DISTRICT COURT OF QUEENSLAND

CITATION:	*Dank v Tabcorp Holdings Limited* [2011] QDC 2
PARTIES:	**KATHRYN JANE DANK** (plaintiff) **v** **TABCORP HOLDINGS LIMITED ACN 063 780 709** (defendant)
FILE NO:	D410/08
PROCEEDING:	Trial
ORIGINATING COURT:	District Court, Southport
DELIVERED ON:	1 February 2011
DELIVERED AT:	Southport
HEARING DATES:	18, 19 August, 6 December 2010
JUDGE:	C F Wall QC
ORDER:	Judgment for the plaintiff for $239,613.62 plus costs
LEGISLATION:	*Workplace Health & Safety Act* 1995
CASES:	*Bourke v Power Save Pty Ltd & Anor* [2008] QCA 225 *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2000] 2 Qd R 83.
CATCHWORDS:	Master and servant - personal injuries - twisting lift from the floor in confined circumstances - damages
COUNSEL:	Mr K S Howe for the plaintiff Mr R A Myers for the defendant
SOLICITORS:	McCowans Solicitors for the plaintiff MVM Legal for the defendant

LIABILITY

[1] 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[1]. 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

[1] T1-77

box[2]. 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"[3]. 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[4]. 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[5]. 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[6]. She had received no instructions or directions as to how to lift the box or how not to lift it from the floor. She received no training in respect of lifting or lifting techniques, or the storage of the boxes[7]. She was not instructed not to lift the box as she did. That she could have moved the box away from the wall and then lifted it in a different way[8] is no answer to the fact that she was not instructed how not to lift boxes such as the one lifted. I accept her when she said she never "thought about" another way to lift the box[9]. She lifted the box as she had always done.

[2] 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"[10]. 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[11] and her supervisors were aware of this and sometimes helped her lift the boxes[12].

[3] As secretary of the Health & Safety Awareness Committee I accept her evidence that her involvement was only as minutes secretary and she played no part in the work or discussions of the Committee[13]. I also accept her evidence that she understood the "leading role" reference to her on page 3 of ex 19 was to her role

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[2] T2-16-21
[3] T1-51
[4] T1-54,55
[5] T1-62
[6] T1-53
[7] T1-53,54,78,79, 2-15,16,69
[8] T2-23,24,25
[9] T2-24
[10] T2-23,24,25
[11] T2-72,73,76,77
[12] T1-53
[13] T1-79

only as minutes secretary[14]. I also accept her evidence that she was not "keenly aware of workplace health and safety considerations"[15].

[4] After the accident the stores personnel who delivered the boxes to the office were instructed (she thinks by occupational health but not by her), to place the boxes on her desk and not on the floor. That occurred[16]. Before this change it had been the system or practice for the boxes to be placed on the floor[17].

[5] The defendant's Incident Summary, ex 12, is to the effect that after the accident the plaintiff was "instructed re good manual handling techniques", "instructed to remove packets (reams) of paper one (at) a time instead of lifting the entire box" and "in future ensure that stores leave heavier items on her desk instead of the floor".

[6] I think Dr Blue is mistaken when he has recorded the plaintiff as saying "as she bent she felt a twinge of pain in her back"[18]. I accept the plaintiff when she says she "felt it as I came up", that she injured her back as she was coming up[19].

[7] The Incident Summary, ex 12, is also entirely consistent with the plaintiff's evidence. I am also satisfied that that was what she meant when she told the Palm Beach Physiotherapy Clinic that she was injured "bending to pick up something at work"[20] and when she stated in her compensation application[21] "whilst bending down to pick up a box of photocopy paper I felt a sharp twinge in my lower back"[22]. She was there describing in quite general terms how she came to be injured. The plaintiff's description to both Dr Langley ("after lifting the weight she had lower back pain"[23]) and Dr Licina ("as she rose from the bent position with the box in her hands she felt a twang in her back[24]) are also consistent with her evidence.

[8] I prefer the evidence of Mr McDonald to Dr Cook. I thought 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. Dr Cook didn't

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[14] T1-79,80
[15] T1-80
[16] T1-53,54,61,62
[17] T1-55
[18] Ex 4
[19] T2-26
[20] T2-26
[21] Ex 21
[22] T2-26,27,70
[23] T2-32
[24] Ex 7

inspect the work site and she assumed there was no twisting element to the lift[25]. She said her report was not predicated on the plaintiff approaching the box at an angle and twisting. She said she was not aware of a twist factor to the lift. She agreed that it is "well recognised that twisting while lifting exacerbates the risk"[26]. She also agreed that adding a twist to the lever arm distance increases the risk[27].

