SUPREME COURT OF QUEENSLAND

CITATION:	*Tabcorp Holdings Ltd v Dank* [2011] QCA 253
PARTIES:	**TABCORP HOLDINGS LIMITED** ACN 063 780 709 (appellant) **v** **KATHRYN JANE DANK** (respondent)
FILE NO/S:	Appeal No 1645 of 2011 DC No 410 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	23 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where the respondent sustained a back injury at work when lifting a box of photocopy paper from the floor to her desk – where the respondent did not receive training in respect of lifting techniques or storage of boxes – where the respondent was not given directions or instructions as to how to lift the box or not to lift it from the floor – where the respondent had lifted boxes in the same manner many times before – where the respondent's supervisors were aware of her manner of lifting the boxes and assisted her with lifting them at times – where the trial judge found that the respondent's injury was caused by the appellant's negligence – where the appellant contended that the trial judge erred in finding that the risk of injury was foreseeable and known to the appellant – whether the risk of injury was reasonably foreseeable – whether the trial judge's erred in the finding of negligence STATUTES – ACTS OF PARLIAMENT – ENFORCEMENT OF STATUTORY RIGHTS AND

REMEDIES – BREACH OF STATUTORY DUTY – DEFENCES – OTHER DEFENCES – where the trial judge found that the respondent had a successful action for breach of the appellant's statutory duty to ensure the workplace health and safety of the respondent under the *Workplace Health and Safety Act* 1995 (Qld) – where the appellant argued that the trial judge erred in failing to find that it had discharged its duty under s 22(1)(b) or that it had a defence under s 37 – where the appellant contended that an employer is not liable under the statute where an employee is injured while carrying out an ordinary, everyday task which is not inherently dangerous, provided that its work conditions encourage the employee to deal with such tasks in an ordinary, safe way – whether the trial judge erred in finding the appellant liable for breach of statutory duty

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – LEGAL PRINCIPLES – where the respondent resigned her employment with the appellant shortly after her return to work to take up a career as a carer – where the respondent was restricted in the work that she could carry out as a carer – where there was evidence that the respondent was a highly valued employee and could have continued work with the appellant as a secretary – where the appellant argued the respondent had lost none of her capacity to work as a secretary – where there was evidence that secretarial work stressed the respondent's back – where the respondent subsequently applied for a job with the appellant but was unsuccessful – where the trial judge assessed the respondent's loss of earning capacity by reference to her work only as a carer – whether the trial judge erred in the assessment of the respondent's loss of earning capacity

Workplace Health and Safety Act 1995 (Qld), s 22(1)(b), s 27(3), s 28(1), s 37(1)(c)

Calvert v Mayne Nickless Ltd (No 1) [2006] 1 Qd R 106; [2005] QCA 263, applied
Dank v Tabcorp Holdings Limited [2011] QDC 2, affirmed
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Parry v Woolworths Limited [2010] 1 Qd R 1; [2009] QCA 26, cited
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518; [2000] QCA 18, considered

COUNSEL: W Sofronoff QC SG, with R A I Myers, for the appellant
K N Wilson SC, with K S Howe, for the respondent

SOLICITORS: MVM Legal for the appellant
McCowans Specialist Lawyers for the respondent

[1] **MARGARET McMURDO P:** This appeal should be dismissed for the reasons given by Fraser JA. I also agree with his Honour's proposed orders.

[2] **FRASER JA:** The respondent was employed by the appellant as a secretary. On 8 October 2004 she sustained a back injury at work when she lifted a box of photocopy paper from the floor to the desk in her office. Following a three day trial in the District Court, the trial judge found that the respondent's injuries were caused by the appellant's negligence and breach of statutory duty, and judgment was given for the respondent against the appellant for $239,613.62, with costs.[1]

[3] The appellant challenged the finding that it was liable and the assessment of damages. The notice of appeal included 19 grounds of appeal, but at the hearing of the appeal the appellant confined its case to the following contentions:

(a) In relation to negligence, the trial judge erred in finding that the risk of injury was reasonably foreseeable.

(b) In relation to breach of statutory duty, the trial judge erred in failing to find that the appellant had discharged its duty under s 22(1)(b) of the *Workplace Health and Safety Act* 1995 (Qld) ("the Act") or that the appellant had a defence under s 37 of the Act.

