SUPREME COURT OF QUEENSLAND

CITATION:	*Sinclair v Sunshine Coast Independent Living Service Inc* [2016] QSC 63
PARTIES:	**TANIA LOUISE SINCLAIR** (plaintiff) **v** **SUNSHINE COAST INDEPENDENT LIVING SERVICE INC** (defendant)
FILE NO:	SC No 1357 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	24 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24, 25 November 2015
JUDGE:	Holmes CJ
ORDER:	**Judgment for the defendant on the plaintiff's claim.**
CATCHWORDS:	NEGLIGENCE – GENERAL PRINCIPLES – PROOF OF NEGLIGENCE – SUFFICIENCY OF EVIDENCE – where the plaintiff claimed damages for an injury to her lower back – whether the plaintiff could establish that she sustained injury in the course of her employment
COUNSEL:	M Grant-Taylor for the plaintiff B Charrington for the defendant
SOLICITORS:	Schultz Toomey O'Brien for the plaintiff Mullins Lawyers for the defendant

[1] The plaintiff, Tania Sinclair, claims damages for personal injuries said to have been suffered in a workplace accident at Kuluin on the Sunshine Coast on 28 July 2013. She says that working in the employ of the defendant (Sunshine Coast Independent Living Service Inc, known as "SCILS") as a disability support worker, she injured her lower back while pulling a patient's wheelchair over the lip of a doorway. SCILS denies that any such accident happened, and advances a secondary argument that if it did, it was not the result of any foreseeable risk. Aspects of quantum are also in dispute.

The plaintiff's account of her injury

[2] Ms Sinclair worked for SCILS between February 2008 and July 2013, assisting disabled people living in supported accommodation. In December 2010, she suffered a back injury, diagnosed as a disc prolapse at L5/S1, in falls from a hammock; that injury, she said, caused her to be careful in the way in which she managed her work, particularly picking people up. Generally she worked at a particular house where three disabled women lived, but in mid-2013 she began to undertake fortnightly shifts at a house at Kuluin.

[3] There were three residents at the Kuluin house, one of them, Paula, a middle-aged woman with Downs Syndrome. She was very short, but heavy in build. Her actual weight is unknown, and estimates vary between 70 and 90 kilograms, but it is not of great moment; I will proceed on the basis of Ms Sinclair's lower estimate of it, at about 80 kilograms. Paula was able to move about the house, occasionally using a walker, but a wheelchair was employed to take her on trips beyond the premises. She was the resident in moving whom Ms Sinclair claimed to have injured her back on 28 July 2013, when she was performing her third shift of work at the Kuluin house.

[4] On 28 July 2013, Ms Sinclair's shift began at 8.30 am and ended at 4.30 pm. Only two of the residents were home. Mid-morning she took them to a nearby park. Paula was taken in her wheelchair. They left the house through a door which gave access to the carport of the property. There was a key safe outside the carport door, and a key hanging inside the door, which Ms Sinclair used to lock it. On her account, she was injured on their return to the house, pulling Paula in her wheelchair through the same door. There was a large concrete step immediately below the door sill. Standing behind the wheelchair, with her back to the house, Ms Sinclair had pulled Paula in her wheelchair up the step and over the sill of the door. She immediately felt a sharp stabbing pain in her lower back, extending down her left side. It was considerably worse than the pain she had felt after falling out of the hammock.

[5] Ms Sinclair said she spent the next couple of hours watching a film with the other resident and not moving about, but at about 4 pm, Paula, using her walker, went to the toilet. While she was there, she spread faeces about. Ms Sinclair walked her to the

shower and placed her in a shower chair, from which she fell. Because Ms Sinclair was unable to lift her, Paula remained where she was until the next worker, a Mr Spirenza, arrived to start the 4.30 shift. He lifted Paula into the chair and showered her. Some of the faeces had ended up on Ms Sinclair; she cleaned herself and left the house.

Use of exits at the Kuluin house

[6] The Kuluin house had at its front a sliding glass door leading onto a patio area in which were a table and chairs, and a concrete ramp suitable for wheelchair use led from the driveway up to the patio. Ms Sinclair gave evidence that on her first shift a month or so before 28 July, another worker had shown her around the house, explaining which resident was in which bedroom and giving her details of their proclivities and the medications they took; but she was not shown the points of access to and exit from the house. Ms Sinclair said that she was unaware of the concrete ramp and did not realise that the sliding door was a means of egress from the house. She understood it simply to lead to an entertaining area. In any case, passage from the room containing that door was blocked by a number of items of furniture: recliners, cane lounges, coffee tables and a large television.

