SUPREME COURT OF QUEENSLAND

CITATION:	*Romig v Tabcorb Holdings Ltd* [2014] QSC 249
PARTIES:	**LIDIJA ROMIG** (plaintiff) **v** **TABCORP HOLDINGS LTD** (defendant)
FILE NO/S:	4523/10
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	15 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2014, 3 April 2014, 10 April 2014
JUDGE:	Dalton J
ORDER:	Judgment for the plaintiff in an amount of $213,416.53
COUNSEL:	G J Cross for the plaintiff R Myers for the defendant
SOLICITORS:	Patinos Personal Lawyers for the plaintiff Kaden Borriss Brisbane for the defendant

[1] The plaintiff is a 51 year old woman who sues for personal injury to her neck, together with psychiatric injury. She was employed part-time (three nights a week) as a roulette dealer at the Treasury Casino at the time of the events which gave rise to her injuries.

[2] The plaintiff was born in Slovenia. She had a university diploma in social work from that country. When she came to Australia her qualifications were recognised and she did work as a social worker for some time. Notwithstanding that, she chose to work dealing roulette at the Treasury Casino from 1995. Part of the work of a dealer is to gather chips used by gamblers and sort them into stacks by colour (value). This was done manually until the year 2000 when the casino installed chipping machines. These machines attached to the part of the table where the dealer was situated. The dealer swept chips which had been played into the mouth of a chute which was at table level. The machine sorted the chips and spat them into a tray of chutes which sat beside the dealer, just under the table. To reach to the bottom of the chutes, the dealer was obliged to reach down below table level. As well, the chute farthest from the dealer was 90 cm from the closest chute – tt 4.64 – 65. The dealer would reach into the chutes, remove a stack of chips, and return them to the table.

[3] I find there was no training given to the plaintiff as to how to use the chipping machine except for a quick demonstration on the casino floor while gamblers waited for the training to finish and the game to begin – t 1.31. This was the plaintiff's evidence. Mr Stephan, called by the defendant, said he could not recall being given any training – t 4.70. The defendant led no evidence that it trained the plaintiff before she was injured. The plaintiff said she developed her own method of removing chips from the chutes: she stood beside the machine and leant over and down to access the chips. To pick up a stack of chips she held her hand so that her thumb was lower than her fingers. I accept that evidence.

Initial Injury

[4] The plaintiff says that she injured herself one Friday night – 10 September 2004 – when she was working on what was known as a left-hand roulette table. If a dealer was working at a left-hand table, the dealer would stand to the right of the chipping machine. The gamblers would stand to the dealer's right. The plaintiff says she reached to her left, with her left hand, to collect a stack of chips from a chute in the chipping machine and that as she did so she turned her head to the right to check that the gamblers were not misbehaving. It was not disputed that part of the dealer's job was to keep a close eye on the gamblers. It was also not disputed that the dealer must work quickly so that the game proceeds quickly. The plaintiff said that when she reached into the chipping chute and then looked down the table to her right, she felt a terrible pain in her neck and suffered from pins and needles. She said she dropped the chips – t 1.44. She said the pain was on the left-hand side of her neck and across her left shoulder and down the lateral side of her left arm to her elbow.

[5] The plaintiff complained of injury at 7.30 that night, and that is documented. She went home from work before her shift finished, although not until 9.45 pm – first she saw the nurse and other staff at work – tt 2.19 – 20. She drove herself home. She did not go to a hospital that night as she thought she would be sitting around for ages as it was a Friday night – t 1.45. Nor did she attend at a doctor or a hospital over the weekend. I thought the plaintiff exaggerated the extent of this initial pain. She said the pain was excruciating – t 1.78, and that she could not drive herself to the doctor over the weekend. However, she was content to wait about at work and then drove herself home. Had the pain really been excruciating she would have sought medical advice promptly.

[6] The plaintiff went to see a doctor, Dr Kent, on Monday morning. Dr Kent wrote a letter for time off work saying that she was suffering from "left neck muscle strain caused by left upper limb activity at work". He referred the plaintiff to a physiotherapist, Chris Knight. The plaintiff took two weeks off work and returned to work on reduced duties for two weeks after that. After this the plaintiff returned to her normal hours of work until she left work on 8 September 2006. In 2005 Ms Romig took long service leave combined with annual leave – t 2.57.

[7] After the incident of 10 September 2004, the plaintiff was given instruction as to how to use the chipping machine. The position in which she was taught to stand and the technique to remove chips from the chutes was substantially different from that which she had used before being so instructed– t 1.32. Her techniques of leaning down and across the machine and picking up chips with her thumb down and fingers up were corrected. She was taught to stand behind the chipping machine and to reach into it with both hands, thumbs up.

[8] Ms Romig was cross-examined along the lines that, so far as her technique of removing chips from the machine between 2000 and September 2004 was concerned, she simply performed the task in a way which came naturally to her. Submissions were made that an employer need not attempt to regulate an employee who performs a basic task in a manner which comes naturally to them – cf *O'Connor v Commissioner for Government Transport.*[1] I reject that argument. The chipping machine was an unusual piece of equipment. It was used quickly and repeatedly by those dealing roulette. There was obvious potential for employees to adopt a poor technique in using it and there were substantive techniques explained to Ms Romig when training was provided – it was not just a matter of common sense or performing a task so basic it could be reasonably left to the employee themselves to decide how to perform it. Ms Romig was also to perform other tasks repetitively and quickly at much the same time as she used the chipping machine – eg: spinning the wheel, throwing the ball and watching for misbehaviour amongst the gamblers. It was reasonably foreseeable that if a correct or ergonomically sound technique was not used she might suffer injury. It was easy enough to provide proper training in using the chipping machine – it was provided immediately after injury was suffered. Not to provide training was a breach of the common law duty the defendant owed the plaintiff as employer.