(c) In relation to quantum, the trial judge erred by assessing the respondent's loss of earning capacity by reference to the impairment in her capacity to earn income only as a carer, which overlooked her unimpaired capacity to earn income as a secretary.

Facts

[4] There was no challenge to the trial judge's findings of fact about the accident:[2]

> "The plaintiff was injured at work when she lifted a box of photocopy paper from the floor in her office. The accident happened on Friday 8 October 2004. The plaintiff was employed by the defendant as a secretary where she was highly regarded. I accept the plaintiff's account in evidence as to how she was injured and how she was lifting the box. It was an awkward lift. She was as close as she could get to the box. She had to lean forward and over the box. She bent forward and down at an angle, picked up the box from the floor, turned as she lifted it to put it on her desk to the left as she was straightening up and 'felt a twang in her back'. She was about half way or a bit more up when she felt the pain about two thirds of the way to the top of her desk. The lift is shown in photos 2 and 3 of ex 1. She had to reach forward and down to pick up the box. The box weighed about 12.7 kg. It contained 5 reams of photocopying paper. She was intending to unpack the box once she had placed it on her desk and store the reams in the cupboard under the photocopier. In simple terms it was a twisting lift with the box held at an angle and in this way it exposed the plaintiff to a foreseeable risk of injury. She found the lift 'very, very hard' because she couldn't pick the box up easily. She approached it at an angle. She had received no instructions or directions as to how to lift the box or how not to lift it

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1 *Dank v Tabcorp Holdings Limited* [2011] QDC 2.

2 [2011] QDC 2 at [1] - [2].

> from the floor. She received no training in respect of lifting or lifting techniques, or the storage of the boxes. She was not instructed not to lift the box as she did. … I accept her when she said she never 'thought about' another way to lift the box. She lifted the box as she had always done.
>
> The plaintiff agreed in cross-examination that 'common sense' in 2004 required her to get as close as possible to the load to be lifted so she would be 'stronger'. She didn't, at the time, consider that she was picking the box up the wrong way; she had done it the same way many times before and her supervisors were aware of this and sometimes helped her lift the boxes." (footnotes omitted)

[5] The trial judge preferred the evidence of the respondent's expert witness, Mr McDonald, to the evidence of the appellant's expert witness, Dr Cook, because Mr McDonald was "better qualified, more experienced and better informed about the circumstances of the plaintiff's lift and her position when she picked up the box".[3] The trial judge summarised Mr McDonald's evidence as follows:[4]

> "Mr McDonald said that the horizontal distance from the L5/S1 disc to the centre of gravity of the box was such that the load on the lumbar spine was above recommended limits, above acceptable criteria, and posed a reasonably foreseeable risk of injury to the plaintiff. There was not enough space for the plaintiff to freely orient her body for the lift. The angle at which she could approach the lift was limited by the photocopier (with or without the feed trays) and desk and, because the box was next to the wall she couldn't put her head past the box which increased the reach distance. Mr Howe correctly described the lift as not simple but 'at an angle, awkward, cramped conditions, unacceptable lever distance and a twisting manoeuvre'." (footnotes omitted)

The trial judge's conclusions

[6] The trial judge concluded:

(a) "That she could have moved the box away from the wall and then lifted it in a different way is no answer to the fact that she was not instructed how not to lift boxes such as the one lifted."[5]

(b) The disc prolapse which the respondent suffered as she was lifting the box was due to the negligence of the appellant in that it failed to "instruct the plaintiff not to lift in the way she did", "instruct and ensure that storemen or other employees placed the boxes of paper on her desk", and "have in place a system for storing such boxes at knuckle height."[6]

(c) "It was clearly foreseeable that the plaintiff risked injury should she lift the box from the floor in the way in which she did. The defendant failed to take reasonable care to avoid the foreseeable risk of injury

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3 [2011] QDC 2 at [8].
4 [2011] QDC 2 at [9].
5 [2011] QDC 2 at [1].
6 [2011] QDC 2 at [16].

