

# DISTRICT COURT OF QUEENSLAND

CITATION: *Talty v Cotton On Group Services Pty Ltd* [2016] QDC 99

PARTIES: **ERIN JADE TALTY**

**(plaintiff)**

**v**

**COTTON ON GROUP SERVICES PTY LTD**

**(defendant)**

FILE NO/S: 1723/2015

DIVISION: Civil

PROCEEDING: Claim

ORIGINATING  
COURT: District Court of Queensland

DELIVERED ON: 29 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 10-11 March 2016; 16 March 2016

JUDGE: Butler SC DCJ

ORDER:

**1. There will be judgment for the plaintiff in the sum of \$235,668.00.**

**2. I will hear from counsel as to costs.**

CATCHWORDS: DAMAGES – PERSONAL INJURIES – QUANTUM – Liability admitted – Workplace accident – Dispute as to quantum of damages

COUNSEL: A D Stobie for the plaintiff

S P Gray for the defendant

SOLICITORS: McNamara & Associates Solicitors for the plaintiff

B T Lawyers for the defendant

## Introduction

- [1] The plaintiff was employed by the defendant Cotton On Group Services Pty Ltd (“Cotton On”) as an inwards team supervisor at the defendant’s warehouse. On 11 April 2012 the plaintiff was injured in an accident at work when she was struck on the side of the head by a pallet weighing approximately 90 to 100kg which fell from a height of about 6 meters. The plaintiff claims damages for injuries suffered as a result of that accident. The defendant admits liability and negligence, but disputes

the nature, extent and consequences of the injuries alleged to have been suffered by the plaintiff. The quantum of damages is in issue.

### **The plaintiff's pre-accident qualifications and employment**

- [2] Ms Talty was born on 13 December 1983. She was 28 years of age at the time of the accident and is aged 32 now.
- [3] Ms Talty was educated to year 12 but did not succeed academically. Her senior exit statement was tendered as an exhibit. It recorded limited or very limited achievement in all her subjects. She said that she had stopped applying herself in her teenage years. After finishing school she succeeded in obtaining a traineeship in horticulture with Ipswich City Council. Over a decade of working for the Council Ms Talty progressed from being a trainee to a field worker, then a crew leader and, for a year and a half, an acting supervisor. The work, which involved maintenance of street and park vegetation, was physical but as she progressed she became responsible for the supervision of other staff. She then applied for and obtained appointment as an inwards supervisor at Cotton On. The work combined administrative functions, coordination and staff management of a small team.
- [4] Notwithstanding her very poor academic record, the plaintiff presents as having been a committed employee. In addition to her work with the streetscape maintenance for the Council she also supplemented her income from time to time with casual positions as a bottle shop attendant and nursery attendant on the weekend. She completed a Certificate II in horticulture and a range of certificates and tickets in workplace functions. At an early age she purchased a residence and was paying off the mortgage. She participated recreationally in sport and exercise.
- [5] Ms Talty's supervisor at Cotton On, Mr McDonald, said that in the period prior to the accident he had a good working relationship with her, that she had a great personality and got along with everyone and he never had any occasion to speak to her about whether she was performing her work satisfactorily. He did say that in giving directions in relation to her work duties he would endeavour to simplify them and explain things very clearly.
- [6] I have an impression of a motivated employee who performed well in a physical work environment, was from time to time deemed suitable for promotion and successfully carried out supervisory roles in respect of small work teams for two employers. Her success in performing supervisory roles which required a level of organising and coordinating ability indicates a level of application and ability not apparent in her year 12 results.

### **The accident**

- [7] Ms Talty has no immediate memory of the accident. She has no memory of particular events in the two weeks prior to the accident and has only fleeting recollection of the time when she was in hospital for eight days after the accident. After leaving hospital she convalesced for about three weeks in the care of her mother, during which time she was on crutches due to her knee and ankle injuries.
- [8] The ambulance report from the day of the accident recorded a Glasgow coma score of seven upon arrival which improved following loading in the ambulance to 14 then 15. The patient is recorded as having nil recent memory recall. An occupational

therapy report on assessment of the patient on 18 April 2012 describes her as emerging from posttraumatic amnesia on 17 April 2012—a period of amnesia of 10 days.