[9] 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[28], 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[29]. Mr Howe correctly described the lift as not simple but "at an angle, awkward, cramped conditions, unacceptable lever distance and a twisting manoeuvre"[30].

[10] By reference to Fig 3.8 in his report, ex 3, and comparing that to Fig 1 in Dr Cook's report, ex 26 Mr McDonald explained in terms which I accept, why use of the measurement of 38cms (Dr Cook's lower green line) and the revised figure as a result of the plaintiff's demonstration, would result in a significant underestimation of the load on the L5/S1 disc[31]. I accept Mr McDonald's evidence that the more relevant distance is that between the L5/S1 disc and the centre of gravity of the load and that what is important to consider is the distance of the lever arm to the lower spine and not the lever arm to the ankles.

[11] Using Mr McDonald's photographs in ex 1, Dr Cook estimated the distance between the plaintiff's ankles and her hands (the mid point of the load) at about 280mm. That fell within the hatched area in Fig 2 of ex 1. The actual distance of 420mm (from the plaintiff's demonstration in court) fell just outside that area. The distance between ankles and the L5/S1 disc - 500-600mm - is well outside that area. For the reasons given by Mr McDonald I accept that the measurement to L5/S1 is the

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[25] T3-33
[26] T3-35
[27] T3-35
[28] T3-5
[29] T3-6,7
[30] T3-61
[31] T3-8,9

preferable way to approach a lift such as the present. Mr McDonald said that even at 420mm there was an unacceptable risk to the person lifting which would be increased by a twisting mechanism[32]. Dr Cook conceded that 420mm "indicates - slight risk"[33]. She agreed 420mm "takes it over the bottom line of yes, we need to look at this". Mr McDonald said that he had always taken Fig 2 as simply being illustrative and he has then plotted diagrams for each specific lift[34].

[12] Dr Cook said she did not think the plaintiff's lifting options were limited by the space available to her[35]. I cannot accept this evidence. I prefer the plaintiff's evidence about the situation actually faced by her. Dr Cook agreed[36] that the fact that the box was up against the wall had the potential to impact on the lifting technique chosen by the plaintiff but said she could have moved the box away from the wall before lifting it.

[13] Mr McDonald agreed that what the defendant subsequently did (see ex 12) would have protected the plaintiff from the risk of injury. I agree with the submission of Mr Howe[37] that the defendant unreasonably failed to take measures or adopt a means reasonably open to it in all the circumstances which would have protected the plaintiff from the dangers of her task without unduly impeding the accomplishment of the task. No consideration appears to have been given by the defendant before the accident to whether or not the risk of injury could be reduced by the simple and cost free method subsequently adopted.

[14] I prefer the plaintiff to Ms Andrews. The latter did not work in the plaintiff's office when the accident occurred and I felt she had some reservations about the precise location of the photocopier. If I am wrong I don't consider her evidence such that warrants a finding that the lifting here did not occur in a cramped and confined situation which was not conducive to a straight or normal lift.

[15] Dr Noel Langley, an orthopaedic surgeon[38] said that the mechanism of the lift described by the plaintiff, the manner in which she lifted the box, could have caused

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[32] T3-29
[33] T3-33
[34] T3-26
[35] T3-31
[36] T3-31
[37] Ex 28, p3
[38] Reports Ex 6 & 8

the disc prolapse[39]. His evidence was to the same effect[40].

[16] In my view the plaintiff suffered a disc prolapse as she was lifting the box and this was due to the negligence of the defendant in the respects alleged by the plaintiff, I find that the defendant failed to

(a) instruct the plaintiff not to lift in the way she did;
(b) instruct and ensure that storemen or other employees placed the boxes of paper on her desk;
(c) have in place a system for storing such boxes at knuckle height.

[17] 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 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.

[18] I cannot accept the submission of Mr Myers that this was just a simple or trivial lift, a simple accident for which the employer is not to blame.

[19] For the same reasons that the defendant 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.