Some Continuing Symptoms

[9] The plaintiff said that between her return to work in October 2004, and her stopping work in September 2006, she had continuing symptoms in her neck and shoulder. I find that this is true only to the extent that she did from time to time, during that period, experience relatively insignificant pain in her left neck and shoulder. The evidence does not support any greater difficulties being experienced through this time. I now discuss that evidence.

[10] The plaintiff said that she complained of pain to her general practitioner, Dr Heves throughout that period. There are no notes of this in the doctor's notes despite there being notes of the plaintiff attending frequently for a myriad of complaints. Notwithstanding this, Dr Heves was quite certain that the plaintiff had made frequent complaints of ongoing left neck and shoulder pain during this period. I accept that this is so. I find that the plaintiff would attend frequently on Dr Heves and complain of several different symptoms on most of those occasions, so that Dr Heves would be in a situation where she had to triage the plaintiff's complaints; deal with, and note, those which appeared most serious, and therefore she did not note those which did not appear so serious.

[11] While the plaintiff may have complained of left neck and shoulder pain frequently enough during this period, Dr Heves did not understand the complaints to be the main topic of her consultation on any of the many attendances, and did not consider the complaints to be very serious. She made no note and took no other action, such as referring the plaintiff to a physiotherapist or prescribing any medication. I think Dr Heves was a conscientious doctor who did the best she could for the plaintiff. After October 2006 she made notes of left neck and shoulder pain and made referrals to various other practitioners to investigate and treat this. After October 2006 Dr Heves prescribed pain relieving medication. Had the plaintiff made any

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[1] (1954) 100 CLR 225; *Williams v Mt Isa Mines Ltd* [2000] QSC 161; *Seage v New South Wales* [2008] NSWCA 328.

serious complaints of left neck and shoulder pain between September 2004 and October 2006, I believe that Dr Heves' notes and actions would have reflected that.

[12] In evidence Dr Heves described Ms Romig's left neck and shoulder pain between September 2004 and October 2006 as "ongoing rumbling pain" – t 3.104. She said that it was something Ms Romig would "mention" – t 4.45. Dr Heves failed to mention it at all in a WorkCover document dated October 2006 – t 4.48. She did not mention it at all in a letter written to the defendant on 25 September 2006. She described it as an "ongoing twinge" in a letter to a physiotherapist – t 4.49. In a referral to a neurosurgeon dated 7 August 2007 she wrote, "In 2004 Lidija suffered a pulled muscle when dealing roulette, when working at the Treasury Casino. There had been a resolution of the pain with physiotherapy. The pain recurred in September 2006" – t 4.52

[13] It was submitted that Dr Heves' documentation (and non-documentation) of the plaintiff's pain between September 2004 and October 2006 were inconsistent and that her letters in the latter part of 2006 showed that she was advocating for her patient. I think that Dr Heves was honest in giving her evidence and that such inconsistency as is evident in her letters and notes is simply a product of her writing in the course of running a busy practice, not anything else. Dr Heves was doing her best to manage a patient who was needy and required more time and attention than was readily available in a general practice. I think she probably was somewhat advocating for Ms Romig in the letter to the defendant of 25 September 2006, but I do not think she was ever providing anything but her honest recollections and views in her letters and in her evidence. It may well be that as Ms Romig's pursuit of this claim grew in significance, so did the 2004-2006 complaints of left neck and shoulder pain assume a greater significance in Dr Heves' mind.

[14] The plaintiff said that she told the manager to whom she directly reported – John Stephan – that she continued to suffer pain between October 2004 and September 2006. Her evidence was that she told him this "all the time" – t 1.72. Mr Stephan could not recall these conversations but did not dispute that she might have told him "a couple of times after October 2004 that she had pain while performing tasks at work" – t 4.74. Ms Romig said that whenever Mr Stephan saw her at work he would ask her how her pain was – t 2.39. I disbelieve this. When Mr Stephan gave evidence it was obvious that he had no memory of Ms Romig complaining to him about ongoing pain. Although he accepted in cross-examination that she may have done so, had Ms Romig complained constantly and with any degree of seriousness to Mr Stephan over a two year period between October 2004 and September 2006, I think it likely that he would have some recollection.

[15] There is a memorandum dated 20 October 2004 as to a review at work which notes that the plaintiff felt constant pain in her left shoulder and neck and complained that any task performed with her left hand caused an increase in that pain. This is just after the plaintiff returned to work and is in the context of her being provided training in using the chipping machine. That memorandum also records that the plaintiff had told the reviewers that she had been given exercises by her doctor and physiotherapist and wanted to follow the advice to exercise. There is a further note from 8 December 2004 that the plaintiff told her manager, Mr Stephan, that dealing was not exacerbating her condition and that, to the contrary, she would like to deal more often to exercise her muscles. He noted that she was using correct techniques at work.

[16] There were records from Ms Romig's workplace that she complained on 31 December 2004, 25 February 2005 and 29 September 2005 that she was sick or injured. These complaints had nothing to do with the 2004 injury. I conclude that, if and insofar as she was suffering pain referable to the 2004 injury through this time, it was not pain which was significant enough to cause her to complain in any formal way to her workplace or ask for time away from the workplace. It appears that when there was something significant enough to make a formal complaint about, the plaintiff did so.