[7] Of the other support workers who performed shifts at the house, Ricky Moore said that the most obvious entry point to the house was the carport door, which was immediately on hand when one arrived by car. When taking Paula out in her wheelchair, he would move furniture in order to use the front door, of which he was aware because he had previously been the supervisor of a maintenance crew which did work on the house. Amanda Cudlipp said that she commonly drove into the carport and entered the house through the door there; that was also the door she used when moving wheelchair-bound residents in and out of the house. Ms Cudlipp said she only realised that there was an entrance to the house other than the carport door long after she started working there, and she had never made use of it. She was aware of a double door at the front of the house, but there was always furniture in the room, and outside the door there were tables and chairs, so it had never struck her as a means of access. Both Mr Moore and Ms Cudlipp said that they had not been given any instruction about which entrance they were to use in taking residents into and out of the house, nor were they told to use the ramp.

[8] Meredith Francis said that there was no induction process at the Kuluin house. She did not think there was any key to the sliding glass door, whereas there was a key safe at the carport door. Initially her practice in leaving the house with Paula, who at that stage was more capable of walking, was to guide her, holding her hands, through the carport door. About halfway through her time working at the house (which was between August 2012 and October 2013) it became usual to move Paula in a wheelchair. Having seen Mr Spirenza take Paula in her wheelchair through the front door, she began herself to take Paula out that way. There was furniture in the front room, which was frequently moved about by one of the occupants, and a table and chairs on the patio. Her recall was that the patio furniture might have been moved forward once she had started using the front door as a means of access.

[9] SCILS's supported accommodation coordinator, Sarah Newman, was asked about a staff induction checklist which had been introduced in 2014. It was the result, she said, of feedback that staff were having to start work in households of which they had no knowledge, where they were unfamiliar with the layout of the house. Before the introduction of the induction checklist, the system, she agreed, was "hit and miss".

Ms Sinclair's reporting of her injury

[10] Having regard to Ms Sinclair's own evidence, and that of her fellow workers about their perception of the carport door as the usual means of ingress and egress from the house, I find on the balance of probabilities that Ms Sinclair did use that door to leave and re-enter the house on 28 July with Paula and the other resident. Consequently, on her return she had to manoeuvre Paula in her wheelchair up over the step. That was an activity which had the potential to cause injury, given Paula's weight. The more difficult question is whether Ms Sinclair was actually injured in that process. In that regard, her opportunities to report, and what she did say and when, become critical matters for consideration.

[11] Ms Sinclair said that she had told Mr Spirenza that she was unable to lift Paula from the shower floor because she had hurt her back. Mr Spirenza gave evidence; he recalled that Paula was on the floor of the shower and had to be helped up. He did not remember Ms Sinclair's making any comment about having hurt her back but, he said, that was

"not to say she may not have said something". If she had done so, he would have told her to speak to the coordinator about it and to fill out an incident report. He would not have made any note about her having hurt herself.

[12] Ms Sinclair explained that the incident had left her distressed and in discomfort; consequently, she did not think of making any incident report. She acknowledged that it was SCILS policy that any incidents involving an injury which occurred during a shift were to be recorded, and there was more than one means by which that might be done. A monthly household communication book was used for recording any incident, while for each client there was a book called a "Service User Daily Record". At the end of each shift the worker was required to make entries in each of those books. There were also forms used by the service, one an Incident/Hazard Report and another an Accident Report (Personal Injury) which she had used on different occasions in March and April 2012 when a resident had struck her. She had also completed an incident report in December 2012 when one client had injured another.

[13] The Service User Daily Record for 28 July 2013 concerning Paula was in evidence. The entry written by Ms Sinclair first described Paula's sister coming to the residence and staying for morning tea. Thereafter it read:

> "I took the girls for a long walk 1½ hrs to the park & then DVD + jobs. She was a very happys (sic) girl today. Feaces (sic) in her [word unclear] clean up & in her PJs. Showered. On the floor at the shower Subhan [Mr Spirenza] helped. Thank you so much."

Ms Sinclair agreed that she had completed the document after Mr Spirenza had arrived, assisted her and taken over for night shift.