QANTUM

[20] The plaintiff was born on 22 May 1956 and is aged 54 years.

[21] After being injured she kept working that day. The following day she was “in a terrible state”. She couldn’t walk and was in a lot of pain. The pain was in her

[39] Ex 8
[40] T2-30

lower right back and went down her right leg. She had never before experienced such pain or had any back problems prior to 8 October 2004[41].

[22] She returned to work on Monday 11 October 2004 "in a lot of pain"[42]. She saw a chiropractor that week – probably on 13 October – and a general practitioner, Dr Fitzgerald, on Friday 15 October[43]. He diagnosed "lumbo sacral strain"[44].

[23] Ex 13 has details of treatment she has received for her back injury.

[24] By 19 October she felt "much better" and on 2 November she received a clearance certificate to return to work on full duties, unrestrictedly[45]. On 3 November she was "good". I accept her when she said she "just had very slight pain"; she could walk and do her job[46]; she was "not in bad pain"[47]. The "terrible pain had gone" but she nevertheless had a "tingling feeling" in her back which remained with her and has never left her[48]. When she returned to work she "wasn't allowed to pick up anything heavy or move heavy things"[49].

[25] Generally she adopted a fairly stoic attitude to her injury. She thought "she had just got a bad back" so she didn't seek extensive treatment, notwithstanding that she continued to suffer back pain of more or less severity[50]. She accepted what Dr Tony Blue said to her on 1 November 2004 that her back would improve. For a while it did but there were "a couple of flare ups in 2005"[51]. Because Dr Blue told her there was every chance her back would come good she didn't seek any further treatment[52]. She said she thought it would take time for her back to come good[53].

[26] Before she resigned from her employment with the defendant on 25 February 2005 she felt her back would improve and she would get over what had happened to her. Unfortunately for her this did not happen. Up to February 2005, she experienced "some slight pain, some pain". There were periods when "it was better" but the

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[41] T1-55
[42] T1-55
[43] T1-56, Ex 13
[44] T2-2
[45] T1-81
[46] T1-81,82
[47] T1-84,87
[48] T1-83,84,87
[49] T1-78
[50] T1-59
[51] T1-59,60
[52] T1-84
[53] T1-85

pain persisted. Sometimes it was "very bad" such that she couldn't walk[54]. She had her "next bad attack" in mid 2005[55]. This was when she realised that what Dr Blue had said "wasn't correct"[56]. She had "flare-ups" of pain in 2005 and because she put it down to the fact that she "had a bad back" she "put up with it" and didn't seek treatment[57]. She was, I accept, taking pain medication.

[27] She saw doctors for other ailments and even though she was suffering from back problems or back pain she didn't think to also mention her back. I accept her when she said this was because she "wasn't in extreme pain" and she could walk[58]. She suffered bad attacks of back pain every 5 or 6 months[59] and she suffered most pain then. She was resigned to having "a bad back" and there was little that could be done about it[60]. She tried to "put up with" the pain[61]. I accept her when she said that in 2005 she had a bad back, she would go to bed for rest and take pain relief medication[62]. I accept her explanation[63] for not mentioning back pain or back problems when she went to the Robina Chiropractic and Physiotherapy Centre on 25 August, 5, 7, 9, 21, 29 September and 6, 13, 27 October 2005[64]. She finally mentioned low back pain on 7 November 2005 – probably because of a flare-up in pain[65]. It is clear, in my view, that her presenting complaints outweighed her back problems on these occasions and this was why the latter weren't mentioned.

[28] Ever since the accident she has suffered pain of varying levels and intensity. No particular activity triggers it[66]. She has never been "back to normal"[67].

[29] I accept her evidence[68] that her back pain has been the same type of pain, more or less serious, at all times since 8 October 2004, it is up and down, she has some good days, some bad days, seizures come and go and that there is no difference in the type of pain since she commenced work as a carer – "it is the exact same pain; the attacks are the exact same attacks" – and that the pain she has suffered working as a

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[54] T1-60,61
[55] T1-84
[56] T1-84
[57] T1-88,2-7
[58] T1-90,91, T2-4,5,12
[59] T1-91
[60] T2-4
[61] T2-9
[62] T2-12
[63] T2-7,8,9
[64] See Ex 20
[65] T2-66
[66] T1-61,65
[67] T1-84

carer is the same type she suffered from immediately after the lifting incident on 8 October 2004.