### **Post-accident employment**

- [9] Ms Talty returned to work with Cotton On as part of a gradual return to work program which commenced with a few hours of work a day and increased over time. In this initial period she described experiencing difficulty in organising, remembering and concentrating which caused her considerable frustration. She explained that there was a significant difference between how smoothly she could perform these functions before the accident and her post-accident experience. She said that she returned to fulltime hours after about six months. Ms Talty described how even after her recovery she would still get mentally fatigued at work and was not able to physically keep up. She said that the fatigue was not as significant as in the first six months and plateaued after 12 to 18 months.
- [10] Ms Talty said that she had the assistance of a personal assistant during her return to work. She did not have an assistant at all before the accident. There was some change in the assistants but eventually Amanda Hanson performed that role for some time. Ms Hanson was called by the plaintiff. She worked closely with Ms Talty in the same office. She described Ms Talty as being vague at times and said that she would at times appear silent and lost. This caused Ms Hanson to prompt her as to the task at hand. Ms Hanson said that she would prepare checklists to help them remember their daily tasks and that Ms Talty would use the list. She said that the use of the checklist was unnecessary after a time but she continued to need to prompt Ms Talty throughout the period. After Ms Hanson moved to another position other employees fulfilled that function. Ms Talty testified that it was a big assistance to have someone to help coordinate the day.
- [11] Ms Talty’s manager at the time, Mr McDonald, was called by the defendant. He testified no extra staff were put on to assist Ms Talty in her work. This evidence appears to be inconsistent with Ms Talty’s testimony that the assistance she received from Ms Hanson had not been available to her before the accident. An explanation may be that there had been a change in work practices during her absence. Mr McDonald said that he thought that Ms Talty and Ms Hanson shared office accommodation but when asked as to their respective roles and responsibilities he said that he did not have much dealings with Amanda Hanson at that time. He said he did not recall Amanda Hanson being part of the inwards team. In her evidence Amanda Hanson described her position as “Administration for Inwards”.
- [12] I accept Ms Talty’s testimony in this regard, supported as it is by Ms Hanson. Mr McDonald does not have a recollection of the work Ms Hanson was doing but accepts she worked in the same office as Ms Talty. While the position may not have been created to address deficits in Ms Talty’s performance, I accept that Ms Talty performed the position of inwards supervisor without administrative assistance prior to the accident but received the benefit of that assistance after her return.

### **My assessment of Ms Talty**

- [13] Ms Talty presented as an earnest, thoughtful witness. I was impressed by her willingness to make concessions against her interest. I did not detect any tendency to

exaggerate her claims. Her testimony appeared consistent with the history as obtained and detailed in the medical reports.

- [14] In one regard there was an apparent conflict between Ms Talty's evidence and that of another witness. She testified Mr McDonald commented informally that if she did not lift her game another employee, Martin, could potentially be taking her job. Mr McDonald said he could not remember having experienced dissatisfaction with her output and denied saying if her work did not improve she would be replaced. Mr McDonald said he never implemented an employee management plan with her and ordinarily that would guide his recollection. I am not persuaded that this conflict reflects on the credibility of either witness. Mr McDonald described how the employee Martin took up a team leader role immediately below Ms Talty in the management structure. A passing comment such as that described by Ms Talty could have been made without it reaching any level of significance in Mr McDonald's mind. Ms Talty describes experiencing a level of stress at the time and it would be consistent with that condition that minor issues relating to her work performance might be elevated in her perception. Ms Hanson's account supports the claim that Ms Talty continued to experience difficulty in planning and organising her work day. I find that a passing comment was made to Ms Talty which was capable of giving her the impression that Mr McDonald was critical of her work performance.
- [15] Overall, Ms Talty impressed me as an honest and generally reliable witness. This assessment finds support in the opinion of Dr Ohlrich, who said he did not observe any evidence of exaggeration or overstatement by Ms Talty,<sup>1</sup> and in the opinion of Dr Richardson who said he did not observe "any evidence about any abnormal illness behaviour, exaggeration or overstatement of symptoms".<sup>2</sup>

### **The resignation**

- [16] The plaintiff's resignation from her position with Cotton On Pty Ltd, effective 30 October 2014, is of significance to the determination as to whether, and to what extent, there has been a loss of earning capacity.
- [17] The amended statement of claim reads that:
- “(v) as a result of her continuing lack of capacity to fulfil her work role, the plaintiff resigned from her employment with the defendant effective 30 November 2014;”<sup>3</sup>
- [18] In contrast the defence states:
- “(j) the extent the plaintiff suffered economic loss since 11 April 2012, which is denied, such loss:
- (i) was not caused or contributed to by the alleged injury;
- (ii) results from the plaintiff's voluntary decision to resign from her employment in October 2014, despite being fit to continue to perform such work;”<sup>4</sup>

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<sup>1</sup> Exhibit 1, p 85.

