



## **Court of Appeal Supreme Court New South Wales**

**Case Name:** **Karaoglu v Fitness First Australia Pty Ltd**

**Medium Neutral Citation:** [2023] NSWCA 229

**Hearing Date(s):** 29 August 2023

**Date of Orders:** 03 October 2023

**Date of Decision:** 03 October 2023

**Before:** Mitchelmore JA at [1];  
Stern JA at [2];  
Simpson AJA at [79].

**Decision:** (1) The appeal is dismissed.  
(2) The appellant is to pay the respondent's costs of the appeal.

**Catchwords:** NEGLIGENCE – breach of duty of care – lawful occupant of gym – foot plate of leg press collided with head of user – duty to warn – whether failure to decide material issue – where primary judge made findings relevant to duty to warn – no evidentiary basis that warning would have prevented accident from occurring

APPEALS – from findings of fact – inferences from primary facts – where primary judge not satisfied leg press fitted with spring – where evidence of spring related to a different machine – no proper evidentiary basis for finding leg press fitted with spring

APPEALS – from findings of fact – inferences from primary facts – negligence – damages – where primary judge not satisfied conversion disorder caused by accident – whether primary judge erred – evidence did not support a finding that conversion disorder caused by accident

**Legislation Cited:** *Civil Liability Act 2002 (NSW)*, s 16  
*Supreme Court Act 1970 (NSW)*, s 101(1)(a)

Cases Cited: *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186; [2006] NSWCA 187

Category: Principal judgment

Parties: Deniz Karaoglu (Appellant)  
Fitness First Australia Pty Ltd (Respondent)

Representation: Counsel:  
J Morris SC / M J Davis (Appellant)  
J Catsanos SC / R Perla / J Hart (Respondent)

Solicitors:  
Carters Law Firm (Appellant)  
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File Number(s): 2023/16747

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### **Decision under appeal**

Court or Tribunal: Supreme Court of NSW

Jurisdiction: Common Law

Medium Neutral Citation: [2022] NSWSC 1772

Date of Decision: 23 December 2022

Before: Campbell J

File Number(s): 2018/192428

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## HEADNOTE

**[This headnote is not to be read as part of the judgment]**

Mr Karaoglu an experienced gym user, was training at a gym in Auburn (the “Gym”) run by Fitness First Australia Pty Ltd (“Fitness First”). Mr Karaoglu was using a Technogym 45 – degree incline leg press (the “leg press”) which he had loaded with 240 kilograms. After completing a set of ten repetitions he rose to exit the machine. As he did so, the footplate descended and collided with the crown of his head knocking him unconscious (the “Incident”).

Mr Karaoglu commenced proceedings against Fitness First, alleging it breached the duty of care owed to him as a lawful occupant of the Gym and claimed damages based on him suffering from a conversion disorder.

The primary judge dismissed the proceedings and found that of the various causative mechanisms that were advanced, the possibility that inattention of Mr Karaoglu caused the Incident was at least of equal probability as the other possibilities alleging a failure by Fitness First to maintain the leg press. The primary judge also rejected Mr Karaoglu’s claim based on a failure to instruct as to the safe use of the leg press, in part based on a finding that he was not satisfied Mr Karaoglu would have accepted and followed an instruction even if it had been given. Finally, in assessing damages on a contingent basis, the primary judge was not satisfied that Mr Karaoglu had suffered from a conversion disorder caused by the Incident.

By a notice of appeal filed 23 March 2023 containing six grounds, Mr Karaoglu appealed from the whole of the primary judgment. During the hearing of the appeal, senior counsel for Mr Karaoglu abandoned the first two grounds of appeal and reframed the extant grounds of appeal. The main issues on appeal were:

- (1) Whether the primary judge erred by failing to draw proper inferences of fact as to the existence, function and maladjustment of a spring on the leg press;
- (2) Whether the primary judge failed to decide a material issue of whether Fitness First breached its duty to warn; and
- (3) Whether the primary judge erred by concluding he was not satisfied that Mr Karaoglu suffered from a conversion disorder caused by the Incident.

**The Court** (Stern JA, Mitchelmore JA and Simpson AJA agreeing) **dismissing the appeal, held:**

*As to issue (1)*

- (1) There is no proper evidentiary foundation for the contention that the leg press either had, or ought to have had, a spring. In these circumstances, Mr Karaoglu's contention that the primary judge erred in his rejection of a maladjusted spring as the explanation for the Incident must be rejected. So too must Mr Karaoglu's contention that the leg press was somehow defective on account of the lack of a spring: [51].

*As to issue (2)*

- (2) The primary judge made a number of findings of relevance to the failure to warn issue. Those findings were well supported by Mr Karaoglu's evidence. Having regard to that evidence, there is no basis for the contention that a warning would have prevented the Incident from occurring: [54]-[60].
- (3) The evidence does not support a conclusion on the balance of probabilities that Mr Karaoglu would have acted any differently if he was warned of the need to ensure that the weight bar was in a stable position on the support. Mr Karaoglu was well aware of the steps he had to take to ensure that the weight bar was properly supported: [62].

*As to issue (3)*

- (4) The primary judge did not err in finding, on the basis of inconsistencies and absence of corroboration, that an inference of conversion disorder was not more likely than the inference that Mr Karaoglu was feigning his disability. The evidence of contemporaneous complaints does not stand in any material way against the primary judge's conclusions. The evidence relied on does not support a conclusion that any conversion disorder was caused by the Incident: [72], [75]-[76].
- (5) The primary judge did not err in preferring the evidence of Dr Kinny to Dr Guirgis. A fair reading of the primary judgment is that the primary judge found the reasoning of Dr Kinny to be persuasive and preferred it to the evidence of Dr Guirgis on that basis: [67].