[14] The entry which Ms Sinclair had made in the monthly household communication book for 28 July 2013 recorded again that Paula's sister had visited. Under "General Household Comments", Ms Sinclair detailed laundry, cleaning and cooking tasks which she had carried out during her shift. She did not make any note under the heading, "Hazards/Incidents noted today". Mr Spirenza, however, did. He recorded that he had assisted Ms Sinclair with a patient who was on the bathroom floor when he arrived. He

and Ms Sinclair had got her up and sitting in a shower chair before she was assisted to stand and walk into her bedroom.

[15] On Ms Sinclair's account, on Tuesday 30 July she telephoned Ms Sarah Newman, her support manager, to advise her she could no longer work with Paula and that she had hurt her back the preceding Sunday. She worked two night shifts at the other house on Wednesday 31 July and Thursday 1 August. During the day on 1 August she went to her general practitioner, told her that she had hurt her back and was advised to take anti-inflammatories.

[16] Sarah Newman, on the other hand, said that in late July 2013, after Ms Sinclair had worked two or three shifts at the Kuluin house, she contacted her by telephone and said that she was concerned about working with Paula because she had a back condition. After a discussion with her own supervisor, Ms Newman telephoned Ms Sinclair and asked her to obtain a medical certificate which indicated what tasks she could and could not perform. Ms Sinclair did not tell her that she had actually injured her back on 28 July 2013 in either conversation. After the second conversation Ms Sinclair rang again and told her that her doctor was not prepared to stipulate her limitations; but in a later discussion she advised Ms Newman that she was to see a specialist. Ms Newman suggested that the specialist might be able to give the necessary guide as to her limits. She informed Ms Sinclair that she would not be able to work in a supported accommodation area while there remained a question about her back condition. Had Ms Sinclair told her that she had hurt her back, Ms Newman would have proposed she fill in an incident report or a personal injury report, which was a standard procedure.

[17] Ms Sinclair's version of these conversations was that Ms Newman had asked her to provide an opinion as to the state of her back and a copy of the radiological findings from her 2010 injury. Her recollection was that the doctor had given her something which she had forwarded to her employer. That document was put into evidence. It was a certificate dated 1 August 2013, saying that the doctor had examined Ms Sinclair and that she had

> "degenerative spinal disease with disc bulge at L5/S1 level. She is presently undergoing treatment".

Ms Sinclair obtained another letter from her doctor on 7 August 2013, which read

> "Tania presented today requesting assessment regarding her work capabilities considering she has disc bulge L5/S1 level. She has been referred to an occupational therapist for this".

Ms Sinclair acknowledged that at the stage the letter was written, she had had no further radiological examination, so that the disc bulge referred to must have been the one she had sustained in the hammock incident. On 8 August she worked a day shift. On the same day she went to her doctor and complained of continuing severe pain. On that date she applied for and was granted workers compensation.

[18] Paul Martin, SCILS' General Manager, confirmed that if he became aware that a disability support worker had a back condition he would require a medical certificate which indicated the condition's severity and the work they could do before permitting them to continue. If the worker could not obtain medical clearance, it would be difficult to retain them in employment, because SCILS work involved very few light duties.

The general practitioner's records

[19] The clinical notes of Ms Sinclair's doctor, Dr Dayal, recorded in December 2010 two falls from a hammock in recent weeks, but also noted that she was presenting then with "back pain for six months". Pain was now radiating to her left leg. Ms Sinclair was cross-examined about that entry, but said she could not recall having back pain six months prior to the hammock falls. Dr Dayal prescribed Brufen (an anti-inflammatory) and Panadeine Forte (an analgesic) and sent Ms Sinclair for CT scans of her cervical, thoracic and lumbar spine. She returned in early February 2011 with the results, and a disc prolapse was diagnosed. She was advised to see a specialist and undertake an MRI scan. There is another entry on 16 November 2011, describing "ongoing back pain". That was noted as following a jet ski accident a month previously. Dr Dayal recorded in February 2012 that she had ceased the Brufen and Panadeine Forte prescriptions. Ms Sinclair gave evidence, however, that although she was given prescriptions she did not necessarily fill them and she was not on those medications for the entire 14 month period suggested by the notes.

[20] The entry for 1 August 2013 shows Ms Sinclair presenting with some skin complaints, with the "Reason for contact" recorded as "cryotherapy – warts", but it also bears the note "needs letter for work". On 7 August 2013, the "Reason for contact" is "referral", which is expanded on: "needs detailed letter to employer regarding what she can and cannot do at work". There is no presenting complaint on that occasion, but it is noted that there is a referral to a Ms Attenborough (an occupational therapist). The referral letter is in evidence. It thanks the recipient for seeing Ms Sinclair for "workplace assessment". It goes on to say that she

> "has L5/S1 disc herniation. She works with disabled clients. Her pain flares up at times especially when moving heavy clients."