[17] Ms Romig said that there were other witnesses to her suffering at work– she said that she had over 100 Facebook friends who worked with her at the casino in this category – tt 2.40-2-41. None were called. She said she was unwilling to have them involved in the litigation. I find this assertion indicative of Ms Romig's having convinced herself of a position that is not reflective of reality, and exaggerated matters to do with this claim in her own mind (see below).

[18] Ms Romig did not attend at a physiotherapist between October 2004 and September 2006.

[19] Mr Knight, a physiotherapist who treated Ms Romig in 2004 and 2006, gave evidence. I thought he was a careful and impressive professional witness. He said that he had not seen Ms Romig since October 2004 until she presented on 20 September 2006 complaining of left-sided neck pain which extended to her scapular – t 3.43. Ms Romig told Mr Knight that the pain had been ongoing for two years but that it had become more significant about this time, ie, September 2006. Mr Knight administered 10 treatments of physiotherapy ending in December 2006.

[20] Mr Knight thought that Ms Romig's history of the pain persisting since 2004 was consistent with her physical presentation: underlying muscular tension – tt 3.46-3.47; some shortened muscles in the neck, adaptive to long-term pain – t 3.47; and a lack of quick response to treatment in 2006 – t 3.84.

Plaintiff ceases Work

[21] On the night of 8 September 2006 Ms Romig left work before the end of her shift – t 2.30 – and she has not performed paid work since. She said that on 8 September 2006 she was required to deal five left-hand roulette tables, one after the other, rather than rotating, as was the casino's system, from left to right-hand tables. She said:

> "No. I was [al]ready on four roulette tables that night – left-hand side roulette tables that night, prior to be[ing] placed – the pit [boss] – came to be me while I was still dealing on the fourth left-hand side roulette table in that night, and said, Lidija, after your next break, you don't have to come to pit 2 to check what table you are rostered on, go down to pit 6 because that's where they need a dealer after your break. And in my mind – because I haven't been down to pit 6, which is, you know, in the dungeon, we call it – the particular number table that he said, in my memory, was a right-hand side roulette. So – but I already had a migraine. So in that break, I took – you know, because I said, oh, you know, I will just say something. If after my next break it's a left-hand side table again, I will say something. But I had the migraine anyway. So I took the migraine

> pill – the Zomig pill – and, you know, in my break and I thought, well, thank God, this is a right-hand side. And as I came to the table, the other table that was – right-hand side was gone and there was a left-hand side table there. And I said – I'd said – I just – I couldn't spin the ball. It wasn't just chipping the machine. After the initial injury in 2004, it was – everything was painful. Spinning the ball, retrieving the chips out of the chipping machine, holding the folder as a floor manager, writing – everything was causing me more and more pain."

[22] In evidence, Ms Romig said that when she decided to leave there were no staff in attendance for her to report to, so she said to the security guard, "I have a migraine and I also have a very sore back and neck and I am going home" – t 2.32. This is a version contrary to the signed application for compensation, exhibit 22. This form was dated 27 September 2006 and claims that the injury of 8 September 2006 was reported to John the floor manager and Ian the pit boss at 11.00 pm on 8 September 2006.

[23] Ms Romig then took sick leave until she ran out of sick leave. She tried to be reassigned so that she worked earlier hours. There is some suggestion that she tried to get a different type of work, but this really was not clear in the evidence – tt 2.56-2.57. The defendant had a record of a telephone call with the plaintiff on 26 September 2006 during which Ms Romig requested a shift change.

[24] The plaintiff had Dr Heves write to the casino asking for an earlier shift and mentioning medical problems, but not problems about her left arm and shoulder. That letter was dated 25 September 2006, it said, "Ms Romig has requested I write to you, regarding her health. She appears to have suffered many more medical problems since commencing night duty, five years ago." The letter asked for Ms Romig to be moved off night shifts. As I say, while I accept that Ms Romig had made mention of her left neck to Dr Heves during the period between September 2004 and September 2006, there was no major complaint during that time to Dr Heves. Thus I interpret the letter of 25 September 2006 as not referring to this. Apart from anything else, it would make no difference to neck pain what time the plaintiff worked her shift.

[25] Even in her evidence Ms Romig did not squarely put her failure to return to work on the basis of her left arm and shoulder injury – see [21] above. She said she had to leave, "because I was not able to continue working as I did" – t 2.56. Further she said, "After the original accident and after the – particularly after that 8th of September in 2006. I was just really unwell. So I knew there was something really major – not just the muscles – and that I just could not continue like that." – t 2.57.

[26] When cross-examined on the basis that her requests to the Casino in September 2006 were not to be taken off roulette tables, and not to complain about the injury to her left shoulder and arm, but to get earlier hours of work, Ms Romig explained that she thought earlier hours would ease her sleeplessness and headaches – tt 2.57-2.58. She blamed both her sleeplessness and headaches on her 2004 injury. However, the medical notes clearly document that she had a long history of complaining both of sleeplessness and headaches before 2004.

[27] On 15 September 2006 the plaintiff saw Dr Heves, but there is no note of any complaint about work-related injury or the incident on 8 September 2006. Dr Heves said that Ms Romig attended on 15 September 2006 and that there were many problems listed in her notes as being discussed that day: birth control, menstrual irregularities, toenails, breasts, muscle aches, mood, and a request for migraine medication – t 4.37. Dr Heves said that she went back on 25 September and annotated her notes for 15 September to the effect that Ms Romig had mentioned neck pain that day but Dr Heves had not been able to attend to all her problems – t 3.106. I accept this evidence from Dr Heves. However, I find that Ms Romig did not complain of serious neck pain that day, for had she done so, Dr Heves would have noted it – my view is that she was a responsible and attentive doctor. Dr Heves said she made the annotation to her earlier notes because on 25 September she was asked to provide a certificate – t 3.106. I accept Dr Heves' evidence about this was truthful.