## JUDGMENT

- 1 **MITCHELMORE JA:** I agree with Stern JA.
- 2 **STERN JA:** On 25 June 2015, the appellant Deniz Karaoglu, an experienced gym user, was training at a gym in Auburn (the “Gym”) run by the respondent, Fitness First Australia Pty Ltd (“Fitness First”). Mr Karaoglu was using a Technogym 45 – degree incline leg press (the “leg press”) which he had loaded with 240 kilograms. After completing a set of ten repetitions he rose to exit the machine. As he did so, the footplate descended and collided with the crown of his head knocking him unconscious and, he alleges, causing him significant and ongoing injury (the “Incident”).
- 3 By an amended statement of claim (“ASOC”) filed on 6 April 2021, Mr Karaoglu brought an action in negligence. Accordingly, questions of liability are to be determined by the common law as modified by the *Civil Liability Act 2002* (NSW). He alleged that in multiple respects, including failure to maintain (or install safety features on) the leg press, failure to instruct and failure to warn, Fitness First breached the duty of care that it owed to him as a lawful occupant of the Gym, thereby causing the Incident. Mr Karaoglu particularised numerous injuries he claimed were caused by the Incident and claimed damages in the sum of \$2.7 million.
- 4 After a trial which continued over nine days, the primary judge dismissed Mr Karaoglu’s claim and ordered that he pay the respondent’s costs: *Karaoglu v Fitness First* [2022] NSWSC 1772 (“Primary judgment”). Whilst various potential causative mechanisms were advanced for the Incident, the primary judge was satisfied that the Incident being due to inattention by Mr Karaoglu was at least of equal probability as the other possibilities that Mr Karaoglu advanced. In these circumstances, Mr Karaoglu’s claim that the Incident was caused by a failure to maintain (or install safety features on) the leg press failed. As to the failure to instruct as to the safe use of the leg press, the primary judge also rejected Mr Karaoglu’s claim. This was “most importantly” because the primary judge was not satisfied that Mr Karaoglu would have accepted and

followed instruction even if it had been given. The primary judge found that, absent defect, there was no duty to warn as Mr Karaoglu was aware that the weight bar may have been unstable if the supports were not properly brought back into the locked position.

5 The primary judge assessed damages on a contingent basis. Mr Karaoglu's claim was based upon him suffering from a conversion disorder, being a psychiatric disorder, which manifested itself in ongoing and debilitating neurological and physiological symptoms. The primary judge was not persuaded on the balance of probabilities that Mr Karaoglu had a conversion disorder. This was largely because the primary judge rejected the primary factual basis for the claim. The primary judge found that even if he had been satisfied that Mr Karaoglu had a conversion disorder, he was not satisfied that it was caused by the Incident. As to the immediate physical injury, the primary judge characterised this as a "temporary" physical injury which had resolved by the time Mr Karaoglu recommenced regular gym work in September 2015. Thus, the primary judge was not satisfied Mr Karaoglu had suffered from anything more than a temporary physical injury, which did not cross the threshold in s 16 of the *Civil Liability Act* which provides that no damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.

6 By notice of appeal filed 23 March 2023, Mr Karaoglu appeals from the whole of the decision below pursuant to *Supreme Court Act 1970* (NSW), s 101(1)(a). He seeks orders that the judgment and orders of the primary judge be set aside, substituted with judgment for Mr Karaoglu and that there be a new trial on the question of damages alone. Whilst he initially advanced six grounds of appeal, he abandoned the first two during the hearing of the appeal. The extant grounds of appeal are:

"3 The learned trial judge erred by failing to draw proper inferences of fact at paragraph [146] of the Judgment, as to the existence, function and maladjustment of a spring on the Machine from primary facts established by the unchallenged evidence of Mr Charles Tassone at pages 400, 401, 408, 410, 411 and 416 of the Transcript.

- 4 The learned trial judge erred by failing to decide a material issue raised by the appellant, namely, contention that the respondent breached its duty of care by failing to warn him of the need to fully engage the lever of the Machine so as to fully engage the locking mechanism.
  - 5 The learned trial judge erred by failing to decide a material issue raised by the appellant, namely, whether the appellant sustained physical injuries, other than injury to his spinal cord, on 25 June 2015.
  - 6 The learned trial judge erred by failing to give proper weight to, or otherwise engage with, the corroborative effect of evidence adduced in the proceedings below of contemporaneous complaints made by the appellant about physical injuries and symptoms where to do so would have affected the verdict.”
- 7 By notice of contention on 4 August 2023, Fitness First contends as follows:
- “1 To the extent relevant to error established on the part of the primary judge, the respondent contends that the judgment in favour of the respondent ought to be affirmed on the basis of the contingent findings of the primary judge at Judgment [158] that:
    - (a) The risk of harm to Mr Karaoglu was an obvious risk and the respondent was, pursuant to s.5H of the Civil Liability Act 2002 (**CLA**), under no duty to instruct or warn the appellant of that risk.
    - (b) The materialisation of the risk which occurred on 25 June 2015 was the materialisation of an obvious risk of a dangerous recreational activity, pursuant to s.5L CLA.
  - 2 Additionally, in the event that the appellant establishes that the primary judge failed to decide a material issue, should it require notice of contention, the respondent says that the outcome would have been the same regardless of that failure.”

### **Factual Background and the findings of the primary judge**

- 8 Given the limited issues that were ultimately pressed on appeal it is unnecessary to rehearse the factual background or the evidence before the primary judge in detail. The primary judge set these matters out very fully. The matters set out below are intended merely to summarise key factual matters, and findings of the primary judge, which go to the issues on appeal.

### *Credibility and reliability of Mr Karaoglu’s evidence*

- 9 The primary judge formed a very unfavourable view of Mr Karaoglu’s reliability as a witness. The primary judge found, further, that Mr Karaoglu pleaded his

poor memory as a strategy to evade answering uncomfortable questions. As to the existence or development of his symptoms and their effect on him, the primary judge said:

“Frankly, I am not persuaded that I can accept him either as an accurate medical historian or as a witness of complete truth in relation to those matters.”