> to the plaintiff. The steps which the defendant should have taken to avoid that risk were simple, easy and cost free. They were taken after the plaintiff was injured and they should have been taken before. The risk of back injury to employees in lifting objects from the floor was known."[7]

Negligence

[7] In relation to the conclusion set out in [6](c) of these reasons, the appellant contended that there was no evidence to support the trial judge's conclusions that the risk of injury was foreseeable and known to the appellant. In that respect, the appellant relied upon the respondent's evidence in cross-examination that she had picked up boxes of photocopy paper in the same way "on hundreds of occasions" or at least "lots of times".

[8] However there was other evidence on the topic. Mr McDonald reported as follows:

> "Dank's injury was foreseeable in general terms because it was a 12-13kg weight on a floor against a wall, constricted on one side by a photocopier and adjacent to a desk on which the box was eventually placed. This involved the lift of a significant weight from floor level, where the wall resulted in a 'restricted' lifting posture thus not complying with the characteristics of a lift to which the NIOSH 1981 lifting limits apply. See first page 'Lift Graphs' in Appendix II of my original report. The restrictions from the wall would predictably be likely to make the load on the lumbar spine greater. A rotation is required to place the box on the desk. This could involve twisting of the spine and should be allowed for in evaluating this lift."

[9] The appellant submitted that in finding that the injury was foreseeable the trial judge did not rely upon the first sentence of that passage, and that in any event, that sentence established only that the risk of such injury was foreseeable to Mr McDonald. I do not accept those submissions. The trial judge summarised Mr McDonald's evidence in the passage quoted in [5] of these reasons. It is not surprising that the trial judge did not address the issue in more detail, since the appellant's submissions at trial opposed a finding of liability on the different bases that: the trial judge should not be satisfied that the plaintiff was engaged in any lifting at all; the respondent had in fact received training in respect of lifting; and the proper mode of lifting was a matter of common sense, and could be left to the discretion of competent employees without any instructions. In oral submissions, the appellant's counsel emphasised the contention that it was a matter of common sense that the respondent should have got as close as possible to the box before lifting it, or she should have removed the reams of paper within the box one by one rather than lifting the entire box. That submission assumed that it was reasonably foreseeable that the respondent's method of lifting did involve a significant risk of injury.

[10] Further evidence that the risk was reasonably foreseeable is found in Mr McDonald's original report. Mr McDonald summarised his opinion in these terms:

> "Dank is understood to have received damage to her L5/S1 disc as she lifted a 12kg box containing five reams of photocopy paper from

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7 [2011] QDC 2 at [17].

> floor level. The posture adopted by Dank for lifting gave a long lever arm for the box weight, giving a bending moment of over 350kg at her L5/S1 disc. As a result of the box being against a wall, the proximity of a desk and a photocopier, the lever arm was increased. A comparison with the criteria set out in the U.S. National Institute for Occupational Safety and Health's 'Work Practices Guide for Manual Lifting' shows the weight of the box exceeds the criteria for acceptable lift. The movement of the photocopy paper would be within acceptable limits when lifted close in around knuckle height or when individual reams were handled from low level. The NIOSH document was called up in Appendix IV of 'Manual Tasks Advisory Standard 2000' which is an Advisory Standard published by the Queensland Division of Occupational Health and Safety which was part of the Department of Employment Training and Industrial Relations."

[11] In evidence-in-chief Mr McDonald, having explained that the horizontal distance from the L5/S1 disc to the centre of gravity of the box "was such that the load on the lumbar spine was above recommended limits", gave evidence that twisting increased the likelihood of injury although it was difficult to quantify it. Mr McDonald said that "we know that the twisting problem is there and it's best to avoid it completely, but I should say that regardless of any other factor, the twisting is not necessary to anticipate damage in this – in this lift … [b]ecause the load on the lumbar spine, once – just from a straight lift with no twisting, it would be above acceptable criteria."