[28] Ms Romig filled out an employee incident report form on 27 September 2006, ie, 19 days after she left work. On this she claimed that she had suffered an injury "dealing left hand side roulette in pit 6" and described the injury as "left shoulder and neck muscular strain" – exhibit 21. An application for compensation was filled in that day and is consistent with that description – exhibit 22.

Plaintiff's History after Leaving Work

[29] In September 2006 Ms Romig re-attended at a physiotherapist, Chris Knight, as discussed above.

[30] After September 2006 Ms Romig's medical notes do focus on the pain she complained of in her left neck and shoulder. Dr Heves referred her to Dr Philip Watson, a musculoskeletal physician, and to neurosurgeons. They recommended against surgery, and indeed both Dr Weidmann and Dr Campbell gave evidence that they did not think Ms Romig was a candidate for surgery. She was referred to a rheumatologist and a pain physician, neither of whom offered any solution. She was prescribed increasingly strong pain killers. In 2007 an MRI was performed and it showed degenerative changes to her neck and a disc protrusion at C5/C6. On 14 October 2008 surgery fusing her C5/C6 vertebrae was performed and was largely successful in that it eliminated the pain and other symptoms radiating down the plaintiff's left arm and allowed her to stop taking strong prescription pain killers – she now takes only Panadol and non-steroidal anti-inflammatory medication for her ongoing pain tt 1.55 and 1.60.

[31] A report from a general practitioner, Dr Higgins, was admitted by consent, exhibit 27. Dr Higgins has passed away. His report was admissible pursuant to s 92 of the *Evidence Act.* I do not rely upon it in coming to conclusions as to either the symptoms Ms Romig suffered between 2004 and 2006 or her condition at the end of 2006. Necessarily the report from Dr Higgins is hearsay and, of course, he could not be cross-examined. I prefer to rely upon the evidence of witnesses who could be cross-examined and who deal with this very topic in some detail – the plaintiff herself, Chris Knight, Dr Heves and Mr Stephan.

Plaintiff's reliability

[32] I thought Ms Romig had developed well-entrenched negative attitudes towards the 2004 incident, its sequelae, and the casino in general. These matters have become

exaggerated in her mind. She made emotional statements and exhibited an undue focus on those matters and associated matters. She claimed, for instance, that in 2004 the casino, or WorkCover, had denied her four hours pay on the six occasions she worked reduced hours – for example t 2.54. Complaint about this trivial matter recurred in her evidence, as did emotional language such as graveyard shift – for example, t 2.35, or reference to the dungeon – see the above extract from t 2.58. At one point in her evidence Ms Romig exclaimed, "I gave my life to the casino and look what they're doing to me" – t 2.62.

[33] I see her evidence as to her performing work on left-hand tables as highly exaggerated and a product of these attitudes. Ms Romig said that between 2004 and 2006 she was frequently asked to work on a disproportionate number of left-hand tables, because she was an experienced dealer – for example tt 1.43, 1.44, 1.54, 1.55, 2.28, 2.42 and 2.43. The system at the casino was that dealers were rotated, turn about, from left-hand tables onto right-hand tables – t 4.68. I do not accept that, contrary to the system which pertained throughout the whole casino, Ms Romig was made to deal on significantly more left-hand tables than right-hand tables. Ms Romig could offer no explanation as to why she was so frequently on left-hand tables, except that she claimed she was more experienced than other dealers and this somehow influenced things – see for example t 1.44. Her supervisor, Mr Stephan said that if a strong game was taking place on a particular table the dealer may work that table for two turns, rather than rotate. However, that would not happen very often and would only happen for that reason – not for reasons of experience – t 4.68. I thought he gave evidence in a fair, straightforward way and I accept his evidence in preference to that of the plaintiff.

[34] Ms Romig's evidence about medical matters was odd and unsatisfactory insofar as she seemed unwilling to discuss past history involving depression and medication for that.[2] This was in relation to times well before the 2004 incident – see tt 2.5, 2.6, 2.8, 2.9, 2.10, 2.13 and 2.14. There seems no doubt that she was prescribed antidepressant medication over many years before and after 2004. She denied knowing that some drugs were antidepressant medication, and denied that she took them, even accepting they were prescribed. Generally Ms Romig claimed to have allergies to antidepressant medication, anti-inflammatory medication, antibiotics and what she called hormone tablets – tt 1.54, 1.69, 2.6, 2.12, 2.14, 2.16, 2.25, 2.26, 2.27, 2.28, 2.30. There was no medical evidence that she did have any such allergy.

[35] From the medical records it was clear that Ms Romig did have a history of attendance upon medical practitioners for psychiatric symptoms such as depression and anxiety and sleeplessness over many years before and after 2004 – tt 2.7, 2.8, 2.9, 2.10, 2.12, 2.13 4.2, and 4.22. Her condition was serious enough at times – there is mention of suicidal ideation in 1996 – t 4.52. She scoffed at, or made light of, suggestions that this was serious when giving her evidence. She also suffered depression in October 2005, shortly after returning from long service leave – t 2.28. She has complained of, and been treated for, psychiatric symptoms since 2006. From 1996 there were also many consultations about the plaintiff not sleeping and requiring medication to sleep – tt 4.6-4.7. Throughout the period 1996 to 2004 Ms Romig presented several times complaining of migraine, for which she was prescribed medication – t 4.8.

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[2] She also would not discuss this with Dr Cantor when he examined her, see below.