<sup>2</sup> Exhibit 1, p 102.

<sup>3</sup> Amended statement of claim para [10].

<sup>4</sup> Defence of the defendant para [6](j).

- [19] The defendant relies upon the explanations provided by the plaintiff for her resignation. Upon resignation the complainant completed a form and responded to an exit interview with Ms Tani Jacobi. These sources do not refer to her injuries as a reason for her leaving, with the exception of mentioning difficulty in disconnecting the work site from her memory of the incident. Ms Talty's testimony before me was generally consistent with the explanations given at the time of her resignation. Once again, she did not directly attribute her decision to resign to her head or ankle injury.
- [20] The plaintiff in her exit interview speaks of a need for a break, an inability to face up to another peak season, an increase in team size and a failure of management to appreciate her need for extra support, hours and resources. In her evidence Ms Talty spoke of increasing stress at the time due to workload and staff increases.
- [21] Although Ms Talty did not ascribe any effects of her brain injury to her decision to resign, her concerns about her ability to cope with work demands are consistent with her description, in a different context, of a reduced capacity post-accident to plan and organise her work program.

### **Post resignation**

- [22] Following her resignation from Cotton On the plaintiff immediately sought other employment and soon, through a recruitment agency, obtained a position with Treescapes Australia, a horticultural and landscaping business. Her role involved driving a watering and fertilising truck and soft landscaping work including turf laying and tree planting.
- [23] Although the work was physical and Ms Talty described experiencing some discomfort when squatting and some pain in her ankle when moving on uneven ground, she testified she was able to satisfactorily perform her task. After six to eight months she resigned from Treescapes to holiday in Europe and seek other opportunities. Evidence from Ms Talty and a witness from the recruitment agency confirmed that her employer at Treescapes was willing to reemploy her upon her return from overseas.
- [24] Ms Talty's sister, Erin Talty, testified as to her observations of changes in the plaintiff's behaviour after the accident. She noticed the plaintiff had a short attention span, repeated questions, lacked concentration, and was unable at times to grasp simple concepts. The witness gave a number of specific examples of Ms Talty's forgetfulness and lack of preparation. She characterised these as changes that occurred after the injury.
- [25] Counsel for the defendant submitted that the examples advanced by Ms Erin Talty did not describe behaviour outside the normal range. For example, the witness spoke of the plaintiff's preparation for a trip to Europe and described how the plaintiff on the day of departure had not packed or turned her attention to necessary preparations for the trip and required assistance in that regard. Counsel argued that this described no more than oversights that might be expected of a person who had no experience of international travel. I am not persuaded by that submission. It is true that each example when viewed alone might be interpreted as falling within the normal range of behaviour. Nevertheless, I am satisfied that when the evidence of Ms Erin Talty is viewed as a whole, it provides support for the plaintiff's own testimony as to continuing difficulties with concentration and mental fatigue. Ms Erin Talty is a

person with a long experience of the plaintiff's behaviour, and was in a good position to recognise any reduction in her mental capability. I found her to be an honest and reliable witness and accept her observations of a change in the mental capability of the plaintiff after the accident.

- [26] On her return from Europe Ms Talty pursued a desire to train in the field of health care. She successfully completed a 12 week Certificate III course in aged care. Meanwhile she obtained work as a domestic household cleaner and continues in that role at present. She currently works 15 to 25 hours a week as a cleaner. She has just commenced an additional part-time position filling shelves at Big W. That is expected to involve approximately 15 hours a week.
- [27] Ms Talty aspires to work eventually as a nurse or assistant in nursing. She is applying for work appropriate to her Certificate III qualification but to date has been unsuccessful. It is a competitive field with as many as 100 applicants for one such position. It is her intention upon obtaining work in that field to complete a Certificate IV qualification in Allied Health Care which would qualify her for appointment as an enrolled nurse.

### **The injuries**

- [28] The amended statement of claim particularises the plaintiff's injuries as:
- “(a) traumatic brain injury;
  - (b) right periorbital hematoma;
  - (c) left sided parietal scalp laceration;
  - (d) avulsion fracture to the left ankle;
  - (e) ligamentous laxity to the left knee;
  - (f) musculoligamentous injury to the left shoulder;
  - (g) psychological injury.”<sup>5</sup>
- [29] It is not disputed that Ms Talty suffered a traumatic brain injury and also received injuries to her ankle and knee. In dispute is the extent to which those injuries have affected her capacity to obtain employment.