- 10 There was no challenge to those findings on appeal. Indeed, senior counsel for Mr Karaoglu accepted that the appeal must be conducted on the basis of the unfavourable view that the primary judge took of Mr Karaoglu as a witness.
- 11 It follows that there was no reliable first-hand account of how the Incident occurred. Further, as to the question of injury, the primary judge’s findings were clearly impacted by his conclusions as to the reliability of Mr Karaoglu’s evidence and by his finding, in at least one respect, that Mr Karaoglu was not recounting the whole truth in his evidence. Ultimately, the primary judge found that he was not persuaded on the balance of probabilities that the plaintiff was not feigning his disability.

#### *CCTV Footage*

- 12 The CCTV footage of the Incident can no longer be found. It is likely that it is no longer in existence. It is apparent from an email of 7 September 2018 from Melinda Crompton at Fitness First that unless there was a request for CCTV when an incident occurred, it was only kept for one month. In an email dated 11 September 2018 Kumar Ramachandra, Club Manager at the time of the Incident, said that he was not “100% sure” if he had requested the CCTV footage but “in case of any serious injury I would normally request a CCTV footage”. However, in an email dated 12 September 2018 Sam Campione, National WHS Manager at Fitness First, wrote that he had tried to find the CCTV footage but had had “no luck on that front”. Whatever the explanation, it seems that that footage is no longer available
- 13 There was, however, evidence before the primary judge from Charlie Tassone, maintenance manager at Fitness First at the time, Tiana Burt, then assistant



club manager at the Gym, and Timothy Stanford, then member services manager at the Gym, as to what they recalled the CCTV footage showing. Each of them had seen the CCTV footage shortly after the Incident. Common to the account of each of these witnesses was that Mr Karaoglu grabbed the footplate with at least one hand when he was getting out of the chair of the leg press. Mr Stanford said that the CCTV showed that Mr Karaoglu was getting up really fast and trying to use the safety lock at the same time. Ms Burt's recollection was that the CCTV showed that Mr Karaoglu did not operate the handles at all. As the primary judge found, that could not be correct. Mr Tassone said that he saw the supports moving when the footplate went down which, to him, meant that "it wasn't locked in position properly".

#### *The leg press used by Mr Karaoglu at the time of the Incident*

- 14 Whilst there was evidence from two expert engineers, Dr Stark, instructed on behalf of Mr Karaoglu, and Dr White, instructed by Fitness First, before the primary judge, they did not examine the leg press that was involved in the Incident. Their evidence was given by reference to "exemplar" TechnoGym MG50 machines, which is the make and model used by Mr Karaoglu at the time of the Incident.
- 15 As to the condition of the leg press, Mr Karaoglu said in evidence that he noticed some rust and cracking around the supports of the machine. Of this, the primary judge found that "there is no evidence before me that this was other than innocuous signs of wear having no relevance to what happened". As senior counsel for Mr Karaoglu accepted during the hearing of the appeal, there was no evidence that the leg press was malfunctioning in any way at the time of or after the Incident, or that the top pads or rubber bumpers were malformed or had deteriorated such that they no longer functioned properly.

#### *Terminology and the leg press*

- 16 Different terminology to describe the components of the leg press was used in the evidence. It is thus convenient, at the outset, to set out the terminology to which I will refer in this judgment.

Weight bars	Horizontal chrome bars attached to the yellow frame of the leg press. The user puts the desired weights onto these.
Foot plates	The plates upon which foot force is applied to use the machine.
Handles	The handles with yellow handgrips on either side of the reclined bench which are linked to the supports. These are rotated forwards after some foot force is applied to the foot plates, to enable the user to perform the leg press exercise. Before the handles are rotated the weight bars will land upon the supports, limiting the movement of the foot plates towards the user. With the handles rotated, the weights are supported only by the foot force and the foot plates will move further towards the user.
Supports	The vertically orientated posts on each side of the leg press moved by using the handles. When in the "locked" position, these sit at about 20 degrees from centre. This is described as the 1 o'clock position. These are also referred to as "props", "locking bars" and "bolts".
Top pads	Rubber pads which sit on the top of the supports and what the weight bar sits on when the supports are in the 1 o'clock position. These are also referred to as limit stop pads.
Rubber bumpers	Two rubber bumpers that sit beneath the black frame of the machine and prevent the supports from moving further than the 1 o'clock position. Also referred to as the buffers or limit stop pads or limit stops.
1 o'clock position	As described above. There is no "lock" as such. Rather, when in this position, the weight bars rest on the top pads of the supports, the weight is supported, and the extent to which the foot plate can move towards the user is limited. Also referred to as the parked or locked position.

17 Each of these components is illustrated in the following images which are reproduced in the primary judgment and are taken from the joint report of Dr Stark and Dr White.

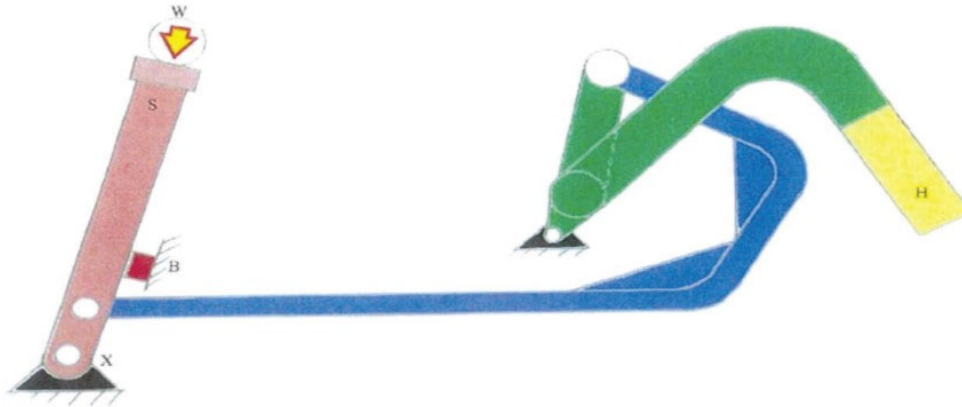


Fig.3 A diagrammatical representation of the linkage mechanism that positions the supports, “S”, using handles “H”.