Her history of "active" conditions is given in list form; it includes two mentions of disc prolapse in 2011, but no relevant current presentation.

[21] On 8 August 2013, however, Dr Dayal recorded in her notes, "Reason for contact: back pain" with the detail,

> "pulled client up the stairs in a wheelchair to get in house on 28/7 – increased back pain since then radiating to left leg."

Rebuttal evidence

[22] It was put squarely to Ms Sinclair that she had invented her account of injuring herself in the way described. To rebut that suggestion, evidence was led on her behalf from two witnesses: a friend, Michelle Johnson, and Ms Sinclair's mother, Margaret Whitbread. Ms Johnson said that she had, on an unidentified date, arranged for Ms Sinclair to attend a function related to her own workplace. However, on the afternoon of the function, Ms Sinclair telephoned her and told her that she would not be able to attend. She was in extreme pain and was also distressed because she was "covered in shit from the incident". Ms Johnson saw Ms Sinclair in person either the same night or the following day. On that occasion, Ms Sinclair told her that she had had to pull a client in a wheelchair over a step into the house and had felt pain of a kind she had

never experienced before. Although she knew something was wrong, she had to deal with the problem of being covered in faeces.

[23] Ms Whitbread said that she had rung her daughter and found that she was upset and in excruciating pain. The preceding day she had pulled the wheelchair of a patient, Paula, over a lip and felt pain, but had to carry on because

> "Paula was in the shower and there was…shit everywhere that she…had to deal with".

Whether the injury occurred as described

[24] Counsel for the plaintiff submitted that his client's account of the accident should be accepted. Ms Newman had confirmed that Ms Sinclair was a reliable and caring worker with SCILS; Mr Lake, the workplace health and safety officer of SCILS, said that he had no concerns about her claim when her report was originally lodged; and there was powerful evidence from Ms Johnson and Ms Whitbread in rebuttal of the allegation of recent invention. It had not been put to Ms Sinclair that she had failed to complain to Mr Spirenza, so her evidence as to that should be accepted. Ms Newman had no particular reason to recall her conversation with Ms Sinclair until almost a year later and may have failed to recall that she had reported the particular incident at a time when she also expressed concern about working with Paula and her back condition. The fact that Dr Dayal's clinical notes in the entries for 1 August and 7 August did not record the incident did not mean that Ms Sinclair had not mentioned it, and the doctor had not been called on the point.

[25] I have come to the conclusion, for a number of reasons, that Ms Sinclair's account of hurting her back while moving Paula on 28 July 2013 cannot be accepted. One could readily understand, in light of the trying circumstances in which Ms Sinclair finished her shift on that day, that she might have felt too tired and dispirited to make a record of events, but that is not what occurred. She did in fact make notes in both the monthly household communication book and the service user daily record of events during her shift. The note in the latter was cheerful in tone. It is simply not credible that had Ms

Sinclair sustained a significant back injury, she would not have recorded the event in either document.

[26] I do not consider it of any significance that it was not specifically put to Ms Sinclair that she had failed to complain to Mr Spirenza; it was implicit in what was put to her that there was no matter of which she could have complained to him. Although he had little actual recollection of the incident, it is of some interest that his contemporary note records that "Tania and I got [Paula] up..."; which is at odds with Ms Sinclair's account of being in such pain that she left it to him to lift their client.

[27] Secondly, the absence of any recorded complaint in the clinical notes of Ms Sinclair's general practitioner also militates strongly against acceptance of her account. The notes, tendered without objection, became evidence for all purposes: *Robert Bax & Associates v Cavenham Pty Ltd.*[1] Their nature as hearsay may of course be relevant to their weight, but the court is entitled to give the record "such probative value as the court thinks it is worth"[2]. The glaring absence of any mention of back pain in the presentation four days after the accident is entirely inconsistent with Ms Sinclair's having injured herself. The notes are short but quite clear; on 1 August she presented for an unrelated problem and sought a letter whose content shows that she was concerned with her existing back condition, not any fresh injury. Again, almost a week later, on 7 August, Ms Sinclair attended Dr Dayal for reasons quite distinct from any question of fresh back injury. It is notable that the doctor's referral letter on that occasion makes no reference at all to a current injury, which would be extraordinary had one been reported; and similarly the letter which she addressed to SCILS on the same date raised the need for the referral for assessment of Ms Sinclair's capacity in light of her disc bulge, not any new injury.