### **Brain injury**

- [30] The plaintiff was seen by Dr Scott Campbell on 21 May 2014 in respect of her brain injury. At that time it was a little over two years since her accident and she reported difficulties with poor short term memory, decreased concentration, mood swings and impulsiveness. Memory problems reported included forgetting of names, conversations, recent events and personal items. She described having difficulty with multitasking and learning new information. She told Dr Campbell that her efficiency in her position as a warehouse supervisor was decreased by her forgetfulness of tasks to be performed.
- [31] In his report Dr Campbell assessed her in accordance with AMA 5 to be suffering a 5% whole person impairment. When testifying before the Court, other information from the medical records was drawn to his attention, namely an initial Glasgow coma score of 7 to 8, post traumatic amnesia to day seven and more recent MR scan results.

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<sup>5</sup> Amended statement of claim para [6].

Taking this information into account, Dr Campbell revised his opinion to an assessment of 8% to 10% whole person impairment.<sup>6</sup>

- [32] The plaintiff was examined by Dr Ohlrich, consultant neurologist, on 12 February 2015. Ms Talty reported to him that although her memory and concentration had improved they were still impaired. She spoke of being forgetful and that she had difficulty in sticking to tasks. She explained there was “no order” in her brain, that she was impulsive, representing a change from before the accident. She said she was impulsive in spending money and in speaking to others. Dr Ohlrich had the benefit of a neuro psychometric assessment report by Ms Debbie Anderson dated 22 July 2014. Dr Campbell opined that the plaintiff’s complaints of memory and concentration impairment were due to brain injury associated with the subject head injury. That opinion was based upon the clinical assessment, the nature of the head injury, the neuro psychometric assessment results and also a MRI head scan. He considered the patient had reached maximum medical improvement from a neurological prospective and that the reported symptoms would persist indefinitely. His report concluded that the plaintiff had suffered a total permanent whole person impairment level of 8% resulting from the brain injury. This is based on the AMA 5 criteria.
- [33] Dr Ohlrich considered Ms Talty would be able to continue an occupation for which she was trained and suited but there would be mild restrictions because of her memory problems. These may interfere with her ability to study to obtain a nursing degree although she may be able to cope. He did not observe any evidence of exaggeration or over statement.<sup>7</sup>
- [34] Dr Ohlrich testified that this was a “significant” head injury. He said that the MRI scan indicated a significant brain injury, without being major. He said that having regard to the *Worker Compensation Rehabilitation Regulation* injuries scale values it was his opinion the plaintiff’s condition would fit into the category of minor brain injury. He said that the more recent report by Ms Anderson dated 6 January 2016 did not change his opinion. He was also of the opinion that the plaintiff could manage a TAFE course.
- [35] Dr Eadie, a neurologist, saw the plaintiff in March 2013 at the request of her GP. At that time he opined that there seemed to be no significant residue of the injury although it could be anticipated there would be small degrees of restoration towards normal over the next three to four years. His opinion was that she could safely resume driving a motor vehicle on an unrestricted licence. When giving evidence Dr Eadie said that he had no independent recollection of his examination.
- [36] A neuropsychologist, Ms Debbie Anderson saw Ms Talty in May 2014 and October 2015. Ms Talty’s 2014 cognitive test results indicated deterioration in function compared to earlier results in 2012. However, by October 2015 there had been an improvement in performance compared to the 2014 results. Ms Anderson was of the opinion there had been a recovery in function over time in attention, concentration, information processing speed which was consistent with that expected in terms of recovery from a traumatic brain injury. The psychometric testing indicated general intelligence in the average range with a full scale score on the WAIS – IV of 106, placing her at percentile 66.

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<sup>6</sup> Transcript 2-29 ll 35-45.

<sup>7</sup> Exhibit 1, pp 76-85.