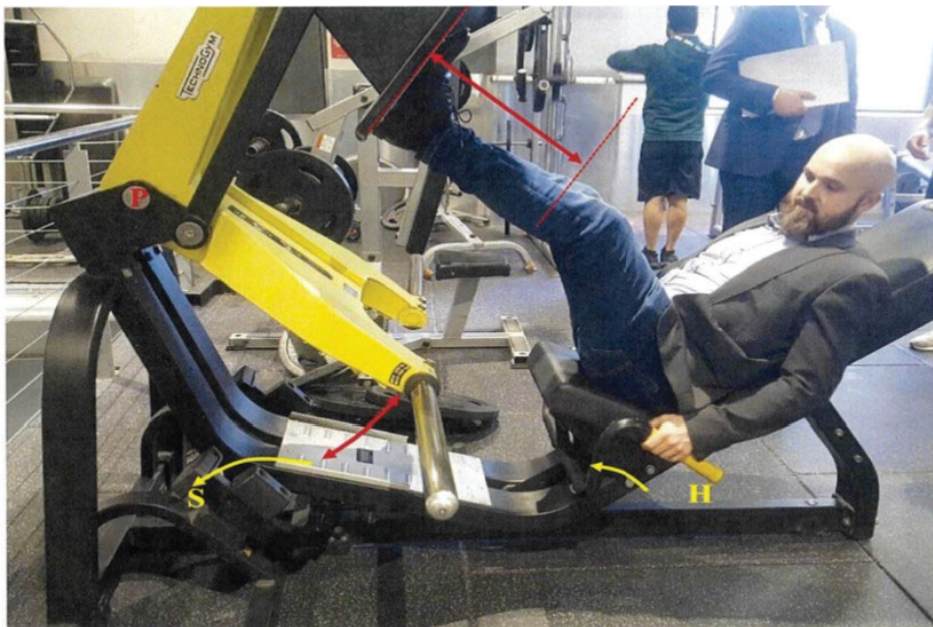
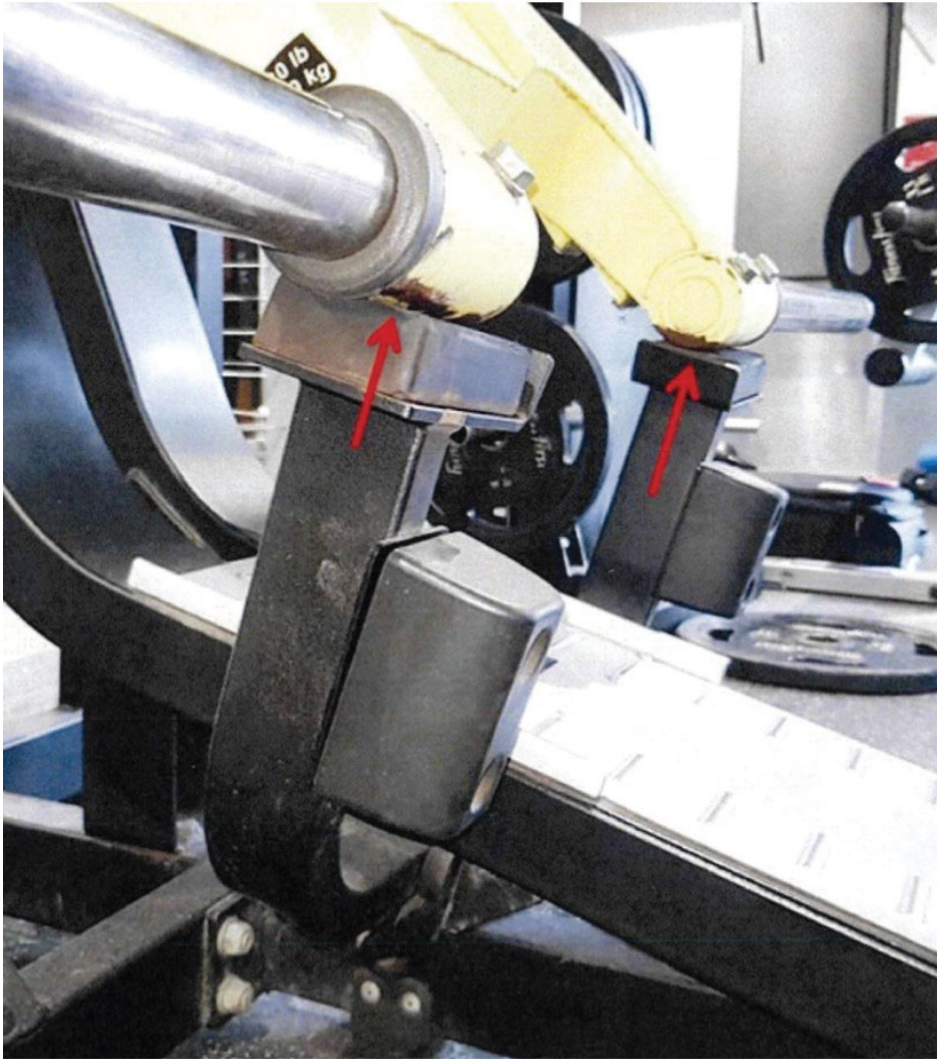


Fig. 2 The user pressing on the footplates to lift the weight bars (weights not shown.)

- 18 The evidence of the engineering experts was that the leg press is used by applying foot force to the foot plates to lift the weights which are placed on the weight bars. Once this is done, and the user’s legs are extended, the handles should be lifted/rotated forwards. This causes the supports (which are mechanically linked to the handles) to rotate forwards so they are no longer under the weight bars. The machine can then be used to perform a leg press. To cease using the leg press the user must straighten their legs pushing the foot plates away, then push the handle down fully. That will then rotate the

supports backwards to the 1 o'clock position where they are located under the weight bars. The supports move in a pivot motion. They are restricted from moving backwards beyond the 1 o'clock position by the rubber bumpers. The user can then bend their legs to rest the weight bar on the top pads.