[30] She next saw a doctor on 29 March 2009 – Dr Baguley – for back pain and was prescribed pain killers which were stronger than she had been taking up to then[69]. She had received some chiropractic treatment in the meantime. It was not until she'd had "flare-up after flare-up" that she decided to find out what was wrong with her back[70].

[31] On 26 September 2006 she first complained to her regular doctor - Dr Mark Whillans – of low back pain radiating down her right leg. He prescribed Brufen for pain relief[71]. A CAT Scan carried out on 26 September 2006 showed a L5/S1 disc prolapse[72] which, I find, is the cause of her back pain and problems and the pain radiating into her right buttock and right leg and was caused on 8 October 2004.

[32] I think the abbreviated history in ex 6 is more probably due to Dr Langley's history taking method rather than to the suggestion[73] that the plaintiff has not had the problems she stated since the accident. I am reinforced in this view by the history recorded by both Dr Blue[74] and Dr Licina[75]. The reference to 2005 rather than 2006 in the second paragraph on page 2 of ex 6 is clearly a mistake.

Employment with the defendant

[33] The plaintiff could have retained her employment with the defendant (up until today)[76] but she had for a long time wanted to work in aged care. That was where her heart was[77]. She believed she would cope with the work[78]. That is what she has done since leaving the defendant's employment. She didn't think she would not be able to cope or that she would be "left with a bad back". She thought she would be able to do the work[79]. She didn't expect it to be as heavy as it was[80]. She thought her back "would come good"[81]. I don't consider it was, in the circumstances,

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[68] T2-70,71,72
[69] T2-6
[70] T2-7
[71] T2-5,6
[72] Ex 6
[73] T2-13,14
[74] Exs 4 and 5
[75] Ex 7
[76] T1-77
[77] T1-71,85
[78] T1-71
[79] T1-61
[80] T1-83
[81] T1-84

unreasonable of her to change jobs. I accept the written submissions of Mr Howe in this respect[82].

Employment after leaving the defendant

[34] This is outlined in ex 14.

[35] Effectively it commenced on 21 June 2005.

[36] She is not entitled to compensation for the periods from 25 February 2005 to 1 June 2005 and 6 June 2005 to 20 June 2005 when she was training to be a personal care worker and was not earning an income for reasons unrelated to her injury.

[37] 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[83]. 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[84]. She worked 20-27 hours a week for RSL Care. Her back prevented her from working more hours[85]. 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[86]. She couldn't handle the work involved[87]. Her current employment with Spiritus Care Services is easier as a separate team does the cleaning work[88]. 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[89]. She doesn't think though that she could work a 40 hour week[90]. But for her back pain she would work more hours each week, up to 40[91].

[38] Whilst her employment appears permanent she feels that if her back "keeps up the way it is" she "won't be able to work for any great length of time"[92]. Her back pain increases if she sits for any length of time (which she would have to do as a

[82] Paras 24-26
[83] T1-63
[84] T1-64, 2-54,55,56
[85] T2-63
[86] T1-64
[87] T1-65
[88] T1-65
[89] T2-53 (23-28 hours a week) T2-63
[90] T2-54
[91] T2-63,64

secretary), getting in and out of cars, standing for any length of time[93] and lifting[94]. Her back starts to "hurt a lot" after about 15 minutes walking and 10 minutes driving[95].

[39] She is limited in the housework she can perform. She wasn't limited before her injury. Her husband puts in a couple of hours a week at home cleaning (showers, toilets, floors) for her which he did not do before the accident. She can't afford to pay him[96].

[40] But for the accident she would have worked well into her 60's. Because of current pain she can see herself only working "for a couple more years maximum" even with reduced hours[97].

[41] She applied for a cleaning supervisor's job with the defendant in early 2007 but was not successful[98].

[42] In early 2009 she trialed a job with Spiritus as an assistant co-ordinator but it required much sitting which aggravated her back pain so she returned to what she was previously doing and has done since[99].

[43] She takes pain medication, more or some days than others depending on the pain. Medication costs her $5 - $8 a week[100]. The medication helps with her pain but at times she gets "very very tired". She didn't take such medication before the accident[101].