[12] Furthermore, Dr Cook agreed that it was "well recognised that twisting while lifting exacerbates the risk" and that adding a twist to the lever arm distance increased the risk.[8]

[13] The evidence amply justified the conclusion that it was reasonably foreseeable that the respondent would sustain injury in conducting the lift in accordance with her usual method. The appellant knew that the respondent used that method. The respondent gave evidence that because the box of photocopy paper was constantly left on the floor between the photocopier and her desk she had to approach the box at an angle to pick it up. She said that she could have moved the box out from the wall or to the side, but she did not do so because she could pick it up from the angle and it did not enter her mind that she should get as close as she could to the load. Other evidence explained why it had not entered her mind: that had always been the system; the respondent's superiors had seen her having to lift a box of photocopy paper from the floor in the manner she described and, at times, one of her superiors helped her if she asked; she was never instructed or directed not to lift the photocopy paper directly from the floor or how to lift the photocopy paper; she was not given any training in respect of lifting or the storage of boxes; and she was never instructed or directed to approach or lift the box from the other side and angle. She gave unequivocal evidence that she "wasn't ever trained".

[14] The trial judge accepted the respondent's evidence and the appellant did not submit that his Honour erred in doing so. On that evidence, the trial judge's conclusion in [6](a) of these reasons was correct. The respondent's failure to move the box

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8 [2011] QDC 2 at [8].

sufficiently far away from the wall to avoid the foreseeable risk of injury was attributable to the appellant's failure to fulfil its obligation as her employer to take reasonable care, including by training. As the trial judge concluded in the passage in [6](b) of these reasons, the respondent's injury resulted from the appellant's negligence. It was not contended that the respondent was guilty of any contributory negligence.

[15] The appellant has not established a ground for setting aside the trial judge's decision that the respondent's injury was caused by the appellant's negligence.

Breach of statutory duty

[16] The *Workplace Health and Safety Act* 1995 (Qld), in the form in which it stood when the accident occurred on 8 October 2004,[9] provided in s 28(1) that "[a]n employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking." Section 22(1)(b) provided, so far as is relevant in this case, that workplace health and safety was ensured when persons were free from risk of injury created by any workplace activities. A breach of the statutory duty gave rise to a civil cause of action against the employer in breach.[10] Where there was no relevant regulation, ministerial notice, advisory standard, or industry code of practice dealing with the relevant risk, s 27(3) provided that "the person discharges the workplace health and safety obligation for exposure to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged." Section 37(1)(c) relevantly provided that it was a defence for the person to prove "that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention."

[17] The trial judge found that the appellant had breached its statutory duty to the respondent for the following reasons:[11]

> "For the same reasons that [the plaintiff] succeeds on negligence she must also succeed on the breach of statutory duty relied upon. The plaintiff was injured at work. The defendant failed to ensure that her workplace health and safety was not affected by the conduct of the defendant's business or undertaking. The defendant did not ensure that the plaintiff was kept free from the risk of injury. The defendant did nothing to prevent the risk of injury and cannot avail itself of the provisions of sections 26, 27 and/or 28 of the *Workplace Health & Safety Act* 1995. See *Bourke v Power Save Pty Ltd & Anor* [2008] QCA 225 and *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2000] 2 Qd R 83."

[18] The appellant's contention was that the trial judge erred in failing to find that the appellant had discharged its duty under s 22(1)(b) or had a defence under s 37. The appellant relied upon *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2),*[12] in which an employer was found not liable to an employee who injured her back as a result of shovelling and raking sand for about 25 minutes. An expert called for the

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9 Reprint 5C.

10 *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518.

11 [2011] QDC 2 at [19].

12 [2001] 1 Qd R 518.

employee gave evidence that the work was unlikely to be a problem when handled in normal circumstances, but might pose a problem in the midst of prolonged significant bending, if the wheelbarrow was lifted at a distance from the body, or with twisting and bending while lifting and in the process of wheeling the wheelbarrow. In that case there was an applicable advisory standard under the Act, so the relevant provisions concerning discharge of the employer's obligation or a defence to the contravention were found in s 26(3) and s 37(1)(b). The Court observed:[13]