- 19 If the weight bars are resting on the top pads then the weights are supported and will not slip. Dr White said during cross-examination that the position of the load on the top pads is critical to the capacity of the leg press to restrain the foot plate, but it is not critical that the weight bars are placed centrally on the top pads. There is about  $\frac{3}{4}$  inch leeway either way. Dr Stark's evidence was that the weight bars may be adequately supported even if they did not land on the top pads as there are triangular structures adjacent to the weight bars which can also bear the load.
  
- 20 The important aspect of this evidence is that, as found by the primary judge, the weight bars would be safely supported provided that they were placed relatively centrally on the top pads. More particularly, that a safe method of operating the leg press would be to ensure that the weight bars were resting on the top pads. As both expert engineers said in oral evidence, there would be no accident if the weight bars were resting on the top pads in that position. That position is illustrated in the following image taken from Dr White's report.



- 21 The experts were asked whether it would be possible for the support to come to a stop before it got to the 1 o'clock position. Both experts said that “with care” it may be possible to get the support to stop in a neutral position, somewhere before the 1 o'clock position, but they both agreed with the following proposition that the primary judge put to them:

“In the 1 o'clock position – that’s its locked position – it will remain stationary, but in the spectrum between them, gravity will likely push it in one direction or the other?”

- 22 However, as set out by Dr White, if the weight bars were lowered before the handles had been fully engaged then the weight bars may themselves stop the movement of the supports before they reached the 1 o'clock position. In that scenario, the result would be that the:

“whole system stopped with the weight bars teetering on the edge, if you will, of the [top] pads on top of the [supports]”.

- 23 It was his hypothesis that this is what happened in the Incident.
- 24 Dr Stark’s hypothesis was that, if the rubber bumper was worn or maladjusted, the support may have moved beyond the 1 o’clock position so that the weight bar was not sitting securely on the top pad and was thus not properly supported. As was shown by demonstrations performed by Dr White, this could have occurred only if both rubber bumpers were in fact removed. In these circumstances, the primary judge was not satisfied that there was an available inference, more probable than other competing inferences, that this was how the Incident happened. No challenge to that finding was pressed on appeal.
- 25 As is clear from the above, and as was confirmed during the oral evidence of the engineering experts, the hypotheses of both experts as to how the Incident may have occurred involved a degree of misalignment between the weight bars and the supports.

### *The Incident*

- 26 The Incident occurred at some time around 9:20 pm on 25 June 2015 when Mr Karaoglu was training at the Gym. Mr Karaoglu had been a regular attender at gyms from around 2012. He was not given any training or instruction on use of the leg press, nor was he given any warnings concerning its use, but the primary judge found that he was very experienced in the use of the various apparatus used by him at the Gym. He had used a leg press some 40-50 times.
- 27 Mr Karaoglu had loaded 240 kgs of weight on the leg press. He completed a set of ten repetitions. He was rising from the bench and as he was rising to his feet the foot plate descended and hit him on the crown of his head. His evidence was that he was knocked out and came to in the sitting position on the bench of the leg press. He was then helped out of that position by Mr Stanford. He was taken to the office where an Incident Report form was completed.
- 28 The Incident Report completed by Mr Stanford described the Incident as:

“Leg press machine gave way and hit in head, complained about back injury”.

- 29 The nature of injury was described as “sore back/slipped disc maybe”.
- 30 An ambulance was called and took Mr Karaoglu to Westmead Hospital. At the hospital he is recorded to have complained of a loss of consciousness for a period, a loss of feeling in both lower legs but with sensation returning after “[a] few seconds”. He had a headache, but no visual changes. On examination, his central nervous system was grossly intact; power, sensation, motor, proprioception in the upper and lower limbs were intact, but the doctor was unable to elicit a reflex bilaterally. There was tenderness at the T4-6 level in the thoracic spine and anal tone was intact. CT scans were taken and showed no abnormality including in the cervical or thoracic spine. There was tenderness in the intrascapular region, but no neurological symptoms were found.
- 31 Mr Karaoglu was discharged the following day with paracetamol and Nurofen. He was advised to see his general practitioner or to return to hospital for further investigation if new neurological symptoms emerged.
- 32 Mr Stanford inspected the leg press after being alerted to the Incident on 25 June 2015. He completed an online report which had the comment: “Spoken with maintenance manager Charlie and he is coming to assess the machine to see if it was user error”. This report also said by way of description of the Incident: “Member was using plate loaded leg press, when getting up member said the machine gave way and hit him in the head”.
- 33 The primary judge made three key findings as to how the Incident occurred.
- 34 First, his Honour found it “virtually beyond question that Mr Karaoglu suffered an injury while he was dismounting from the Technogym 45-degree leg press apparatus on 25 June 2015”. Further, that “[p]robably, on the basis of the same body of evidence, the descent of the weight bar drawing the footplate down was precipitated by Mr Karaoglu taking hold of it to pull himself free of the operator’s position”.

35 Second, his Honour found that:

“The essential mechanism of the descent of the footplate involved the weight bar separating from the supports’ top limit stop and descending to the reclined position. This is the effect of the evidence of Dr Stark and Dr White and on which they both agree. Again, it is also the evidence of Mr Karaoglu that this occurred and, in this regard, he is supported by Mr Stanford, Ms Burt and Mr Tassone.”

36 Third, his Honour rejected Mr Karaoglu’s evidence that after completing the repetitions he brought the supports into the “locked position”, finding that if the weight bars had been brought to rest in the centre of the top pads, the Incident could not have occurred:

“It is also abundantly clear to me that Mr Karaoglu’s evidence about the manner of his completion of his repetitions and in particular having brought the supports into the “locked” position with the weight bars resting on the centre of the top stop limits must be rejected. It is directly contradicted by evidence of the mechanical engineers upon which they both agree. If the weight bars had been brought to rest in the centre of the top stop limits, there was and could be “no accident”. On my appreciation of their evidence, this is so whether the supports were in the “locked” position, or the weight bar had been brought to rest in that position at some intermediate point of equilibrium short of the 1 o’clock or locked position. This compelling evidence of the engineers, and what I have already said about the many unsatisfactory features of the presentation of the plaintiff, lead me to reject his evidence about the procedure he followed to bring the apparatus to rest prior to attempting to dismount.”