- [37] Testing generally indicated that results were in the average range with two important exceptions. The immediate and delayed memory indexes were significantly below the level expected, as was the auditory memory index. The psychologist concluded that Ms Talty demonstrated clinically significant impairment of delayed memory function and clinically significant forgetting of newly learnt information. The difficulties were particularly evident on auditory memory verbal tasks. The difference with the delayed memory index was clinically significant with differences of this magnitude occurring in less than 4% of the standardisation sample. Compared to other individuals of a similar intellect, her forgetting is significantly impaired, particular after a delay from receiving newly learnt information.
- [38] A test of higher cognitive functions disclosed a borderline level of performance suggesting “some persisting executive difficulties”. On memory testing she struggled to organise more complex information.
- [39] Ms Anderson reached the opinion that the test results exhibited mild to moderate difficulties with memory functions as well as mild to moderate difficulties with executive function and these are likely to be of a permanent nature as they reflect the effects of the brain injury. Ms Anderson was of the view that Ms Talty would struggle with higher levels of study and that her ability to undertake further study beyond the Certificate III level in order to obtain promotion and advancement in the workplace is likely to be significantly limited by her cognitive dysfunction.
- [40] Ms Anderson was of the opinion that when applying AMA 5, the plaintiff’s whole person impairment is of the order of 10% to 14%.
- [41] Ms Anderson, when questioned about the specific deficits she had identified, said it would be extremely unlikely in the normal, unimpaired population for those deficits to arise. They are deficits that would be expected given the brain injury the plaintiff had received. When questioned about Ms Talty’s capacity to proceed with further education the witness said that compared to other students, her memory will be significantly poorer and that may be a fatal problem in terms of tertiary courses. She said that at Certificate IV level and definitely at university level she is likely to encounter a lot of problems. Ms Anderson’s expert opinion is that the cognitive difficulties seen on testing will continue to impact on the plaintiff’s ability to undertake further training to improve her prospects in the workplace and thus are likely to have a long term impact on her career.
- [42] Ms Talty was seen by an occupational therapist, Mr Lee Ng, on 16 July 2014. Mr Lee expressed opinions as to Ms Talty’s work capacity based on the medical and psychological reports and information provided to him by Ms Talty. In his opinion Ms Talty remains physically unsuited to the full demands of work as a horticultural worker but is fit to continue with the cleaning work she is currently performing. He considered she would likely tolerate employment as an assistant in nursing in a supportive and structured environment such as an Age Care facility. He concluded that the plaintiff is unsuited to work in positions with higher reasonability such as an enrolled or registered nurse. He considered her memory and other cognitive difficulties meant that an employer on the open market would be unlikely to employ her in a supervisory role.



### **Ankle and knee injuries**

- [43] Dr Gillett, an orthopaedic surgeon, examined the plaintiff on 11 June 2014 and provided an assessment of her ankle and knee injuries. He determined that she did not require surgery, but would need to live with the conditions, modifying activities to accommodate the conditions.
- [44] Dr Gillett assessed her left knee as having a 3% loss of whole person function and the ankle as 1% loss of whole person function. He opined that she could continue to function at her present level but working on uneven terrain would be inappropriate. Dr Halliday, an orthopaedic surgeon, saw Ms Talty on 16 February 2015. He assessed her knee injury as a 0% whole person impairment. He assessed the ankle injury as a 2% whole person impairment. Dr Halliday adhered to his opinions under cross-examination. His was the most recent examination of the plaintiff's knee. I accept his opinion that the injury to the knee has now resolved to a point where it makes no negative contribution to the plaintiff's whole person function.
- [45] Dr Halliday accepted that crouching or squatting would cause the plaintiff difficulties in her ankle and is likely to cause discomfort on an ongoing basis. He placed significant reliance on the fact that Ms Talty was working as a landscape labourer when he saw her and considered that indicated the injury would not prevent her working on uneven terrain. The information that Dr Halliday based that opinion upon appeared to lack the detail of evidence placed before me. I do not consider that Dr Halliday had a full appreciation of the limited nature of the work performed by Ms Talty during her time with Treescap Australia.
- [46] While I accept Dr Halliday's assessment that the ankle injury amounts to a 3% loss of whole person function, I do not accept his assessment that it would be appropriate for the plaintiff to work as a labourer on uneven terrain. I prefer the opinion of Dr Gillett in that regard. I find that although the plaintiff will continue to be able to perform a considerable range of physical landscaping tasks, the ankle injury will restrict her capacity on an ongoing basis to engage in a full range of physical work. The plaintiff will continue to be limited by an inability to crouch or squat repetitively and will need to avoid working on uneven surfaces.