> "The respondent [employer] will only discharge that obligation under s. 26(3) by:
>
> '(a) adopting and following a stated way that identifies and manages exposure to the risk; or
>
> (b) adopting and following another way that identifies and manages exposure to the risk.'
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> Alternatively, and to similar effect, the respondent will defeat the appellant's claim by establishing the defence under s. 37(1)(b) by showing:
>
> '(i) that the person adopted and followed a stated way to prevent the contravention; or
>
> (ii) that the person adopted and followed another way that identified and managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention;'
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> In the absence of a reasonably foreseeable risk there is no room for further application of the Code. Indeed considerable artificiality attends any attempt to apply the Code of Manual Handling to such a simple ad hoc task. For example, the employer would have no workplace injury records to consult relevantly to such a task. However, whilst such an employer would not be in breach of the requirements of the Code, it would be difficult to say that the employer 'adopted and followed' any stated way of managing the risk under s. 26(3)(a) or s. 37(1)(b)(i).
>
> Accordingly, the respondent's defence can be found only in s. 26(3)(b) or s. 37(1)(b)(ii). The 'other way' that the respondent followed was of course quite informal, but it does not necessarily fail on that score. The employer demonstrated that it was willing to listen to any employee who did not wish to undertake the task, as this is precisely what it did with Ms Jewel. The task was straightforward, ordinary and physically undemanding. It required the removal of a small quantity of sand over a short distance. It provided a suitable shovel and small wheelbarrow. It placed no pressure upon the employee to hurry or to accomplish the task within a particular time. It was a low-risk manual task which was not susceptible to further consultations, inquiries or investigations. In the circumstances, the employer followed another way that gave the same level of protection against the risk as the managerial practices that were recommended in the advisory code would have given. That shows

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13 [2001] 1 Qd R 518 at 538 [69] - [71].

> a defence under s. 26(3)(b). Similarly, the above circumstances show a form of managed exposure to the risk and the taking of reasonable precautions and the exercise of proper diligence to prevent the 'contravention' referred to in s. 37(1)(b)(ii). The contravention, of course, was the failure under s. 28(1) to 'ensure the workplace safety' of the appellant at work."

[19] The appellant referred also to *Calvert v Mayne Nickless Ltd (No 1)*[14] in which Jerrard JA (with whose reasons McPherson JA and Atkinson J agreed) said:

> "The joint judgment held there [in *Schiliro*] that in the *absence* of a reasonably foreseeable risk, an employer was entitled to rely on, for example, s. 26(3) and s. 37(1)(b)(ii) of the 1995 Act, by establishing that the employer had adopted and followed 'another way' of managing exposure to risks that were not reasonably foreseeable. In that particular case that 'other way' was quite informal; it consisted of being willing to listen to any employee who did not wish to undertake the relevant task, which in that case was straightforward, ordinary and physically undemanding and which required only the removal of a small quantity of sand over a short distance, and for which task a suitable shovel and small wheelbarrow were provided. The employer had placed no pressure on the employee to hurry or accomplish the task within a particular time. This Court held that in those circumstances the employer followed 'another way' that gave the same level of protection to that low risk manual task, (which task was not susceptible to further consultations, inquiries or investigations), as would have been given by managerial practices recommended in the relevant advisory code for those tasks.
>
> I consider that once Ms Calvert proved that she was not free from a trivial risk of injury created by her workplace or work activities, as she did, she established the *prima facie* conclusion that Mayne Nickless had breached its obligation to ensure her workplace health and safety. The onus then lay on Mayne Nickless to establish either of the matters specified in s. 26(3), and that it had accordingly discharged its workplace health and safety obligation, or to establish the defence provided by s. 37(1)(b) of that Act."

[20] The appellant submitted that "in the context of a case where the likelihood of injury was not reasonably foreseeable, there may be a prima facie breach – a prima facie contravention to ensure the workplace safety of an employee", but in this case the employer's obligation was discharged or there was a defence because the respondent's task was "an ordinary task which did not require anything further to be done beyond what was done [by the appellant]." In that respect the appellant relied upon the respondent's evidence in cross-examination that she was given assistance with this task when she sought assistance. The appellant submitted that: it followed from *Calvert* that where an employee was injured by carrying out an ordinary task which was carried out on an everyday basis and was not inherently dangerous, "[t]hat is to say it's not reasonably foreseeable that [the] task undertaken by an ordinary human being, adult human being with full capacity, would be likely to injure that person", the employer was not liable under the statute; the statute did not

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14 [2006] 1 Qd R 106 at 133 [86] - [87].

require an employer "to go through the meaningless procedure of maintaining training systems and registers and incident reports"; and "so long as the work conditions are such as not to interfere with the worker's ability to deal with such a task in an ordinary, safe way, that any person would appreciate, then the employer will have adopted another way within the meaning of the statute."