Cause of Prolapsed Disc

[36] There was variation in the understanding of the medical professionals (treating and expert) as to the exact mechanism by which Ms Romig had suffered injury on 10 September 2004: see the evidence of Mr Knight, Mr O'Sullivan, Dr Todman and Dr Weidmann. Dr Campbell's view of the matter does not hold any weight as he did not take a proper history from the plaintiff, but relied on information sent to him by solicitors. Dr Kent did not give evidence, and his letter in support of time off work does not set out to describe the incident which caused the injury. Dr Heves could not be sure that she ever heard the version of events given by Ms Romig in evidence until 2006 – tt 4.23, 4.42 and 4.45, but she was not really concerned with the treatment of any complaint as to the plaintiff's neck until 2006.

[37] Notwithstanding all this, and my views about her reliability, I accept that Ms Romig did suffer injury on 10 September 2004 at a time when she was removing chips from the chipping machine in the way she had been doing, untutored, since 2000. I accept that she picked up chips out of the machine in the way she described. There is no doubt that she injured her left neck that night while dealing roulette. Mr O'Sullivan's evidence is that her method of picking chips out of the chipping machine was something which might cause injury to the part of her neck which was injured.

[38] None of the medical professionals who gave evidence was of the view that the exact mechanism of injury described by Ms Romig was essential to their conclusions and opinions, and it may be that is the explanation for their not paying so much close attention to it as lawyers. They were all of the view that Ms Romig had likely suffered a prolapsed disc on 10 September 2004 in the course of reaching across the chipping machine to pick up chips with her left hand. In my view the plaintiff's untutored use of the chipping machine, either over time from 2000 until 10 September 2004, and/or particularly on 10 September 2004, was the cause of that prolapsed disc on the balance of probabilities.

[39] Mr O'Sullivan was a physiotherapist jointly briefed by both plaintiff and defendant. Mr O'Sullivan impressed as a reliable and careful professional who gave reasoned evidence which seemed logical. His view was that using the hand with the thumb down and fingers up while reaching down and across the chutes in the chipping machine caused the shoulder to rotate forward. He said that involved the muscles that attached at the neck and put tension on the nerves at the C5 and C6 vertebrae – t 2.81. Mr O'Sullivan also said that rapid movement was always more stressful to the body than slow movement – t 2.82. He said that repeatedly stretching across the chipping chutes over time might cause cumulative damage and instability and then cause symptoms – t 3.6. He thought that most disc ruptures were as a result of cumulative damage like this – t 3.7. The movements which Mr O'Sullivan says are likely to put strain on the C5 and C6 vertebrae are those which the plaintiff adopted untrained and used for some years before 10 September 2004. They are the movements which were corrected when training was provided after the injury was suffered – the plaintiff was taught another way to use the chipping machine.

[40] Dr Todman gave evidence for the plaintiff. He obtained an MRI in 2007. That showed a disc protrusion at C5/C6. It was Dr Todman's opinion that the protrusion probably occurred in the incident described by the plaintiff on 10 September 2004 – see his second report.

[41] Dr Weidmann, for the defendant thought the type of activities described by the plaintiff may well have provoked the onset of the plaintiff's symptoms, describing those activities as the straw that broke the camel's back. He described their persistence over time as "more a reflection of the underlying degenerative condition rather than the action they [sic] were undertaking at the time." – t 3.87.

[42] Dr Scott Campbell, a neurosurgeon, gave evidence. His report was perfunctory and gave mixed conclusions of fact and law, in effect swearing the issue. This approach was also apparent when he gave oral evidence – he seemed to assume the role of an adjudicator, speaking of what the evidence was and what conclusions could be drawn from it. It was clear that he had never taken a proper history from the plaintiff – t 3.67 – and he did not know what the plaintiff did on 10 September 2004 – t 3.68. His view was that the plaintiff did suffer a prolapsed disc on 10 September 2004, he saw her radicular symptoms – pain radiating down her left arm and pins and needles in her left arm - as strongly supporting this.

[43] On all the evidence it seems that Ms Romig did suffer a prolapse of her C5/C6 disc on 10 September 2004. The history she gave of symptoms radiating down her arm immediately and subsequently to this make it more probable than not that this injury was the prolapse of the disc which shows on the MRI taken in 2007.

Psychiatric Injury

[44] The plaintiff's case was that she had a chronic pain disorder associated with the injury to her cervical spine. The plaintiff relied on the report of Dr Chris Cantor in support of this. Dr Cantor gave evidence and my impression is that he was thoughtful and attentive to the plaintiff's condition. There are two difficulties with his opinion. The first is that Ms Romig was not co-operative with him in the sense that she gave a false past medical history, denying any history of mental health problems - see p 13 of his report - and would not, or could not, discuss matters relating to her psychological state despite repeated questioning - see p 16 of his report. No doubt problems such as these are not unique, and Dr Cantor certainly rejected the idea that they prevented him performing his function.

[45] However, the second problem affecting the report is more fundamental. The plaintiff's counsel made no attempt to prove many of the factual premises on which Dr Cantor proceeded. This is despite my having drawn that specifically to counsel's attention before the plaintiff finished her evidence - tt 2.32-34 – and my drawing counsel's attention to the case of *Makita (Australia) Pty Ltd v Sprowles*.[3] My concerns in this regard are not technical but go very much to the basis upon which Dr Cantor proceeded.

[46] His report begins substantively at p 11 of 22. On that page there are three paragraphs under the heading, "Social" as to Ms Romig's early life; relationship with her biological father; poor relationship with her stepfather and poor relationship with her stepsisters. None of this information was proved. There is a one line paragraph under the heading, "Psychiatric" which was not proved. Under the headings "Infancy" and "Education" (first paragraph) is more material which was not proved. Under the heading "Sexual/Marital", the first two paragraphs contain information which was not proved. Nor was the work history described in the paragraph beginning at the end of page 12, "From December 1984 …

[3] [2001] NSWCA 305.