### **Plaintiff's submissions**

- [47] The plaintiff submits that the evidence supports an injury scale value ("ISV") of 30, corresponding to a general damages award of \$54,500.00. This is arrived at on the basis of the dominant injury being a moderate brain injury. It is submitted that past economic loss should be calculated for the period since the plaintiff left Cotton On, by reference to the difference between the plaintiff's actual earnings over that period and her level of remuneration at Cotton On, giving an amount of \$18,049.00.
- [48] The plaintiff submits future economic loss is best represented by the difference between the average incomes of a registered nurse and an aged care worker, which is about \$400 net per week. This gives a calculated loss of \$318,528.00. In addition the plaintiff contends for an additional lump sum component of \$120,000.00 in recognition of difficulties the plaintiff will have in entering the workplace.

### **Defendant's Submissions**

- [49] The defendant submits that the evidence does not support the loss of capacity claimed by the plaintiff. It is submitted that Ms Hanson's evidence described only minimal support, reducing over time, as being necessary.
- [50] The defendant submits that the dominant injury should be assessed as a minor brain injury, giving an ISV of 20. That corresponds to general damages of \$31,550.00.
- [51] It is submitted that the evidence does not show the plaintiff's injuries have resulted in her being unable to perform her work at Cotton On. Rather, her resignation was a voluntary decision on her part. Therefore, it is contended that in assessing past economic loss Ms Talty should receive only the amount of benefits paid by WorkCover, or at best a global award of no more than \$20,000.00.
- [52] Turning to future economic loss, the defendant contests the substantial award sought by the plaintiff. It is accepted that the plaintiff has a permanent impairment and it will have some impact on her. However, in light of the fact that she is employable doing work that will remunerate her at her previous level, it is submitted that a global award in the order of \$120,000 - \$160,000 is all that is justified.

### **Assessment of General Damages**

- [53] Assessment of general damages requires that the Court assign a single ISV to the plaintiff's injuries by reference to Schedule 9 of the *Workers Compensation Rehabilitation Regulation 2003* ("The Regulation").<sup>8</sup>
- [54] The parties agree the dominant injury is the brain injury. The opinions expressed by Dr Ohlrich and Dr Campbell are in close accord on this assessment. I accept their opinions and find the plaintiff's permanent whole person impairment to be in the range of 8% - 10%. The degree of permanent impairment is an important consideration although it is not the only consideration affecting assessment of an ISV.<sup>9</sup>
- [55] Dr Campbell was invited by counsel to advance an opinion as to the item in Schedule 9 to which the brain injury belonged and he described it as falling in item 8- minor brain injury. While I have taken Dr Campbell's opinion into account, I note that the Regulation provides that it is not a function of a doctor to identify the item to which an injury belongs.<sup>10</sup>
- [56] In approaching the assessment of an ISV it is necessary that the Court proceed having regard to the provisions in Schedule 9, to the extent to which they are relevant. The Court may also have regard to other relevant factors.<sup>11</sup>
- [57] I have formed the view that the plaintiff's injuries fall within item 7- moderate brain injury. The permanent brain injury suffered is significant as it constitutes an 8% whole person impairment. I accept the evidence of Ms Anderson that the plaintiff suffers continuing cognitive deficits which I find result from the brain injury. I accept the opinions of Ms Anderson and Mr Nu as to the impact these deficits will have on

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<sup>8</sup> s 306O Workers Compensation and Rehabilitation Act 2003.

<sup>9</sup> s 10, Schedule 8, Workers Compensation and rehabilitation Regulation 2014.

<sup>10</sup> s 11, Schedule 8, Workers Compensation and Rehabilitation Regulation 2014.

<sup>11</sup> ss 8 and 9, Schedule 8, Workers Compensation and Rehabilitation Regulation 2014.

future employment prospects. The plaintiff has a permanent disability that reduces her capacity for employment. In that sense it is a serious disability. In my opinion the evidence discloses the injury is more significant than the following description in item 8 that:

“There may be minor problems persisting that prevent a restoration of normal function.”

[58] I find that the plaintiff’s condition falls within the following description under item 7:

“... reduced concentration and memory, or reduced mood control, and ... reduced capacity for employment...”

[59] In addition to the dominate brain injury the plaintiff also suffered an ankle injury which I find limits her employment opportunities to some extent. I accept that the ankle injury constitutes a 3% whole person impairment. Taking that further entry into account I consider that the plaintiff falls at the top of the relevant range with an ISV of 25.

[60] Based on an ISV of 25, the award of general damages calculated in accordance with Schedule 12, Table 2 of the *Regulation* will be \$42,350.00.