[21] I do not accept the argument. As Jerrard JA observed in *Calvert*, once the employee proved that "she was not free from a trivial risk of injury created by her workplace or work activities … she established the *prima facie* conclusion that [the employer] had breached its obligation to ensure her workplace health and safety", and the onus then shifted to the employer to establish that it had discharged its obligation or to establish a defence. Where the risk is trivial, an employer might readily rebut the *prima facie* liability established by proof of an apparent contravention of s 28.[15] Even so, the appellant did not fulfil that onus.

[22] The appellant's pleaded defence to the alleged breach of statutory duty was that: the appellant "had in place a system of hazard identification, risk assessment and control implementation for all manual tasks at its workplace"; the risk of injury in the particular lift was assessed as being an acceptable risk of injury or was within the safe guidelines for manual handling in the workplace set out in the Workplace Health and Safety "Guide to Manual Handling" and Manual Tasks Advisory Standard 2000; as a result of the assessment, administrative control measures by way of manual handling training were deemed to be appropriate; the respondent was trained in manual handling; and in those circumstances the appellant discharged its obligations to the respondent to protect her from the relevant risk of injury. The appellant did not adduce evidence that supported that case. Nor did the appellant challenge the trial judge's findings that the respondent's supervisors were aware of the manner in which the respondent picked up the boxes and the respondent received no instructions, directions, or training about how to lift the boxes.

[23] The appellant's argument that it discharged its statutory duty or had a defence was also built upon the premise that the risk of injury was not foreseeable, but I earlier concluded that the trial judge did not err in finding that the risk was foreseeable. On the evidence accepted by the trial judge, his Honour did not err in finding that the appellant was liable for breach of statutory duty.

Quantum

[24] Three days after the accident the respondent returned to her work with the appellant but about four months later she resigned to work in her preferred career as a carer. The trial judge found that the respondent was restricted in the work that she could carry out as a carer:[16]

> "Her first steady job in personal care was with RSL Care. She believed she could carry out the work. She couldn't cope with the heavier or more physically demanding cleaning work because of her back and she resigned on 4 December 2006. She remained as long as she did because her employer initially agreed to cut back her cleaning shifts, which happened for a couple of months but then they increased to such an extent that she left. She worked 20-27 hours

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15 *Parry v Woolworths Limited* [2010] 1 Qd R 1 at 15 [31], 16 [36].

16 [2011] QDC 2 at [37].

> a week for RSL Care. Her back prevented her from working more hours. See also ex 15 which I accept. She found her employment with Ultimate Personal Care Services more onerous than the earlier job because she was looking after paraplegics and the work was too heavy for her. She couldn't handle the work involved. Her current employment with Spiritus Care Services is easier as a separate team does the cleaning work. Her supervisor is aware of her back problems and the restrictions they place on her. She only does light cleaning and her job is permanent casual. She works all the hours she wants to. She doesn't think though that she could work a 40 hour week. But for her back pain she would work more hours each week, up to 40." (footnotes omitted)

[25] The respondent's impaired condition was not known to senior management in her current "supportive environment".[17] The trial judge assessed damages on the following basis:[18]

> "Her injury has clearly restricted and limited her earning capacity and the employment opportunities open to her. Her loss in this area is to be approached on the basis of her present employment (it not being unreasonable for her to have left her employment with the defendant for a career in aged care) and her impaired capacity, both past and for the future, to carry out that type of employment.
>
> She is clearly at a disadvantage on the open labour market. There are aspects of aged care work that she can't do - mainly heavy work. Her present employment persists in a supportive environment. She will probably have to stop working, because of pain and related restrictions, in two years time. I am satisfied that, but for the accident she would have worked until about age 60 years. I think that pain will cause her to stop working altogether in about two year's time at which time she will not be able to work."