37 The finding that Mr Karaoglu did not bring the supports into the “locked” position as described by the primary judge, is not challenged on appeal.

38 Ultimately, the primary judge was not persuaded that the Incident was caused by anything other than the inattentive operation of the leg press by Mr Karaoglu combined with Mr Karaoglu taking hold of the footplate to lift himself from the chair. His Honour found that that possibility was just as likely to have caused the Incident as any of the other hypotheses put forward.

#### *Instruction or warning*

39 Mr Karaoglu’s claim included an allegation that Fitness First failed to instruct him in the proper use of the leg press and “the need to fully engage the locking mechanism when exiting the Machine”. He also alleged a “failure to warn the



Plaintiff of the need to fully engage the lever so as to fully engage the locking mechanism”.

40 It was common ground that Mr Karaoglu was not given any instruction in the use of the leg press. It was also the common position of Drs White and Stark that a pictogram on the leg press machine, which was all that was provided by way of instruction, did not provide any information about the operation of the locking mechanism and provided no guidance as to the ideal position for the supports. As the primary judge found, it was accepted by the engineering experts that the pictogram was inadequate to convey the necessary information about the safe operation of the leg press.

41 The primary judge was not satisfied that Mr Karaoglu would have accepted and followed instruction as to the proper use of the leg press, given his attitude, his previous experience and his familiarity with the apparatus. The primary judge also found that:

“Given Mr Karaoglu’s evidence that he was aware that the weight bar may have been unstable if the supports were not properly brought back into the “locked” position, absent defect, that risk of harm would have been an obvious risk and Fitness First would have been under no duty to instruct or warn him about that risk: s 5H.”

### **Consideration of the grounds of appeal**

42 It is convenient to deal with the grounds of appeal, as pressed, in turn.

#### *Ground 3 – error as to findings relating to a “spring” on the leg press*

43 As set out above, ground 3 of the notice of appeal alleges that the primary judge erred by failing to draw proper inferences of fact as to the existence, function and maladjustment of a spring on the leg press.

44 One possible cause of the Incident advanced by Mr Karaoglu was that “the weight bar separated from the top pads on the supports because of a maladjustment of a spring fitted somehow to assist the achievement of the proper “locked” position”. The primary judge rejected this as a cause of the

Incident. His Honour was not satisfied on the balance of probabilities that “such a spring was fitted to the [leg press]”.

- 45 On appeal, the submission advanced on behalf of Mr Karaoglu was that the proper inferences to draw from the facts were that the leg press was equipped with a spring (or ought to have been because it was a fail-safe mechanism), the function of the spring was to draw the supports towards the 1 o'clock position and to make sure that they do not come to rest at the 12 o'clock position and that the spring was maladjusted. Alternatively, he submitted (although this was not submitted before the primary judge) that the leg press ought to have had a spring and none was in fact fitted.
- 46 Mr Karaoglu's contentions as to the spring were based primarily upon oral evidence of Mr Tassone, agreeing with suggestions put to him in cross-examination that there was a spring on the leg press that made sure that the supports came up into the correct position. He said that once you pushed the handles down the spring made sure that the support “stays there”. He also agreed with the suggestion put to him by the cross-examiner that “if that spring's not properly adjusted, then the weight bar may not properly engage with the rubber pads” (being the top pads) and said that that was what he had been told by his “guys”. Having regard to this evidence, the primary judge did not err in characterising Mr Tassone's evidence as to the purpose of the spring as hearsay.
- 47 Neither of the engineering experts had any recollection of seeing a spring on the exemplar leg press machines that they looked at, and Dr White's evidence was that he was quite certain that there was no spring fitted to the machine he looked at. They also queried what role a spring would play given that gravity would bring the supports from the 12 o'clock to the 1 o'clock position in any event. Dr Stark said that he could not see what a spring would do. Dr White said that he could not imagine a scenario where adjustment of the spring would affect the final 1 o'clock position of the supports because it is just too unpredictable a mechanical component to do that.

- 48 Diagrammatic instructions for the assembly of the leg press were in evidence. These did not include any indication that the leg press should be fitted with a spring.
- 49 The questions put to Mr Tassone in the passage of cross-examination set out above were in large measure premised upon three pages from the TechnoGym Purestrength (Equipment & Benches) Technical service guidelines, rev 4.1, February 2015 (“TechnoGym guidelines”). The first page, described as section 6.2, included a picture of a spring and some instructions under a heading “The levers with easy start do not rest against the buffers”. The picture shows the spring attached under some yellow componentry. That page was put to Mr Tassone to “identify the spring”, and the question was put to him that “That’s the spring we’re talking about”. He agreed with that proposition. Two further pages, which comprised “5.13.5 Disassembling the spring”, were also put to Mr Tassone. These depict a series of instructions directing that the seat pad on a machine be removed to locate a spring. It was put to Mr Tassone that these pages depict the “maintenance direction for disassembling the spring”. Mr Tassone agreed with that proposition.
- 50 A close examination of the TechnoGym guidelines shows that none of the pages put to Mr Tassone during his cross-examination in fact relate to the leg press. The index to the TechnoGym guidelines makes it clear that the pages headed 5.13.5 relate to a different machine, the linear leg press MG75. The section dealing with the leg press used by Mr Karaoglu at the time of the Incident, the TechnoGym MG50, does not include any reference to a spring. Moreover, it is apparent from a comparison between the picture on the page headed 6.2, and documents from TechnoGym relating to the leg press, that the picture of the spring on the page headed 6.2 is not a picture of the leg press used by Mr Karaoglu at the time of the Incident. This is readily explicable given that the TechnoGym guidelines cover a range of different equipment and section 6.2 is in a section headed “What to do if”, which does not relate to any one identified item of equipment.