Canterbury Family Centre, Camberwell". The information at p 13 under the heading, "Premorbid Personality" was not proved. The information as to past psychiatric history was proved to be significantly understated. The information at p 14, under the headings, "Medical" and "Medications" was either not proved or was inaccurate in that it was substantially understated. Nearly all the information beginning at the end of p 15, last paragraph, "She coped reasonably …" until the end of p 16, "…buying new clothes", was not proved or, facts inconsistent with this history were proved.

[47] These matters were very important to Dr Cantor. He devotes much of the second paragraph under the heading, "Summary" - p 17 - to reviewing matters which were not proved. At p 19 of his report under the heading, "Please identify if possible any trigger factors or causes of any psychiatric injury diagnosed" Dr Cantor really gives the crux of his opinion. It is very much based on matters not proved, or matters which Ms Romig told him which were proved to be incorrect. There are four paragraphs at that section of his report. In the first he begins by stating that the diagnosis of chronic pain disorder in a medico-legal context "is often somewhat speculative". He goes on to say that even in a clinical setting, a psychiatrist must be tentative about such a diagnosis. Then he concludes "on the balance of probability" that Ms Romig has such a disorder saying, "it is well recognised that there is an association between childhood neglect and/or abuse and later chronic pain problems …". This early childhood information was not proved by the plaintiff.

[48] The second paragraph at this section of Dr Cantor's report deals with Ms Romig's social work, which was proved, but not in the detail in Dr Cantor's report, and her caring for stray pets, which was not proved. The third paragraph deals with Ms Romig's marriage breakdown and the problems she had with her ex-husband. The factual basis for this was not proved.

[49] In accordance with the principles in *Makita v Sprowles* (above) I am not prepared to act on Dr Cantor's opinion because it is so substantially based on matters which were not proved.

Effects of Injury to Neck

[50] The September 2004 injury caused Ms Romig to have two weeks away from work and then two weeks on half duties. The injury then caused her some minor symptoms until 2006.

[51] From October 2006 until October 2008, when surgery was performed, the prolapsed disc caused Ms Romig far more difficulty than it had in the past. The evidence of the neurosurgeons was that symptoms from a prolapsed disc do tend to come and go and indeed that is why both Dr Campbell and Dr Weidmann were (wrongly as it turns out) of the view that it would be best to treat this prolapsed disc conservatively.

[52] There is a conflict in the evidence as to whether Ms Romig's neck symptoms caused her to leave work in September 2006. I find that they were a material cause of her doing so. The letter of 25 September 2006 which Ms Romig asked Dr Heves to write, is to the contrary, so are Ms Romig's oral requests of about that time to work as a dealer, but with earlier shifts. The lack of emphasis on her neck symptoms by Ms Romig in her consultation with Dr Heves of 15 September 2006 is against her, and puzzling.

[53] On the other hand, Mr Knight's evidence is that she was experiencing neck and scapular symptoms in September 2006 and Dr Heves' notes, particularly through to January 2007, show an unusual and sustained focus on one type of complaint – neck and scapular symptoms. These complaints are documented and there was no suggestion that the plaintiff was not genuinely suffering these symptoms. Dr Weidmann was initially of the view that her symptoms at this stage were not referable to the September 2004 neck injury, but was later convinced that they were because of the objective evidence in the MRI and because of the beneficial effect of surgery. That is, not only did the plaintiff make sustained complaints of neck and scapular symptoms from late September 2006, the medical evidence is that she had reason to do so.

[54] It seems that Ms Romig stopped working because of an accumulation of factors. I find that psychiatric problems and stresses, which are clearly documented as troubling Ms Romig from 1996, also played some part in her decision to stop work from September 2006. I see these as something independent of her neck injury. As well, she was a single mother trying to work night shifts. Mr Stephan's recollection of Ms Romig was that she always seemed tired, although he added that nearly everybody who worked the night shift seemed tired. Nonetheless, Ms Romig had managed to work consistently notwithstanding all these problems over a considerable time. In those circumstances it seems to me that the increase in symptoms she experienced from her prolapsed disc in September 2006 was a material cause of her leaving work and remaining unable to work at the casino dealing roulette after that date.

[55] Ms Romig's evidence was that she had worked voluntarily at several places: Visitor Information Centre Beenleigh; Kingston Women's Wellness Centre; Loganholme Meals on Wheels; Salvation Army Store at Eagleby and PCYC at Tudor Park as a reception volunteer. It seems that this work was part-time – see t 1.58, but it also seems that she persisted with it for quite some time in some cases. There was no suggestion that the work aggravated her neck symptoms.

[56] Ms Romig said she had applied on the internet for some social working positions but had been unsuccessful – t 1.60. She gave no evidence that she had made any serious or sustained attempt to obtain social work or any other paid positions.

[57] The plaintiff's evidence was that the 2008 surgery had helped her greatly. Neither Dr Campbell nor Dr Weidmann would have recommended surgery for Ms Romig. Dr Campbell said that the surgery had failed – t 3.78 – but this was another factual error on his part. Dr Weidmann accepted that the operation was successful and said the plaintiff's history that she had lost pain and other symptoms in her arm as a result of the surgery is the result which would be expected of successful surgery – tt 3.89-3.90, 3.94, 3.95.