[44] Her earnings since the accident are detailed in ex 18 and the earnings of Deborah Andrews who took the plaintiff's secretarial job are detailed in her group certificates ex 25. She agreed that had she remained in her employment with the defendant she would have earned more than she has in aged care[102]. Given her back pain and age she has concerns now about her employability as a secretary[103] and these are confirmed by Mr Johanson in his evidence and in his report ex 11.

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[92] T1-65
[93] T1-68
[94] T1-70
[95] T1-71
[96] T1-69,71, 2-66
[97] T1-70,2-55
[98] T1-72, 2-65,66,74,75
[99] Ex 24 and T2-60,64
[100] T1-71,74
[101] T1-73
[102] T1-77, 2-54
[103] T1-73

[45] The plaintiff's current employment is fortunately supported by her peers and supervisor who ensure that she does not undertake strenuous activities that may aggravate her condition. Mr Johanson describes this as a "supportive environment" and that is clearly correct[104]. Her impaired condition is not known to senior management[105]. She is clearly, as a result of her injury, at a disadvantage on the open labour market and her earning capacity is restricted.

[46] Mr Johanson expressed the following opinions in ex 11 which I accept:

> "Mrs Dank is working in a supportive environment as a Personal Carer in the client's home. She is not suited to work in a nursing home, hospital, retirement village etc due to the heavier duties and tasks required. Mrs Dank manages her current role but tries to obtain work in the lighter areas such as taking clients out to the shops, appointments, doctors etc.
>
> Mrs Dank realises that in a number of years she may not be able to continue in her current role and may have to think of more sedentary work if lighter duties do not become available with Spiritus.
>
> The options of a Personal Carer just driving a client to and from the shops is quite rare and if available these roles are keenly sort after and the market is extremely competitive, often those with contacts obtaining this type of employment. If Mrs Dank does not obtain employment within Spiritus in this capacity, it would be highly unlikely she will obtain such employment with any other health carer/provider.
>
> Due to the competitive nature of the labour market that Ms Dank was employed in the past, that being the office/administration/ clerical areas, she 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 that Mrs Dank.
>
> In the event of Mrs Dank being unable to continue in her current role, then her prospects of securing alternative lighter employment in her present industry or in office/administration would be negligible.
>
> During my four years with Commonwealth Rehabilitation Services and four years with Workcover Queensland working as a Job Placement Officer locating host employers for clients with an impairment, I came up against a wide range of discrimination against those that were seeking employment. Employers often offered the following comments when I promoted a person for a suitable duties program, work experience and/or paid employment:

[104] Ex 11, p4
[105] See also T2-51

1. ‘They won’t be able to do the whole job and they will get other workers to do some of the work for them’
2. ‘They won’t be as productive as an able bodied person’
3. ‘They might have an accident and put in a workers comp claim, my premiums will go up and I will have to pay more insurance’
4. ‘I will have to spend more time training them and holding their hand’
5. ‘Other employees might get annoyed that a person on the same wage doesn’t do as much as they are doing’

In today’s buoyant employment market employers have the ability to carefully select and screen potential workers often having them undertake medical assessments and drug testing. A person with an impairment who would be up against an able bodied person would find it very difficult to be selected above a person with no impairment. A job seeker does have certain obligations to declare impairments due to work place health and safety issues. Over the years of assisting people with impairments into employment I have noted employer discrimination when it comes to employing a person with an impairment.

Ms Dank is currently employed on a part time, casual basis of approximately 24 hours a week and is coping to the best of her ability if she is not required to undertake heavy repetitive cleaning tasks.

Ms Dank has aspirations of gaining a role where the duties and tasks are not so physical such as driving clients to and from appointments and to the shops. Such employment positions are highly sought after and difficult to obtain.

Ms Dank has not disclosed her impairment to senior management and is unsure what may occur if she does report restrictions to certain duties and tasks.

If Ms Dank is not able to stay with Spiritus and is forced to look at alternative employment in the office/administration area and more sedentary area she would find it extremely difficult to obtain employment in this area due to the following factors:

1. Inability to sit for long periods of times as required by office workers.
2. Age – Ms Dank would be ‘up against’ younger job seekers with better experience and more recent transferable skills.
3. No recent office/administration employment. Skills and competencies have declined over the last five years.
4. Should Ms Dank disclose her impairments and inability to undertake certain activities to a potential employer, employment would not be offered.

