

# Untangling injury from pre-existing conditions

## *Officeworks Ltd v Christopher* [2019] NSWCA 96

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### Summary

In this recent decision the NSW Court of Appeal overturned findings regarding damages made by the District Court on the basis that the primary judge failed to adequately disentangle the effects of pre-existing conditions and incident related injuries.

### Background

The 73-year-old plaintiff sustained injuries when an object fell on her from a height when she attended an Officeworks store on 2 August 2012 (the **incident**). The incident occurred 9 days after the plaintiff underwent a left shoulder surgery to treat a fracture (the **first surgery**).

The plaintiff alleged that, as a result of the incident, she required the following:

1. left rotator cuff repair and left shoulder hemiarthroplasty in December 2012 (the **second surgery**); and
2. left shoulder replacement in August 2014 (the **third surgery**).

In a decision delivered on 19 October 2018, Judge Maiden of the District Court found Officeworks liable and awarded \$215,203.40 in damages.

Judge Maiden did not make a specific finding in respect of the mechanism by which injury resulted from the incident. Instead, his Honour identified two possible scenarios after the falling object (a box or some of its contents) fell onto the plaintiff's shoulder. The impact

either caused the plaintiff to fall onto the floor or caused her to lose her footing and fall with the fall cushioned by some person coming to her aid.

In respect of quantum, Judge Maiden failed to have regard to sections 5D and 5E of the *Civil Liability Act 2002* (NSW) in finding that both the second and third surgeries resulted from the incident.

The Officeworks appeal of the primary decision proceeded on the basis that if the plaintiff had fallen to the floor after being struck from above, there was a greater prospect of injury being caused to her already injured left shoulder than was the case had she merely been struck from above.

Central to Officeworks' appeal was the extent to which the plaintiff, who was still recovering from the first surgery, sustained further injury in the incident.

At trial, the treating orthopaedic surgeon gave uncontradicted evidence that the loosening of a surgical screw, inserted during the first surgery, was a recognised complication of surgery. There was also evidence that the surgical screw likely loosened during physiotherapy treatment received after the first surgery and that no movement of the screw in question was detected by radiological evidence following the incident.

### Decision

The Court of Appeal (Meagher Gleeson and Leeming JJA) ruled that the plaintiff's only entitlement to damages was the sum representing her past out-of-pocket expenses arising out of the left rotator cuff injury caused directly by the impact of the falling object.

The Court of Appeal held that::

1. the plaintiff failed to establish that the incident caused the need for the second surgery as it could not be established that the incident had caused the surgical screw to loosen, even if it was accepted that the plaintiff fell to the ground;
2. even if the loosening of the surgical screw was the cause of the need for the second surgery, it was not established that the incident caused the loosening;
3. the damage to the plaintiff's left shoulder rotator cuff was caused by the incident, however, this was repaired in the second surgery;
4. the plaintiff was not entitled to an award of damages for non-economic loss, future out-of-pocket expenses or gratuitous domestic care and assistance.

## Implications

This case is a useful reminder that, while a plaintiff can often rely on the subsequent worsening of a pre-existing condition to establish aggravation of the condition by injury:

1. a defendant can introduce medical evidence to rebut the inference of cause and effect;
2. in this regard, evidence from treating medical specialists can be important in filling in gaps left in medico-legal reports;
3. the burden of proof ultimately rests with the plaintiff; and
4. when there is a dispute regarding the role of a pre-existing condition, considerable weight should attach to treating medical evidence, including radiological reports and treating specialist's reports.

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