#### **Assessment of past economic loss**

[61] The onus falls on the plaintiff to demonstrate she sustained loss of income arising from her injuries. This is a situation where weekly loss cannot be precisely calculated. In such a situation, s 306J of the Act applies. It relevantly provides:

“(2) the court may only award damages if it is satisfied that the worker has suffered or will suffer loss having regard to the person’s age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.”

[62] The impact on earnings can be best understood by reference to three periods. Firstly, the period up to the plaintiff’s resignation from Cotton On at the beginning of November 2014. It is agreed that the plaintiff should receive for that period the amount refundable to WorkCover, a sum of \$12,753.09.

[63] The two further periods are from her resignation from Cotton On until she departed overseas and the period from her return from overseas until the date of judgment. This totals 71 weeks, excluding the seven weeks spent overseas.

[64] In the period up to her going overseas the plaintiff succeeded in obtaining employment which remunerated her at an income equivalent to that which she received at Cotton On. Upon her return, it was her decision to not continue employment with Treescapes, which on the evidence continued to be available to her. Instead she took part time employment at a lower remuneration in order to pursue studies with a view to obtaining entry to the nursing profession. The defendant contends that the plaintiff has suffered no loss of income due to her voluntary decision to pursue study. The plaintiff submits that she should be compensated for the difference in income over those periods. I have approached the matter in a different way.

[65] While any award for past economic loss for the period from November 2014 must be very moderate, I cannot accept the submission that the plaintiff has suffered no loss

of income. I find that she suffered an injury on 10 April 2012 which rendered her less employable than she had been before. I find the brain injury, amounting to 8% permanent whole body impairment, has had a permanent impact on her memory and cognitive functioning.

- [66] There is a contest between the parties as to the significance of her resignation from Cotton On. The plaintiff did not, either at the time or in her testimony before me, attribute her resignation to her injury. She did, however, give pressures of work as being a significant factor in her decision. On my assessment of the evidence I find that the brain injury affected her work performance and was indirectly instrumental in her decision to resign.
- [67] After her return to work the plaintiff had the benefit of working with an administrative assistant, Ms Hanson. She did not have such assistance before the accident. Ms Talty spoke of how it was a great assistance to have someone to help her coordinate the work day. After Ms Hansson moved to another position, other employees filled that role working with the plaintiff. Ms Hanson confirmed that at times the plaintiff was vague, lost and required assistance by way of prompting about what they needed to do. I accept Ms Hanson's evidence and find it supports the complainant's testimony as to the difficulties she experienced.
- [68] I conclude that while the plaintiff continued in a familiar position and received a degree of support from other employees, difficulties arising from her disability were manageable. She had always applied herself well as an employee and continued to do so in spite of experiencing difficulties with memory and concentration. Those difficulties would have contributed to the work place pressures she reported as being a factor in her decision to resign.
- [69] Once she no longer had the protection of working in a familiar position, her deficits have a more obvious impact upon her employability. Consistent with the expert evidence that I accept, the plaintiff is now unlikely to be employable in a supervisory position. As she previously held such a position with two employers, this represents a real devaluation of her potential to earn income. But for the injury she could have expected in time to progress to positions of greater responsibility in the area where she was already working. I find that as a consequence of her injury, the option of a supervisory level position is no longer available to her. I find that she continues to suffer deficits that affect her functioning, particularly in relation to memory, planning and coordination. In addition to restricting her opportunity to advance to better remunerated positions in areas where she had previous experience, her injury has also reduced her ability to further her prospects through education.
- [70] A period of four years has passed since the accident. It is submitted that as the plaintiff, upon her return from overseas, rejected the option of returning without loss of income to the physical landscaping work she was doing previously, she therefore has suffered no loss of income opportunity. This submission fails to recognise that a range of possible options which would otherwise have been available to the plaintiff in the four year period were closed to her due to her injury. Opportunities of advancement in her existing work place, obtaining promotional employment elsewhere or completing employment related education were not as available to

her due to the injury. An allowance should be made for the consequential economic loss suffered during that period.<sup>12</sup>

- [71] A global amount of \$5,000.00 should be awarded for economic loss in addition to the WorkCover amount. An award of \$17,735.09 will be made for past economic loss.
- [72] Interest on the past economic loss, net of the WorkCover amount, of \$5,000.00 calculated over four years at 2.82% multiplied by 0.5 will be \$282.00.
- [73] Allowance for loss of superannuation contributions on that amount calculated at 9.3% will be \$465.00.