> Ms Dank is in a very fortunate work situation where she is able to undertake the 'lighter duties' of her role and with the support of peers and immediate management.
>
> If and/or when senior management 'found out' about her work restrictions Ms Dank could be terminated. Ms Dank has been vocationally disadvantaged due to her impairment and would find it extremely difficult to return to office/administration/clerical work due to the points indicated above."

[47] I also accept the following evidence which he gave:

> "I think the reality is in the recruitment industry that any employer that hears the word 'bad back' and 'Worker's Comp' basically would dismiss that application. There are enough able bodied people out there looking for jobs. In the office area sometimes there's 70, 80, 100 applicants for each job. If a person did mention – and this is the real world – if a person did mention they had an injury that prevented certain tasks, duties that they could not perform, they would certainly not be hired over a able bodied person.
>
> One of the things with personal carers is that there is a high demand for physical fitness because of the lifting, carrying and the physical nature of the job, so people in that industry, if they had a bad back and disclosed it, it would be very unlikely they would gain employment[106].
>
> Can employees pick and choose what particular tasks they will do? – No.
>
> There are a number of factors that would affect her employability. The main one if she was going to go into the office area, they're her lack of skills and her age in that area. She'd be up against 18 to 25 old years who would have a lot more experience, who would be on the same type of money. Her ability to -----
>
> HIS HONOUR: Now, why – why would – she's a long term secretary before she went into aged care, why would you say that an 18 year old would have more skills than she would as a secretary? – An 18 to 25 year old nowadays coming out of school, coming out of TAFE or university have very good computer literacy. With the new development over the last five or six years of word processing, internet usage, Excel spreadsheet, MYOB and things like that, a person at school sometimes comes out being able to type 70 words a minute and would be more competent than a person at 50 who may have worked five or 10 years ago in that area. Because the – the technology has changed so much that people that may have operated and used equipment of five to 10 years ago certainly would need retraining and they'd be up against younger people with the same skill level[107].

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[106] T2-46
[107] T2-47,48

> If I mentioned to an employer that person cannot do the whole job, has a disability, an injury, an impairment and a previous Worker's Comp claim, they would not be considered. I have placed a lot of people with the casino and their policy is not to be that generous towards people with injuries and impairments.
>
> They would rather take an able-bodied person, and I've placed people in the office, admin, cooking, bar supervisors and gaming staff, and that's their policy[108].
>
> I've placed a lot of people in personal care and some people can get away with very light duties which is just shopping; taking them out in the car for a trip to the doctor, a trip to the movies[109]."

[48] The plaintiff agreed that her employment since leaving the defendant has been harder on her back and may in itself have aggravated her back condition[110].

[49] Dr Langley said that the plaintiff's disc prolapse was caused when she lifted the box and that her symptoms are likely to persist in the future[111]. He re-examined her on 6 August 2010 and her symptoms were the same as before, pain going up and down[112]. Pain from such an injury can "fluctuate up and down"[113]. A niggling pain and a tingling feeling on return to work would be consistent with her injury[114]. Heavy duties and repetitive lifting and bending are inadvisable and she is better suited to sedentary work. She will have trouble with heavier tasks and with domestic duties. Her complaints are consistent with her injury and she has a 10% whole person impairment[115]. But for the accident and barring any other traumatic events she could have remained in her pre-accident job.

[50] To the extent that they differ I prefer the opinions of Dr Langley to those of Dr Licina because of their consistency with the evidence of the plaintiff which I accept and with the chiropractic treatment which the plaintiff clearly had following her injury[116].

[51] Dr Langley said that a later flare-up of pain does happen "with disc lesions particularly when they've got radiation into their leg" which the plaintiff has[117]. He

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[108] T2-49
[109] T2-50
[110] T1-77
[111] Ex 6 and T2-37
[112] Ex 8
[113] T2-30
[114] T2-42
[115] Ex 6
[116] T2-36,37
[117] T2-33

saw no signs of any significant degeneration existing prior to 8 October 2004. Even if there was some it could have been asymptomatic[118]. Even though he said that the plaintiff should be able to maintain her employment as a personal care worker for the time being if she is not doing heavier type work she may need to stop when she is around 60[119]. In evidence he said that because her injury is chronic[120] it would, because of what she says, be reasonable for her to stop working in 2 years[121]. As to her capacity for administration work that "depends on what she is doing" which also depends on how she copes and whether she has problems with what she is doing. It is, to an extent a matter for subjective assessment[122].