[28] Dr Dayal made a detailed record of Ms Sinclair's complaint of injury when she finally came to make it on 8 August 2013; it is not credible that she would not have made similar notes had it been raised earlier. Ms Sinclair's back pain from that injury was not said to be a fluctuating condition which might have meant that it was not dominant in her mind when she visited her general practitioner on 1 August and 7 August. Her

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1 [2013] 1 Qd R 476.
2 *Roof & Ceiling Construction Co v S A Wigan & Co Pty Ltd* [1972] QWN 14 at 25.

description of events to Dr Lawrie, an orthopaedic surgeon who examined her for reporting purposes the following year, was that she experienced pain at a 9/10 level constantly up until the time when she ceased work on 8 August. It is not believable that, attending Dr Dayal's surgery on separate occasions when her existing back condition was evidently the subject of requests for documentation, she would not speak of her new and severe back pain.

[29] Thirdly, Ms Newman was an entirely credible witness whose account was supported by what appeared in the doctor's notes: that is, that her contact with Ms Sinclair concerned the limitations imposed by an existing back condition, not a contemporaneous injury. I consider it probable that, consistently with her communication with Ms Newman, Ms Sinclair was experiencing difficulty in working with that (non-compensable) existing condition. I also find it probable that, as counsel for SCILS posited, it was the intimation that she would not be permitted to work without confirmation of her capacity, so that she faced economic loss, which prompted the complaint of recent injury on 8 August 2013.

[30] The contemporary evidence being so strongly against Ms Sinclair's having suffered the injury, I am forced to conclude that the evidence of Ms Whitbread and Ms Johnson is not reliable. It may be the result of their having been misled. Whatever the reason, while their evidence was on its face plausible, it does not overcome the problem of Ms Sinclair's having failed utterly to complain, in a context in which it is obvious that had she been injured she would have done so: in the household notes, to Ms Newman, and to her own doctor.

View on liability had the plaintiff's account been accepted

[31] Ms Sinclair's statement of claim pleaded that SCILS had been negligent in allowing her to physically lift a wheelchair over the step; failing to undertake risk assessment of the task of moving a wheelchair through the carport door; failing to give her and other employees sufficient training, instruction and assistance in relation to such tasks; failing to inform her that she could enter the house through the front door; failing to ensure that the entry was kept clear so that the access ramp could be used; failing to make the carport door wheelchair-accessible; and placing the key safe at that door rather than the

front door. SCILS, as well as denying that the accident happened, denied the allegations that it had not provided adequate training, instruction and assistance; alleged that Ms Sinclair was not required to lift the wheelchair over the steps and that she could have obtained safe access by using the ramp at the front door; denied that she had not been informed of the existence of the ramp and said that it should in, any event, have been obvious to her, so that any injury was due to her own lack of care in failing to use it; and asserted that there was no need to put the key safe at the front door, to provide wheelchair access at the carport door or carry out a risk assessment.

[32] Had I accepted Ms Sinclair's account, I would have held that SCILS was negligent in failing to ensure that its workers, and in this case, Ms Sinclair, who had only recently started work at the house, were aware of the availability of the front door of the house and associated ramp as a means of exit with wheelchair-bound clients. There was no dispute, unsurprisingly, that as Ms Sinclair's employer, SCILS owed her a duty of care. SCILS conceded, too, that the likelihood of injury to a disability support worker attempting to manoeuvre a heavy client in a wheelchair over the step and sill at the carport door was foreseeable. It was contended, however, that the undertaking of the manoeuvre itself was not foreseeable because Paula was sufficiently ambulant to negotiate the door sill and step without the use of the wheelchair, and the availability of the ramp was obvious.

[33] The first of those contentions however is, I apprehend, premised on a misapprehension of Ms Francis' evidence as to her manner of guiding Paula through the carport door. That evidence related to a time before it became necessary to take Paula out in a wheelchair and before Ms Sinclair began to work with her. As to the second, it does seem surprising, looking at the photographs of the premises, that it would not have occurred to Ms Sinclair that the ramp at the front of the house was the appropriate means of wheelchair access. However, having regard to the evidence of her fellow workers, I accept that it was not evident that the front door could be used. While the ramp itself is clearly visible leading to the patio, it seems that the amount of furniture, both on the patio and in the way of the door in the living room, was such as to make it appear, at least, that there was no navigable means of exit there. The arrangement of the furniture in the living room and the positioning of the key and key safe at the

carport door both pointed to the expected use of the latter, as was the practice of other workers. Ms Sinclair was not advised to do anything differently.

