficult to believe that the plaintiff's attitude to her work has not significantly interplayed with the symptoms that she was experiencing in her back which eventually led her to feeling unable to cope any further with her work.

[70] That she was not happy with her work post accident is plain from Dr Zimmermann's notes. On 20 March 2007 he recorded that the plaintiff was "very stressed" by her work. He recorded that she hated doing sales. She told Dr Zimmermann that she was thinking of joining her husband in his jewellery business. In her evidence she said that statement was "totally unrealistic"[43]. Realistic or not her comment indicates significant unhappiness with her position at the bank. Dr Zimmermann further recorded on this visit; "has been at the bank for 19 years. Very irritable. More aggressive towards e.g. her manager. Gets v. frustrated".[44]

[71] It would seem that around this time the plaintiff had the trip to the gemfields with the consequent aggravation of her symptoms.

[72] The statements to Dr Zimmermann throughout 2006, the need to attend the New Farm clinic in September of that year, the rather odd attendance of the Gladstone Hospital in November all indicate that the plaintiff was extremely unsettled in her life pre-accident. This dissatisfaction with her workplace continued post accident given the entry in Dr Zimmerman's notes of March of 2007. All this suggests that the plaintiff was reaching the probable end of her career at Westpac.

[73] There were significant benefits for the plaintiff if she stayed in service for 20 years and, despite her injury, she achieved that milestone. It seems to me that on the balance of probabilities and irrespective of any injury her career with Westpac would not have extended much further.

What Loss Then of Earning Capacity?

[74] Thus the assessment of the plaintiff's hypothetical future if she had been uninjured is complicated by her pre-existing psychiatric problems, by her dissatisfaction with her working environment and by her anger towards the bank. The defendant is not to be held responsible in damages for those matters save that the defendant must, of

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41 T1-74/25
42 T1-70/57
43 T1-86/35
44 See Ex 12; T1-87/10

course, take the plaintiff as it finds her. Because of these matters it was very much more difficult for the plaintiff to make the adjustment necessary to cope with her injured state. Dr Licina commented that she was taking longer to recover than was usual. I accept that view but do not draw any conclusion of dishonesty, as the defendant submits I should.

[75] My view of the plaintiff is that she is genuine enough in her beliefs but those beliefs do not in fact reflect the reality of her present condition. That she has symptoms I am quite certain. That they have impacted on her capacities is also clear. However they do not do so to the extent that she perceives.

[76] I am satisfied that because of these symptoms the plaintiff has had a reduction in her capacity to obtain and maintain employment. She is more limited in what she can do. But the fact is that sedentary employment was appropriate for her, particularly a job where she could stand up, sit down and move about as she needed to.

[77] Because of the plaintiff's attitude towards the bank and her own peculiar perception of the degree of her difficulties, it is impossible to assess precisely her loss of earnings.

[78] I am satisfied that if the accident had not happened she would have left the Westpac bank at about the time she did – not long after she reached her 20 year service mark (26 July 2008). Had she been uninjured she would have sought other employment.

[79] The defendant strongly submitted that if I reached this view of the plaintiff, that is that her future was not likely to be with Westpac irrespective of injury then I ought to assume that her likely future lay in different and probably less well paying work. The plaintiff clearly had an interest in her art. Indeed she seems to be an accomplished oil painter and has had some very modest success with selling her work. The evidence of her de facto husband and herself suggest that employing her in the jewellery business was not a viable option. But as she mentioned many times the plaintiff is a person of some energy and drive and I have no doubt that if uninjured she would have filled up her time in some substantially productive way.

[80] I am satisfied that in her injured state the plaintiff is capable of maintaining employment. With a sympathetic employer she might well cope with full time work. Even without that sympathy she could probably work, not on a full time basis, but very close to that. It seems to me that with one day equivalent off a week the plaintiff should be able to cope with the demands of otherwise full time employment. Job sharing and part time work are now common place in our society. It is reasonable to think that the plaintiff would be disadvantaged in terms of securing bonuses, promotions and overtime. She would be restricted in her ability to lift and may be slower and so more vulnerable to dismissal. All these matters will probably impact on the income she is likely to generate.

[81] I have little doubt that if the plaintiff was sufficiently motivated she could find employment to about 75% of her previous capacity.

[82] That capacity however is not necessarily measured by the wage that she might have achieved at the Westpac Bank. She may have joined some other financial institution with presumably much the same wage structure. I do not see that as certain – her several statements to Dr Zimmerman certainly suggest that she was considering

other alternatives. The plaintiff may have pursued alternative career options for a period or indeed had a break for a period – many do when changing careers and assessing the future. If she had returned to the banking world the plaintiff sees herself as having management potential.[45] I am not so sure – her character and bipolar condition, while they gave her certain strengths, seems to have made the plaintiff intolerant at times of others and that was likely to hold her back.

[83] In the circumstance I think that all I can do is rely upon averages. The present statistics for seasonally adjusted Queensland full time adult persons ordinarily time earnings as per the Australian Bureau of Statistics catalogue – 6302.0 – is a little under $1300 per week gross which equates to about $1000 per week net. That is in fact not so different to the wage that the plaintiff would have achieved had she remained at Westpac.

[84] There is then the question of when the loss should be dated from. Dr Agar-Wilson suggested there needed to be some time for the plaintiff to regain confidence in her back for her to reach maximal improvement and function. Dr Agar-Wilson thought that the plaintiff needed more time when he saw her. I disagree. It is all a question of reasonableness and motivation. While it is impossible to be precise I will adopt the resignation date as the time by which the plaintiff ought to have achieved maximal function. Hence the plaintiff is entitled to be compensated up and until then as if she had continued her occupation uninterrupted at Westpac. The parties are agreed that any loss suffered up until the time of the resignation from Westpac is compensated for by the allowance for special damages paid by Westpac.