51 Having regard to the matters set out above, Mr Tassone's evidence about there being a spring on the leg press cannot be given any weight whatsoever. It was based upon the false premise that the pictures that he was being shown were of the leg press used by Mr Karaoglu at the time of the Incident. In the light of the experts' evidence as set out above, there is simply no proper evidentiary foundation for the contention that the leg press either had, or ought to have had, a spring. In these circumstances, the appellant's contention that the primary judge erred in his rejection of a maladjusted spring as the explanation for the Incident must be rejected. So too must the appellant's contention that the leg press was somehow defective on account of the lack of a spring.

52 This ground of appeal should be rejected.

*The alleged failure to warn*

53 In ground 4 of the notice of appeal Mr Karaoglu alleges that the primary judge failed to decide a material issue, namely whether Fitness First breached its duty to warn by failing to warn him of the need to fully engage the lever of the leg press so as to fully engage the locking mechanism. In written submissions on behalf of Mr Karaoglu it was alleged that this was required because the locking mechanism had the potential to be operated in an unsafe manner such that the weight bars may have appeared to be stable on the top pads when this was not in fact the case. In oral submissions on appeal senior counsel for Mr Karaoglu put the case on the basis that the leg press may have given the appearance of being stable when it was not in fact stable, and that that should have been the subject of a warning given orally to Mr Karaoglu upon sign-up.

54 As set out above, the primary judge made a number of findings of relevance to this ground of challenge. First, the primary judge recorded the agreed position of the engineering experts that the pictogram on the leg press was inadequate to convey the necessary information about its safe operation. Second, the primary judge found that Mr Karaoglu would not have accepted or followed instruction as to the use of the leg press. Third, the primary judge found that, given Mr Karaoglu's evidence that he was aware that the weight bar may have

been unstable if the supports were not properly brought back into the locked position, there was no duty to instruct or warn him as to that risk of harm. In these circumstances, the contention that the primary judge failed to decide the issue raised by the allegation of failure to warn should be rejected.

55 I would add that the primary judge's findings were well supported by Mr Karaoglu's evidence.

56 When asked whether he would have asked gym staff if he didn't know how a piece of gym equipment worked Mr Karaoglu responded:

"Sir, I don't believe the gym staff are trained in any shape or form on how to use the equipment".

57 He said that he had never felt the need to ask for assistance but if he had, he would have asked his friend. He later gave evidence that he was comfortable that he knew how to use the leg press.

58 Mr Karaoglu gave detailed evidence as to how the leg press was used. He explained that the weight bars do not lock but rather sit on the top pads. He explained further that when the user has completed their repetitions, they suspend the weight with their legs fully extended, pull the handles up and then slowly release the weight until it comes to a complete rest. Consistent with that account, he said that on the day of the Incident he had been careful to ensure that the handles reached their locked position and stopped moving and that he had kept his hands on the handles, "held it down, and lowered the bar very slowly". He said that the weight bar was supposed to rest on the rubber pads on the top of the supports. He said he only slowly lowered the weight bars onto the pads once the support (which he described as the locking bar) was "locked in". He said he only removed his feet from the foot plates, once the weight bars were resting on the top pads. He agreed that the reason that he took care to place the weight bar on the pads as he had described was because he realised that if the weight bar was not sitting properly on the top pads it would be potentially unstable. He added that if the weight bar was not put on the top pads properly:

“it could be dangerous, could be unstable, something could happen”.

59 The following interchange occurred later in Mr Karaoglu’s evidence:

“Q: ... you knew it was necessary as you’ve told us, to raise the locking bar to make sure that it was in place before you then slowly lowered the weights on to it?

A: No. Well, yes, I knew that, and the thing is I am quite adamant I did it.”

60 It is plain from that evidence that Mr Karaoglu was, at the time of the Incident, well aware both that the handles had to be fully engaged to raise the supports into the correct position before lowering the weight bars, and that the weight bars had to be properly resting on the top pads in order to be supported in a stable state. Having regard to that evidence, there is no basis for the contention that a warning would have prevented the Incident from occurring.

61 Senior counsel for Mr Karaoglu also submitted that Mr Karaoglu would have had the ability to form a view as to whether or not it was safe to get out of the chair of the leg press if he had been warned of the need to ensure that the weight bar was in a stable position on the supports. Senior counsel submitted, further, that if Mr Karaoglu had been warned he would have checked and not relied upon the apparent stability “simply by the footplate being in its upper position at the time he got out”. This submission reflected the submission made to the primary judge that:

“... there was no sign or other indicator to the user of this machine as to where the proper position was. No mark on the levers, no mark on the props, and there was no warning about it.”

62 The problem with this contention is that the evidence does not support a conclusion on the balance of probabilities that Mr Karaoglu would have acted any differently if such a warning, or instruction, had been given. As set out above, Mr Karaoglu was well aware of the steps that he had to take to ensure that the weight bars were properly supported. Notwithstanding that, it is apparent that he must not have checked that the weight bar was properly resting on the top pads before attempting to get off the leg press. Had he

checked, and had they been in that position, the Incident could not have occurred.

63 Ground 4 of the notice of appeal should also be rejected

*The primary judge's contingent findings as to injury*

64 Having regard to my rejection of Mr Karaoglu's challenges to the primary judge's findings as to liability, I will deal only briefly with the two remaining grounds of appeal which challenge the primary judge's contingent findings as to injury.

65 I have set out grounds 5 and 6 of the notice of appeal above. In oral argument senior counsel for Mr Karaoglu submitted that the complaints under grounds 5 and 6 both went to the primary judge's conclusion that he was not satisfied that Mr Karaoglu suffered from a conversion disorder caused by the Incident. In this regard the submission on behalf of Mr Karaoglu was that the primary judge gave insufficient attention to early complaints of symptoms by Mr Karaoglu. To the extent that the primary judge's findings as to physical injury were challenged, the contention was that the primary judge should have found that these were of sufficient duration to found a conversion disorder. Senior counsel submitted:

"But what we've got is not so much a picture of neurological injury, although we've got symptoms which are consistent with neurological injury coming through, and it has taken years and all sorts of investigations to sort this through, the relevance is there are concerning symptoms we say that have the capacity to form into a conversion disorder. ... On the night he suffered pain and discomfort. He's making complaints about it 2015, 2016 and he's then going on to see Dr Brimage in 2016 and Dr Harvey for an investigation of what would be deeply disturbing signs and symptoms which are sort of coalescing together to build into a conversion disorder over time."