[34] The fact that a path could be made out with some rearrangement to the furniture might with time have become evident to Ms Sinclair; but SCILS should have taken steps to make it immediately known to her. It would have been an easy step to make familiarisation with means of wheelchair access a standard part of orientation for new workers; it seems to have occurred when the induction check list was introduced. The risk of injury to a worker attempting to manoeuvre a wheelchair through the carport door was foreseeable and significant; a reasonable employer would have taken the step of ensuring that workers were made aware of the safe alternative route.

[35] I would not find the allegations of negligence, other than those which turned on the failure to give that instruction or advice, made out. It was reasonable to place the key safe at the carport door, as that was the usual means of entry and exit; it was unnecessary to make that door wheelchair-accessible, given the existence of the ramp at the front of the house; movement by wheelchair into and out of the house did not require risk assessment, nor did Ms Sinclair require assistance with the task of taking Paula out in a wheelchair per se; and although it would have been desirable that the front entry of the house was kept clear of furniture and equipment, it seems plain from Ms Francis' and Mr Moore's evidence that the furniture did not present any significant physical barrier to movement.

The plaintiff's evidence relevant to assessment of damages

[36] Notwithstanding my finding against Ms Sinclair on liability, I will proceed to assess quantum, in accordance with the practice recommended in *Elliott v Lawrence*[3]. To do so in this case is somewhat artificial because it requires an assumption that Ms Sinclair was a reliable historian, but I will proceed on the hypothesis that she did sustain the injury as claimed on 28 July 2013 and was in severe pain thereafter.

[37] Ms Sinclair said that she had a background in a variety of occupations. She had been a dental nurse; held real estate qualifications; had worked in after-market management,

3 [1966] Qd R 440 at 444-445

which entailed finalising documentation on car sales; and had been a sales consultant at a gym. She became a disability support worker when she commenced work with SCILS in 2008. After her original back injury in December 2010, she had taken more care with her back and reduced her physical activities, but by 2012 she had resumed boxing and other gym activities and had taken up jet skiing.

[38] But for the 2013 incident, Ms Sinclair said, she had envisaged a career in disability support and anticipated moving ultimately into management. She was now unable to work as a disability support worker. Although she had attempted a return to work with SCILS, undertaking computer work for short sessions, she found that to do so caused her spasms and she was unable to continue with it. She was currently taking Valium and Nurofen. She had not applied for any employment since leaving SCILS; asked why, she said

> "Because I am concentrating on getting my back fixed so I can keep a job. I have no problems getting a job."

Asked to expand on that answer, Ms Sinclair explained that she used natural therapies and various forms of exercise in order to strengthen her back so that she would be able to stand and sit for long periods of time in order to enable her to start working. She was currently undertaking physiotherapy.

The medical evidence

[39] Dr Dayal had referred Ms Sinclair to a neurosurgeon, Dr Johnson, who reported on her condition and she was also was examined for purposes of these proceedings by an orthopaedic surgeon, Dr Lawrie, at her solicitors' behest, and by an orthopaedic surgeon and a neurosurgeon, Dr Keays and Dr Coyne, on behalf of SCILS. There was not great divergence in their reporting.

[40] Dr Lawrie described Ms Sinclair as suffering from chronic lower back pain and radicular pain secondary to a left-sided L5/S1 disc protrusion. It was similar on radiological examination to the bulge detected in 2011; accordingly, he regarded 50 per cent of her injury as attributable to that pre-existing pathology. She was exhibiting a depressed ankle reflex which was an objective sign of injury, but it was not possible to

say whether or not it predated the 2013 injury. Dr Lawrie noted, on the use of Waddell's test, which he described as "a group of signs of non-organic or psychological components to pain", that a number of abnormal responses were elicited. Ms Sinclair's straight leg raise could be enhanced from 10 degrees in one leg and 30 degrees in the other to 70 to 80 degrees on distraction, and various tests which did not involve any load on the lumbar spine or stress on the relevant nerve root elicited grunting and groaning. Her pain and disability, he said, was greater than was to be expected for the type of disc bulge involved. He did not think she would be a good candidate for surgery.