#### **Assessment of future economic loss**

- [74] The parties agree that it is necessary there be an assessment of future economic loss on a global basis.
- [75] For the reasons given above I conclude that the plaintiff has suffered a loss of employability at the level she could have realistically aspired to but for the injury. Her options for physical employment had been constrained to a degree by her ankle injury. She held a supervisory position with two employers prior to the injury. I accept the opinion of Mr Ng that an employer on the open market would now be unlikely to employ her in a supervisory role. She has not had such a role since leaving Cotton On.
- [76] The plaintiff now aspires to follow a career in nursing. While her year 12 results were very poor, the evidence suggests that those results are not indicative of her adult capacity. The plaintiff has shown application in her employment endeavours in the past. On a modest income she succeeded in purchasing housing and meeting mortgage payments. She has completed a Certificate III level of qualification in Aged Care. Intelligence testing indicates that she is of average intelligence. With similar application to her studies as she has demonstrated in other aspects of her life, it is likely the plaintiff would have, but for the injury, been able to complete a Certificate IV in nursing and perhaps in time would have been capable of a degree level studies in nursing.
- [77] On the evidence I find that due to the injury, the plaintiff is now unlikely to be able to achieve a Certificate IV level qualification and there is no realistic possibility of her completing a nursing degree.
- [78] In calculating a global sum to reflect the lost possibilities in the period to age 67, it must be acknowledged the result must be an “educated guess”. As a relatively young person the plaintiff had a number of employment options potentially available to her but for the injury.
- [79] In the area of the plaintiff’s nursing endeavour, helpful information has been provided by Mr Ng on the levels of income in that profession.<sup>13</sup> The August 2014 estimates that the Australian average net weekly wages of a registered nurse (medical) is \$1130; enrolled nurse is \$768; nursing support worker is \$703. Having regard to these

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<sup>12</sup> *Nichols v Curtis* [2010] QCA 303 at [29].

<sup>13</sup> Exhibit 1, p 71.

figures and the pay scales for each level of qualification, an assessment can be made of income opportunities.

- [80] The plaintiff's previous income with Cotton On and with Treescapes paid about \$750 net per week. The level of income of a nursing support worker or Aged Care assistant is of a similar level to that. Should the plaintiff be able to obtain a Certificate IV qualification and commence employment as an enrolled nurse, her income would increase by about 10%. On the assumption that due to the injury that option is no longer open to her, the loss of income over 35 years would amount to \$65,670.00. It is my assessment that the chance of the plaintiff completing a Certificate IV and achieving employment as an enrolled nurse is 20%. The loss of income when discounted 20% amounts to \$52,536.00.
- [81] Should the plaintiff obtain a nursing degree and progress to a position of registered nurse, she could expect a further 50% increase in average income. Calculated over 30 years, allowing for a period to complete degree studies, the additional income would be \$328,800.00. I assess that even had the injury not occurred there was a 50% chance the plaintiff would not have reached this level of employment as a nurse. Discounting the amount by that percentage results in an amount of \$164,400.00.
- [82] It must be conceded that in reaching the total of \$216,936.00 by this route lacks precision. That reflects the difficulty in predicting what possible life course the plaintiff may have taken had the injury not occurred. Another possibility would have been for the plaintiff to progress to a position with more responsibility in warehousing or a similar field of endeavour. I am satisfied that due to the injury the plaintiff has suffered a real loss of earning capacity for the future.
- [83] Weighing all the factors discussed above I will make a global assessment of future lost earning capacity at \$220,000.00.
- [84] Allowance for loss of superannuation contributions on that future economic loss calculated at 11.5% will be \$25,300.00.

#### **Assessment of special damages**

- [85] The parties agree that an award of special damages of \$20,529.00 is appropriate. Applicable interest on the relevant component of those damages is \$92.00.

#### **Summary**

- [86] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	\$42,350.00
Past economic loss	\$17,735.00
Interest on past economic loss (net of work cover)	\$282.00
Past loss of superannuation contributions	\$465.00
Future loss of earning capacity	\$220,000.00
Future loss of superannuation contributions	\$25,300.00
Special damages	\$20,529.00

Interest on special damages	\$92.00
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Total	\$326,749.00
Less WorkCover refund	\$91,081.12
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Net total	\$235,668.00
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**Orders**

- [87] There will be judgment for the plaintiff in the sum of \$235,668.00.
- [88] I will hear from counsel as to costs.