[58] Ms Romig said that she currently takes only Panadol or Aspirin for pain in her left neck and shoulder – t 1.55. She said she weaned herself off stronger painkillers after the surgery. She also takes Celebrex and Naprosen – t 1.60 – and sleeping tablets – t 1.60. She took sleeping tablets from well before 2004. She estimates she spends $20 per month on medication – t 1.62 – and that she attends at the physiotherapist once per week. There is no doubt that Dr Heves' notes record consultations about left neck and arm pain after October 2008.

[59] Notwithstanding this evidence of minimal medication, Ms Romig's evidence was that because of her injury she experienced pain in her left arm during virtually all activities of daily living – cooking, washing up and doing her hair – t 1.58. She said it was painful to reverse her car – t 1.58. She said that she does vacuum but has not done the windows "or anything" for years – t 1.63. She says people assist her with the garden – t 1.63. She says she takes her dogs for walks. She gave very little detailed evidence beyond this. There was no attempt to explain that she could not work or that she experienced difficulties when working voluntarily. There was certainly no attempt made to explain why she had not persisted with attempts to obtain work for which she was professionally qualified.

[60] Considering all these matters, I am not persuaded that Ms Romig suffers any significant ongoing pain. I think her situation post-surgery is probably much like that which she was in between October 2004 and September 2006. That is, I find she probably has some minor ongoing symptoms from her prolapsed disc but they are not of the extent she described, however vaguely, in evidence. They are of an order consistent with the amount of analgesics she uses. Dr Weidmann described the plaintiff's disc prolapse as minor – t 3.94, and this was not challenged. I reject Ms Romig's evidence to the contrary, including to the extent complaints are documented in Dr Heves' notes after October 2008. I think that Ms Romig was unreliable as to this because of the matters I discuss at [32]-[35] above. I do not think she was deliberately untruthful.

[61] It may be that some of the headaches Ms Romig experiences are associated with her left neck symptoms – Dr Todman's view was that headaches are commonly encountered in association with injury to the cervical spine. On the other hand, Ms Romig had a long history of having suffering headaches before the 2004 incident. She did not give any clear evidence that this situation materially worsened after it. The same could be said for her insomnia. I cannot be confident enough to make findings in relation to either of these matters.

[62] There is no doubt that Ms Romig is disabled from work which would put strain on her cervical spine. Both Dr Todman and Dr Weidmann are of the view that she would be unable to return to the type of work she had dealing roulette at the casino. In 2007 Dr Todman's view was that "any return to the workplace would be dependent on improvement with further treatment". There has been improvement in Ms Romig's symptoms due to surgery. Dr Todman does not seem to recognise that in his later report of 17 August 2007 and simply repeats exactly the same sentence as to return to work as I have just quoted. This is despite his recognising that surgery did effect an improvement in Ms Romig's symptoms. Dr Todman certainly does not give any opinion that Ms Romig could not work in employment which did not aggravate her neck. Dr Weidmann's report of 12 March 2009 says that she should be medically fit for any employment not requiring heavy lifting or bending and not requiring extended or repetitive use of her left arm. He reports that Ms Romig felt that she would be able to work as a floor manager at the casino but not a dealer and he agreed with that idea – paragraph 8.5. Dr Weidmann said Ms Romig's employment options were "somewhat limited", but seemed unaware of Ms Romig's professional qualifications.

[63] Allowing for time to recover from the effects of surgery and to reduce the amount of pain medication which she was taking, I cannot see any reason why Ms Romig has

not been able to return to work, either in her professional capacity as a social worker or some other sedentary capacity from April 2009.

Assessment of quantum

[64] The plaintiff suffered from sufficient pain to interfere with her work for one month starting on 10 September 2004. She then suffered from minor pain from time to time until September 2006. Between September 2006 and September 2008 Ms Romig suffered considerable pain from her left neck, scapula and arm. She was required to take strong painkillers and undergo surgery to alleviate it. The plaintiff's level of pain now is similar to that which she experienced during the period October 2004 to September 2006. That level of pain cannot be expected to improve.

[65] In this case Dr Todman assessed this lady as having an 8% impairment on the AMA 5 guidelines on 5 June 2007. This was before the MRI and before the surgery. At this point he assessed her as being in DRE category 2 viz, "chronic musculo-ligamentous strain to the cervical spine". In his report of 17 August 2010 he noted that the plaintiff had undergone surgery and that this had led to an improvement in her symptoms. Illogically, that resulted in a higher categorisation under the AMA 5 guidelines as DRE3, "patients who have had surgery for radiculopathy" and a 16% impairment assessment by Dr Todman. Dr Weidmann agreed with the result caused by the application of the AMA 5 scales and agreed it was illogical - see his report of 12 March 2009 and his oral evidence. He thought she had a 15% impairment on DRE3, but that only half of that was due to the prolapsed disc, with half being due to degeneration.

[66] I have regard to the real evidence as to incapacity, pain and discomfort rather than the illogicalities produced by the AMA 5 guidelines.[4] I assess general damages at $30,000. I assess interest on half that amount at a rate of 2% over a period of 9.59 years at $2,877.

[67] The plaintiff's net income in the 2004 financial year was $15,318. Her plans were to work part-time until her son finished school and then from January 2008 to return to full-time work. I find that the plaintiff was unable to work due to her injury from 8 September 2006 until April 2009. At that point I find that she was able to work, not as a roulette dealer, but in some sedentary position, say as a social worker.