[41] Dr Lawrie was prepared to say that the disc protrusion was the organic cause of Ms Sinclair's pain and disability, although there was a significant non-organic component to the pain; he was not able to apportion between the two as to contribution. It was possible that a patient's pain could create a psychological overlay. In theory, a person with an L5/S1 disc protrusion would be able to return to sedentary work and it would be unusual that they should be precluded from any kind of work at all. Dr Lawrie did not consider, however, that Ms Sinclair would be able to return to any work. That conclusion seemed to be based on Ms Sinclair's own report to him that she lived with her parents and spent most of the time lying on her back while her parents did all the housework; an account which was not replicated in her evidence.

[42] Dr Lawrie said that if Ms Sinclair had recovered from the episodes of back pain resulting from the hammock incident, it was not necessarily the case that she would have further episodes of pain, and in the absence of symptoms there was no reason for her not to have continued in her work as a disability support worker. On the American Medical Association Guide to the Evaluation of Permanent Impairment he assessed a 10 per cent whole person impairment, apportioning 50 per cent to the previous injury, and thus arrived at a 5 per cent whole person impairment relating to the work injury.

[43] Dr Johnson noted the radiological evidence of an L5/S1 disc bulge and Ms Sinclair's history of having recovered from a previous injury resulting from a hammock fall. Given that history of recovery, including Ms Sinclair's account of returning to gym work, bicycle riding and taking up jet skiing, he did not think that there would have been any doubt about her ability to maintain employment as a disability support

worker. If, on the other hand, he had been given a history of a six month episode of back pain prior to the hammock fall, in the absence of an acute incident, he agreed there would be some cause for concern about the long term prospects of Ms Sinclair's performing a job which involved manual handling of patients; he would have suggested weight restrictions.

[44] Ms Sinclair gave a history to Dr Keays of an absence of any back problem until a hammock fall, after which her symptoms took six months to settle down. His diagnosis was that she had sustained an aggravation of lumbar spondylosis. On the AMA Guide he would assess her as having a 5 per cent whole person impairment, half of which was attributable to her pre-existing condition. A different history, of six months pain prior to the hammock incident, would not cause him to change that apportionment. Dr Keays noted on examination that Ms Sinclair had exhibited abnormal illness behaviour, displaying 20 out of 26 inappropriate responses. On the other hand, there was some objective evidence of injury: guarding, spasm and asymmetry of movement.

[45] Dr Coyne's report and the note of a more recent conference with him were tendered without his being cross-examined. Dr Coyne considered that Ms Sinclair had probably sustained a lumbar spine disc or soft tissue injury in the work-related incident. Her level of reported pain and disability, however, was uncommonly high, considering that no violent force had been applied to her lumbar spine in the incident; the lumbar spine imaging did not demonstrate neurological compromise or any abnormality, other than mild-moderate degenerative change involving the L5/S1 disc; and some time had elapsed since the incident. In his view, the radiological appearance of the disc prolapse on the lumbar spine MRI scan taken after the work incident appeared improved, if anything. He considered it likely that "psychosocial factors" were of importance in the history of Ms Sinclair's pain condition, and suggested the possibility of mood disturbance. It would ordinarily be expected that the symptoms of a lumbar spine injury of the type Ms Sinclair described would resolve over 3 to 6 months. Those psychological factors were likely to be significant in her persisting pain condition, which was also likely to be related to in part to her pre-existing spinal degeneration.

[46] Ms Sinclair's high level of pain reporting and disability suggested that it would be difficult for her to manage any meaningful employment. It was "conceivable" that a

significant lumbar spine soft tissue injury or degenerative lumbar spine condition could restrict her long term capacity for employment, domestic and recreational activities of a heavy physical nature which would stress the spine. The work-related incident and the pre-existing spine condition would probably have contributed equally to any such restriction. Dr Coyne assessed Ms Sinclair's impairment on the AMA Guide as an 8 per cent permanent impairment of the whole person, apportioning that equally between the work-related incident and her previous spinal history.

General Damages

[47] It was agreed that the appropriate item against which Ms Sinclair's general damages should be assessed is item 92 of Schedule 9 to the *Workers' Compensation and Rehabilitation Regulation* 2014, which allows for an ISV range for moderate lumbar spine injury of 5 to 10. In this case, having regard to the relatively consistent medical assessments of Ms Sinclair's back condition, I would select an ISV of 8, which, calculating general damages in accordance with Schedule 12, would give a figure of $11,290.

Past economic loss

[48] Consideration of economic loss raises the question of the extent to which the injury (which for present purposes I treat as having occurred) has produced Ms Sinclair's past and future incapacity for work. The uniform view of the doctors who had examined her for medico-legal purposes was that Ms Sinclair exhibited abnormal illness behaviour and that her reported pain was out of all proportion to the physical injury.