[52] If the disc prolapse occurred as postulated by Dr Licina, in a setting of pre-existing degeneration[123] (and I prefer the evidence of Dr Langley that there was none), I am satisfied, on the evidence of the plaintiff, that it was and would likely have remained asymptomatic. I am also unable to accept the opinion of Dr Licina[124] that the plaintiff's disc prolapse was possibly caused by the "heavy activities of cleaning associated with being a personal carer". In my view it was caused by lifting the box. Ongoing pain (as described by the plaintiff) and "flares of the current frequency" are likely to continue[125] and are clearly due to the prolapsed disc and are consistent with her injury[126]. She has, according to Dr Licina, a permanent injury amounting to a 5 – 8% permanent impairment[127]. I prefer the 10% expressed by Dr Langley which is, I think, more consistent with the pain and restrictions described by the plaintiff. In my view the plaintiff's symptoms did, in a relevant sense, persist and her present condition is therefore related to the incident of 8 October 2004[128] and not to anything else. Dr Licina has not seen the plaintiff since 27 July 2007.

[53] Dr Licina agreed[129] that the plaintiff "has a somewhat increased risk of not being able to" work to 65 or 67. In my view that is too optimistic. He said there is an increased likelihood of flares of back pain and heavy lifting should be avoided. He agreed that the age to which a person can work depends on the nature of the duties,

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[118] T2-35
[119] Ex 8
[120] Ex 8 – "long standing"
[121] T2-39,40
[122] T2-40,41
[123] Ex 7
[124] Ex 7
[125] Ex 7
[126] T2-86
[127] Exs 7 and 7A
[128] Ex 7A and T2-83,84
[129] T2-81

how the person copes and what they are doing[130]. Coping, associated with avoiding pain, is subjective[131]. He also agreed that sitting and lifting could be problems for the plaintiff[132] and that her tiredness could be due to the narcotic aspect of Panadeine Forte[133] (a pain killer[134]).

[54] I am unable to accept Dr Licina's opinion[135] that the plaintiff's injury healed itself and her current symptoms are the result of a later injury or something superimposed on the initial injury. That is quite inconsistent with the plaintiff's description of her ongoing, albeit variable, pain. He did agree though, that if the pain had not in fact settled within 6 – 12 weeks (which I find it had not) it would be ongoing and chronic[136]. He also agreed that severe pain could cause temporary immobility of the legs and a feeling of falling[137]. The fact that the pain did not settle supports its genesis in the lifting incident rather than later activities.

[55] 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.

[56] 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.

Past Economic Loss

[57] 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

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[130] T2-84,85
[131] T2-85
[132] T2-85
[133] T2-86
[134] T2-88
[135] T2-81,82
[136] T2-82,83
[137] T2-87

(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.

[58] 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.

Future Economic Loss

[59] 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.

[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.

The total of these two amounts is $112,091.06

[61] The plaintiff is also entitled to an amount for lost future superannuation calculated at 9% on her future economic loss of $112,091.06. That amounts to $10,088.19.

General Damages

[62] I think she should receive damages of $50,000 under this heading. Her injury is serious and chronic, relatively debilitating, very painful and her condition is likely to deteriorate. Interest on half of that amount for 5 years 4 months at 2% is $2,666.66.

Special Damages

[63] These are agreed at $3,795.59 plus interest of $497.75, a total of $4,275.34.

Future Expenses

[64] I find she has established an entitlement to these which are referred to at p 17 of the plaintiff's submissions, ex 28 amounting to $12,428.00.

[65] The plaintiff is therefore entitled to damages as follows:

(a)	General damages for pain, suffering and loss of amenities	$ 50,000,00
(b)	interest on (a)	$ 2,666.66
(c)	special damages	$ 3,795.59
(d)	interest on (c)	$ 497.75
(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
(j)	future expenses	$ 12,428.00
	Sub-total	$241,179.97
(k)	Less Tabcorp Holdings refund	$ 1,566.35
	Total	**$239,613.62**

[66] I give judgment for the plaintiff against the defendant for $239,613.62 plus costs to be assessed on the standard bases unless agreed.

[67] I give the parties liberty to apply on 2 days notice in relation to any of my calculations.