[68] As to past economic loss I assess 16 months loss from September 2006 until January 2008 on the basis of the plaintiff's working part-time and 15 months loss on the basis that the plaintiff would have been successful in obtaining full-time work at the Casino. I use the net annual figure of $37,137 to assess the full-time wage – see exhibit 40 and paragraph 21.7 of the plaintiff's submissions. It was conceded by the defendant that there was a loss of $1,580 in relation to the four week period of disability in 2004 – paragraph 5 defendant's supplementary submissions on loss and damage. This gives a figure of $68,425.25 ($1,580 + $20,424 + $46,421.25). I allow interest on past economic loss at 5% for 5.5 years from April 2009, $18,816.94.

[69] After March 2009 the plaintiff would have needed to find employment in a sedentary role, perhaps in her profession of social work. I accept that she was at a

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4 *Driver v Stewart & MMI* [2001] QCA 444, [13].

disadvantage generally in looking for work in her profession by reason of her having spent the years 1995-2006 working at the casino, rather than in her profession. Inevitably I conclude that she would also have been at some disadvantage in the employment marketplace because of her age, she would have been 46 in 2009. I am satisfied that this global disadvantage is as a result of the defendant's breach: were it not for the effects of the breach the plaintiff would probably have continued working at the casino where her performance was satisfactory and she had the advantage of experience and length of employment. Doing the best I can to assess the disadvantage to the plaintiff in the marketplace I put it at the equivalent of two years full-time salary over the period between 2009 and Ms Romig's retiring from a sedentary occupation at age 65. There was no evidence of what the plaintiff might have earned in a sedentary occupation. Doing the best I can in those circumstances I allow $80,000.

[70] I allow a loss of past superannuation benefits at the rate of 9% – $6,158.27 – and at 11% in relation to future superannuation benefits, $8,800.

[71] It was conceded that there was a *Fox v Wood* component allowable to the plaintiff of $48.20 – paragraph 13 defendant's supplementary submissions as to loss and damage.

[72] The plaintiff and defendant agreed an amount of past pharmaceuticals and travelling expenses at $2,000. The evidence was that there was a refund due to Medicare Australia in the amount of $12,800.25; to Tabcorp in an amount of $2,128.65 and to the Princess Alexandra Hospital in relation to the fusion surgery of $3,052. That is a total of $19,980.87 for special damages. Interest on the amount of $2,000 at 5% for a period of 9.5 years is $950.

[73] The plaintiff claimed an amount of $5 per week for medication for 19 years. Discounted that gives an amount of $3,231. A further amount of $1,000 was claimed for physiotherapy expenses. I allow this amount of $4,000 in total for future special damages.

[74] The plaintiff did not prove a claim for gratuitous services which met the requirements of s 59(1) of the *Civil Liability Act* 2003.

Plaintiff's Vulnerability to Injury

[75] The 2007 MRI showing the disc protrusion showed disc degeneration at C5/C6, with disc-space narrowing. This narrowing was something Dr Todman considered had occurred over time – t 3.30. His view was that a disc protrusion was more likely once there was such narrowing – t 3.30. In other words, Dr Todman thought that there had been degeneration over time which gave rise to a greater likelihood of a disc protrusion. In that respect his evidence is consistent with that of Dr O'Sullivan (above). Dr Weidmann, for the defendant, was of the same view. Dr Weidmann's view was that the degeneration shown in the MRI preceded the protrusion, and he could well understand that a traumatic event might, in a spine with that degeneration, cause a disc prolapse – t 3.94.

[76] Dr Weidmann thought that activities undertaken by the plaintiff while dealing roulette would "certainly not cause an injury in a normal healthy person" – t 3-87. Mr O'Sullivan's view was the same: that the movement involved in stretching across the chipping machine chutes and picking up chips with the thumb down and

fingers up was never going to cause damage to what he called a pristine disc, well-supported by vertebrae and ligaments – tt 3.5 and 3.7. That is, he sees the injury caused by using this technique as one which needed some degeneration in the spine as a pre-condition to its occurring.

[77] Dr Weidmann thought that it was "highly unlikely" that Ms Romig would have continued without developing disabling symptoms from her neck. He said, "If we accept that she developed such disabling symptoms from an aggravation of a degenerative [condition] – and if we accept that what she did do constituted an aggravation, well, then, we still have to accept the aggravation was of a very minor nature. … and therefore it's highly likely she was going to develop symptoms in any event." – t 3.88. In his second report he said that he thought that the degeneration in Ms Romig's spine would have led to a "similar outcome" as the 2004 incident within three to five years of September 2004 – paragraph 8.2

[78] Dr Campbell said that prolapsed discs are not often the result of degeneration – tt 3.65 and 3.66. I prefer the evidence of Drs Weidmann and Todman and the physiotherapist, Mr O'Sullivan. Both Dr Todman - t 3.30, and Dr Weidmann – tt 3.96-97 explained the process of degeneration and its relationship with disc prolapse. They gave reasoned explanations for their views in this regard. Dr Campbell did not.

[79] I find that Ms Romig had degeneration in her cervical spine such that there was a relatively high chance that she would have suffered a prolapsed disc caused by something other than the breach of duty by the defendant. Damages awarded to Ms Romig must be discounted to allow for that significant contingency in addition to the usual discount for potential vicissitudes (for which a 15% discount is commonly made). For this reason I discount future economic loss and loss of superannuation by 30%.

[80] In summary then, I assess quantum as being $213,416.53 made up in the following way:

General damages	$30,000.00
Interest on general damages	$2,877.00
Past economic loss	$68,425.25
Interest on past economic loss	$18,816.94
Loss of past superannuation entitlement	$6,158.27
Future economic loss	$56,000.00
Loss of future superannuation entitlement	$6,160.00
Past special damages	$19,980.87
Interest on past special damages	$950.00
Future special damages	$4,000.00
Fox v Wood component	$48.20
Total	**$213,416.53**

[81] I will hear the parties as to costs.