[26] On the footing that what was to be measured was the respondent's impaired capacity to carry out employment as a carer, the trial judge assessed the respondent's economic loss as follows:[19]

> "The evidence as to hours worked or not worked is a little bit fluid and not particularly specific. Mr Johanson's figures are based on a 38 hour working week. I think the evidence establishes a loss to date during her employment with RSL Care (21 June 2005 – 4 December 2006 - 76 weeks) and Spiritus Care Services (3 July 2007 to 31 January 2011 - 190 weeks) of about 10 hours per week for a total of 266 weeks.
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> I accept Mr Howe's average net hourly rate of $13.86 (based on Mr Johanson's figures) as an appropriate figure for calculations. 266 weeks at $138.60 per week amounts to $36,867.60. Interest on $36,867.60 at 5% for this period is $9,427.04. Past lost superannuation on $36,867.60 at 9% is $3,318.08.

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17 [2011] QDC 2 at [45].
18 [2011] QDC 2 at [55] - [56].
19 [2011] QDC 2 at [57] - [60].

…

> Mr Johanson's current net hourly figure of $15.63 should be used for calculating future economic loss on the basis of a continuing loss of about 10 hours per week for the next two years after which I find she will probably not be able to work at all because of her back. But for her injury I think she would, discounting for contingencies, have continued to work unrestrictedly until about age 60.
>
> She is thus entitled to future economic loss calculated at $15.63 per hour for 10 hours per week for two years and then at that amount for 38 hours per week for about 3 years, 4 months both amounts discounted by 5%. Relevant calculations are:
>
> (a) $15.63 x 10 hours = $156.30 per week x 2 years @ 5% = $15,536.22;
>
> (b) $15.63 x 38 hours = $593.94 per week x 3 years 4 months @ 5% = $96,554.84.
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> The total of these two amounts is $112,091.06."

[27] In the result the trial judge awarded damages for the components which are now in issue as follows:[20]

> "(e) past economic loss $ 36,867.60
> (f) interest on (e) $ 9,427.04
> (g) past lost superannuation $ 3,318.08
> (h) future economic loss $112,091.06
> (i) future loss of superannuation $ 10,088.19"

[28] The appellant contended that the trial judge erred by assessing the respondent's loss of earning capacity by reference to the impairment in her capacity to earn income only as a carer, which overlooked her capacity to earn income as a secretary. The appellant submitted that the respondent left a job which would have been less strenuous on her back and exposed herself to heavier work as a carer, and that, although she had lost some of her capacity to act as a carer, she had lost none of her capacity to work as a secretary.

[29] The appellant's argument encounters obstacles in the trial judge's acceptance of the respondent's evidence that: because the respondent had for a long time wanted to work in aged care and believed she could cope with that work, she left the appellant's employment for work as a carer; she did not expect that work to be as heavy as it was and thought that her back would "come good"; it was not unreasonable of the respondent to change jobs; given the respondent's back pain and age, she had concerns about her employability as a secretary; and those concerns were confirmed by expert evidence.[21]

[30] The respondent was found to have suffered an L5/S1 disc prolapse. The trial judge found that the disc prolapse resulted from her accident on 8 October 2004, but it is important to note that this injury was not diagnosed until the respondent underwent a CAT scan on 26 September 2006.[22] Long before then the respondent had left the appellant's employment and embarked upon her career as a carer, a decision which

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20 [2011] QDC 2 at [65].
21 [2011] QDC 2 at [33], [44].
22 [2011] QDC 2 at [31].

the trial judge found was reasonable in the circumstances. That finding was open to the trial judge in light of the respondent's accepted evidence that: following the accident the respondent was in a lot of pain, but she returned to work on Monday 11 October; by 19 October she felt much better and on 2 November she received a clearance to return to her full duties unrestrictedly; she thought that "she had just got a bad back" and she thought that it would "come good" in time; Dr Blue advised her that there was every chance that her back would come good, so she did not seek further treatment; and before she resigned her employment with the appellant on 25 February 2005 to embark upon a career as a carer "she felt her back would improve and she would get over what had happened to her."[23] Furthermore, the appellant did not submit that when the respondent resigned her employment with the appellant she contemplated making any claim in relation to the accident, and there was evidence, which the trial judge accepted,[24] that jobs were available to carers which involved only relatively light work.