[49] It should be noted here that Ms Sinclair's statement of claim was amended to remove a claim for a "secondary psychological injury". Her counsel suggested, however, that the amendment was inconsequential: her perception of pain was the product of her physical injury, not a psychiatric response. I do not think that the medical evidence supports that contention. Dr Lawrie referred to her having "non-organic components to her pain". He did raise the possibility of a patient's pain in itself creating a psychological overlay; but that would appear to be precisely the kind of secondary psychological injury any claim to which Ms Sinclair abandoned. Dr Keays referred to "abnormal illness behaviour" but

refused to be further drawn on the causes. Dr Coyne proposed the existence of "psychosocial factors" and suggested a mood disturbance. To the extent, then, that Ms Sinclair's response is out of proportion to the injury sustained and is due, presumably, to psychological factors, I do not think it forms any part of her claim or is compensable.

[50] On the premise that Ms Sinclair's account is to be believed, I would accept that the injury on 28 July 2013 occurred in an asymptomatic back, because that was her evidence, and because Dr Dayal's notes record no specific complaint for some period. As a new episode of back pain, it would have made it inadvisable for her to return to work as a disability support worker or in any other occupation involving significant manual handling. But the thrust of Dr Lawrie's and Dr Coyne's evidence was that an individual with Ms Sinclair's physical injury would be expected to be able to return to sedentary work.

[51] As at the date of this judgment it will be about 32 months since the date of the alleged accident and injury. I would allow 18 months loss of income in full, or $95,000 (accepting the plaintiff's net income figure of between $63,000 and $64,000 at the relevant time). I would add a further $37,000 to reflect a capacity reduced by half over the 14 months thereafter to the date of trial, allowing for a gradual recuperation and the difficulties of finding sedentary work. The figures I have been given show that Ms Sinclair actually received some $24,000 as income from SCILS over the 2013-2014 year: $2,000 paid direct by SCILS together with a salary sacrifice of $22,000. Unfortunately, it is not possible to discern from the figures provided how much of that amount was paid post-accident; but assuming it was about $20,000 (representing continued salary sacrifice payments), I arrive at a figure for past economic loss of $112,000. Interest on that amount, less a total of $44,000 odd which Ms Sinclair received by way of workers' compensation and Centrelink benefits, at 1.505 per cent per annum for the 32 months to judgment, would add some $2722. Past superannuation at 9.25 per cent adds another $10,360.

Future economic loss

[52] Some allowance should be made for future impairment of earning capacity. I do not accept that Ms Sinclair is unable to work; indeed given the breadth of her experience,

her prospects of finding sedentary employment seem quite good. Allowance should be made, however, for her inability to work in any area requiring heavy lifting. It is also to be recognised that her impairment comes in the context of a pre-existing injury. Ms Sinclair is now 41 years of age and could reasonably expect another 25 years in the labour market. It is impossible to arrive at a figure with any precision, but having regard to the considerations mentioned, I will allow $150,000 for future loss. That figure is arrived at as loosely equating to an assumed annual loss of some $10,000 per year over 25 years, applying the 5 per cent discount table. Future superannuation at 11.22 per cent would add $16,830.

Special damages

[53] Expenses met by WorkCover combined with out of pocket expenses were an agreed amount of $15,269.32**,** with interest on out-of-pocket expenses of $966.45 over 2.66 years to the date of judgment at 1.5 per cent per annum adding $38.56.

Future special damages

[54] The submissions for SCILS were somewhat more generous than Ms Sinclair's own. It was conceded that a global allowance for future physiotherapy of $5,000 was appropriate, $2,500 for the prospect of Ms Sinclair attending a pain management clinic and $961 for future medication, giving a total of $8,461. Ms Sinclair had only contended for $6,664. I will allow an amount of $7,500.

Fox v Wood

[55] The *Fox v Wood* component was agreed at $3,626.38.

SUMMARY

General Damages	$11,290.00
Past economic loss	$112,000.00
Interest on past economic loss	$2722.00
Past superannuation	$10,360.00

Future economic loss	$150,000.00
Future superannuation	$16,830.00
Past special damages	$15,269.32
Interest on past special damages	$38.56
Future special damages	$7,500.00
Fox v Wood component	$3,626.38
Total	$329,636.26
Less WorkCover refund	-38,251.87
TOTAL DAMAGES	$291,384.39

[56] For the reasons I have given in relation to liability, however, I give judgment for the defendant on the plaintiff's claim. I will hear the parties as to costs.