[85] Assuming that her income earning capacity is reduced by about 25% I assess the plaintiff's loss at $250 per week from the date she resigned her employment with Westpac (16 September 2008).

Medical and the Like Expenses

[86] I note that the plaintiff has been urged by virtually every practitioner who has seen her to endeavour to rehabilitate and find a means by which she can cope with her pain. The expenses claimed suggest that she has tried many different avenues.

[87] There are two difficulties that I perceive in accepting the evidence of monies actually expended as the reasonable assessment of compensation for expenses necessarily incurred in attempting to alleviate the plaintiff's condition. The first is the difficulty that the plaintiff's perception of her problems is objectively unrealistic. The second is that the plaintiff seems to have expended substantial monies on treatment modalities that find no particular support in the evidence – I have in mind continued visits to physiotherapists, purchase of orthotic devices, heel lifts and back supports, obtaining of massages, and purchases of creams and gels of various types.

[88] Balanced against those considerations is the prospect that there may have been a greater justification for expenditure had the plaintiff persisted with work as I find she could and should have. I do not assume that such a course would not have had its difficulties for the plaintiff. In doing so it is very likely that she would have had a significant need for pain relieving treatments, at least initially. And while continued

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45 Ex 1 p2 para 19

visits to physiotherapists over the longer term is rarely supported in my experience, Dr Morris did suggest this was one avenue he would recommend for someone in the plaintiff's position of having chronic pain[46] and so did Dr Agar-Wilson.[47]

[89] I see the assessment here as akin to a general damages assessment rather than a calculation of special damages. Doing the best I can I assess those damages at $10,000.

Future Expenses

[90] The plaintiff claims for ongoing expense at $28.57 per week for 42 years. That assumes that the pre-trial expenditure should reasonably continue. There is no warrant for thinking that it should.

[91] As Dr Agar-Wilson commented, the plaintiff should, with gaining confidence, "do quite well". With that confidence should come a decreasing reliance on treatment.

[92] I propose to allow a modest sum of $10,000 for future medical expenses.

General Damages

[93] I have set out the findings that it is necessary to make to arrive at an assessment of general damages. The plaintiff has a soft tissue injury; it has permanent consequences and is best assessed as a 5% impairment. Generally I accept the opinions of Drs Licina, Gillett and Agar-Wilson save where I have mentioned my reservations.

[94] In arriving at a view on this and on every aspect of this claim I have borne in mind that cases where relatively minor injury results in what is said to be devastating consequences, all dependant on the plaintiff's perceptions and self reporting, are difficult to assess and call for considerable caution in the assessment of damages that it is said a defendant ought to pay. As Pincus JA observed in *Colmark (Australia) Pty Ltd v Hall*[48]:

> "Claims for damages for personal injury present particular difficulties where, as here, there is a relatively minor soft tissue injury which is said to have brought very serious consequences. …. The assessments of disability were 3% of the right leg (Dr Tuffley) and 5% (Dr Gillett). This is an injury low in the range of seriousness, … it was thought by the learned trial judge to be properly compensated by an award of over $150,000 damages.
>
> Such an award was in the circumstances of this case plainly excessive. In my opinion a cautious approach to assessments of damages in such cases - ie those in which an injury of no great significance is alleged to have been seriously disabling - is generally justified and should have been adopted with respect to this respondent."

[95] Despite the symptoms which I am satisfied the plaintiff must endure, that is a level of pain in her back with some radiation and consequent care with lifting too heavy a weight, twisting, bending, and sitting and standing for too long, I consider that the

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46 T3-7/40

47 Ex 4 p5 para 6

48 [1998] QCA 105; Appeal No 7507 of 1997 - 27 April 1998, 26 May 1998 - BC9802228

plaintiff is capable of a life without too much in the way of restriction and that a relatively modest assessment of damages is called for.

[96] I will allow $35,000 under this head of loss.

Summary

[97] In summary I assess the plaintiff's damages as follows:

Pain, suffering and loss of amenities of life	$35,000.00
Interest on $15,000 at 2% for 5 years	$1,500.00
Past Economic Loss[49]	$44,460.00
Interest on past economic loss[50]	$1,205.00
Loss of superannuation benefits (past) at 9%	$4,001.00
Future Economic Loss[51]	$150,000.00
Loss of superannuation benefits (future) at 9%	$13,500.00
Special damages (paid by Westpac)	$63,526.23
Special damages (paid by the Plaintiff)	$10,000.00
Interest[52]	$1,574.00
Future medical expenses	$10,000.00
Total Damages	**$334,766.23**
Less refund to Westpac	$63,526.23
Net Damages	**$271,240.00**

[98] There will be judgement for the plaintiff in the sum of $271,240. I will hear from counsel as to costs.

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49 $250 x 52wks x 3.42yrs

50 Centrelink Benefits of $37,413.90 were received. Therefore $(44,460- 37,413) x 5% x 3.42yrs = $1,205

51 $250/week for 19 years (646) less 10% = $145,350. I have rounded the figure up to avoid any spurious impression of precision. I have allowed the loss to age 65. I have moderated the discount for contingencies as the plaintiff may have worked longer. Her bipolar condition may have assisted her in doing so. She has now moderated her drinking. Her various pre-existing conditions have not adversely affected her capacity to earn an income in the 18 years preceding the subject incident and there was no evidence they were likely to do so in the future. I accept Dr Gillett's views concerning the likely future impact of the pars defect had the subject incident not occurred.

52 For want of a better guide as per the plaintiff's schedule, Ex 28