[31] It must also be borne in mind that although the respondent could cope with the office work which she performed in her post-injury employment with the appellant, that work itself stressed the respondent's back. The respondent gave evidence of having returned to work with the appellant after the accident to fill in for two weeks in May 2005. She was asked whether she worked at the same pace that she had worked at before the accident and replied "[i]n so far as the work I did, yes, I did not lift anything heavy. I tried to – I tried to keep up the same pace when I was there, yeah … [a]part from having to sit, well, I think, yes." When asked what the problem was with sitting, the respondent said, "[s]itting after any length of time causes me pain or caused me more pain." She said that "I would have to stand up and I would have to walk around a lot, a lot." The trial judge accepted that the respondent's "back pain increases if she sits for any length of time (which she would have to do as a secretary) …".[25] It therefore was not necessarily the case that work as a carer would be substantially more stressful for the respondent than office work.

[32] At the trial the appellant relied upon the respondent's evidence that in November 2005 an employee of the appellant rang to ask if the respondent was still interested in performing stand-by shift work and she said that she was not interested in it but was interested in a full time role. The employee of the appellant told her to check the website because there were administrative roles available, but the respondent did not wish to take up the work as her "heart was in aged care". The respondent agreed that she was told that there were jobs there if she wanted to apply but she did not apply. She hoped that, had she applied, it was likely that she would have got the job.

[33] However the respondent gave evidence that at this stage she believed that she could cope with aged care, and it was not proved that the respondent was in fact offered employment with the appellant on this occasion. That is significant in light of other evidence. The trial judge accepted the evidence of Mr Johanson, an occupational rehabilitation provider, to the effect that because of the respondent's injury, she probably would not find work in her former career. Mr Johanson's evidence on this topic is encapsulated in his following conclusions:[26]

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23 [2011] QDC 2 at [21] - [26].
24 [2011] QDC 2 at [47].
25 [2011] QDC 2 at [38].
26 [2011] QDC 2 at [46].

> "Due to the competitive nature of the labour market … [in] the office/administration/ clerical areas, Mrs Dank would not be competitively employable in this area at the present time and/or in the next two to three years.
>
> From my recent experience with recruiting personnel there are some times 180 to 200 applicants/clients for every position that have better skills and experience [than] Mrs Dank.
>
> In the event of Mrs Dank being unable to continue in her current role [as a carer], then her prospects of securing alternative lighter employment in her present industry or in office/administration would be negligible."

[34] That was consistent with the respondent's evidence that: in early 2007 she applied for a job with the appellant as a supervisor; she was told that she had the job but "it would have to go on health first and they would contact me"; and then she was told that she did not have the job. (In cross-examination, the respondent said that the interviewer told her that it would have to go to "occ health" first.)

[35] The appellant relied upon the trial judge's finding that the respondent "could have retained her employment with the defendant (up until today)".[27] That finding was based upon the respondent's agreement in cross-examination that, had she wanted to remain in the appellant's employment, she would still be employed by the appellant and would have earned more money than she had earned as a carer. It seems clear that the trial judge did not intend to convey that a job with the appellant remained available to the respondent *after* the respondent had left that employment. Such an interpretation would be inconsistent with the evidence that: the respondent's back pain increased if she sat for any length of time and that was required in her work as a secretary; the respondent's prospects of securing alternative lighter employment in office work were negligible; and she failed to obtain employment with the appellant in early 2007 after it imposed the condition of an occupational health assessment.

[36] On the whole of the evidence, the appellant did not prove that the respondent's change of career involved any breach of her obligation to mitigate her loss. Furthermore, having regard to the trial judge's advantage in assessing the oral evidence, the appellant failed to establish any ground which would justify an appellate court in overturning his Honour's finding to the effect that a more lucrative career in office work was subsequently not available to the respondent.[28] It follows that there is no sufficient basis for the Court to hold that the trial judge erred in disregarding the prospect of such employment in assessing the respondent's economic loss.

Order

[37] I would dismiss the appeal with costs to be assessed on the standard basis.

[38] **MULLINS J:** I agree with Fraser JA.

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27 [2011] QDC 2 at [33].

28 cf *Fox v Percy* (2003) 214 CLR 118.