66 The context for these submissions is that it was accepted before the primary judge that the evidence did not support ongoing physical injury and disability. This was largely because the three expert neurologists agreed in conclave that the possibility of cervico-thoracic spinal cord injury was excluded by the absence of significant objective or consistent clinical, radiographic or electrophysiological signs of injury. As to spinal injury, the primary judge

accepted the evidence of Dr Kinny, the orthopaedic expert instructed by Fitness First, that there was no lumbar spinal injury connected to the Incident. Rather Mr Karaoglu had congenitally short pedicles which made him prone to back pain particularly if performing heavy activity such as gym training. As to thoracic spinal injury, the primary judge accepted Dr Kinny's evidence that the radiological evidence, in particular an MRI from December 2016, suggested that there was an interval between the time of the Incident and Mr Karaoglu having any pathology in the thoracic spine. Dr Kinny's evidence was that Mr Karaoglu would not have been able to persist in gym activity to the extent he did from September 2015 if he had suffered from a significant thoracic spine injury that was causing pain that was more than just trivial.

67 Ultimately, in oral submissions senior counsel for Mr Karaoglu did not challenge the primary judge's acceptance of Dr Kinny's evidence. Rather, he accepted that he could not point to any profound neurological injury other than a temporary disturbance and that the complaints of serious physical disability were probably psychogenic. Thus, the submission in writing that the primary judge erred in preferring the evidence of Dr Kinny to that of Dr Guirgis, the orthopaedic expert instructed by Fitness First was not pressed in oral submissions. In any event, there was no error in the primary judge preferring the evidence of Dr Kinny to that of Dr Guirgis. The primary judge set out passages from Dr Kinny's evidence which the primary judge clearly regarded as supporting Dr Kinny's overall conclusion. A fair reading of the primary judgment is that the primary judge found that reasoning to be persuasive and preferred the evidence of Dr Kinny to that of Dr Guirgis on that basis. Contrary to what is alleged in the written submissions on appeal filed on behalf of Mr Karaoglu, there is nothing in the primary judge's reasoning that is contrary to what was held by Ipp JA (Mason P and Tobias JA agreeing) in *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186; [2006] NSWCA 187 at [28].

68 The evidence in support of a conversion disorder came from Dr Dinnen, the expert psychiatrist instructed on behalf of Mr Karaoglu. Dr Dinnen had originally concluded that Mr Karaoglu's primary diagnosis was an adjustment disorder with depressed mood consequent to physical injuries sustained in the Incident.



However, in a later report (prepared without seeing or speaking to Mr Karaoglu again), having been informed of the joint position of the neurologists that there was no neurological injury, Dr Dinnen revised his opinion. He instead posited that Mr Karaoglu suffered from a Conversion Disorder, being a psychiatric syndrome in which there is incompatibility between the symptom and recognised neurological or medical conditions and the symptom is not better explained by another medical or mental disorder. In oral evidence Dr Dinnen said that the account that Mr Karaoglu gave him was that his ongoing bowel and bladder problems were from being hit on the head with a 240 kg weight at the Gym. Dr Dinnen also explained that the history that he got was that the symptoms such as erectile, faecal and urinary incontinence had developed over the first period of months and that his assumption was that they had gradually developed over time, following the original injury. The history that Mr Karaoglu gave Dr Dinnen was that after the injury he was “bedridden for months on end”.

69 By contrast, Dr Samuell, the expert psychiatrist instructed by Fitness First, was unable to reach a definitive diagnosis but would not exclude feigning or malingering.

70 As to the claimed conversion disorder, the primary judge accepted the possibility that Mr Karaoglu had a conversion disorder, but found, on the basis of the inconsistencies and absence of corroboration, that he was not persuaded that that inference was more likely than the inference that Mr Karaoglu was feigning his disability. The inconsistencies and absence of corroboration that the primary judge identified in the judgment included the following:

(1) On discharge from Westmead hospital on 26 June 2015 Mr Karaoglu was advised to see his doctor or return to hospital if new neurological symptoms emerged, but he did neither.

(2) Mr Karaoglu did not consult a doctor about the effects of the Incident until 22 July 2016 when he saw his general practitioner, Dr Harvey. This was notwithstanding that in the interim he saw Dr Lin complaining of a lump on his earlobe and Dr Wan complaining of constipation, especially

if he eats junk food, and requesting laxatives. The primary judge observed that at this latter consultation there was no suggestion that the constipation was related to the Incident historically or otherwise.

- (3) Mr Karaoglu attended Dr Fang on 18 December 2015 on account of an injury to his pectoralis muscle and the inference was that this was a gym related injury. No history was given of the injury on 25 June 2015.
- (4) Mr Karaoglu's evidence was that he regarded the injury as minor and felt it should be ok. He had no concerns about it.
- (5) Inconsistent with these "objective facts", Mr Karaoglu in his evidential statement said that in the months after the accident he was in a lot of pain and found it very hard to leave the house. He rarely left the house. He spent a lot of his time lying down on the floor in the lounge room and found it hard to walk even 100 or 170 metres, which he would do from time to time, and could do so only with pain medication.
- (6) However, bank records showed that in the period from 26 June 2015 to 30 June 2016 Mr Karaoglu was frequently at a range of locations far from his house, which was inconsistent with a person who was bedridden or housebound on account of pain.
- (7) When Mr Karaoglu returned to the Gym on 10 September 2015 he attended frequently, for example he attended on 15 occasions in October 2015 and 20 occasions in November 2015.
- (8) Mr Karaoglu gave inconsistent accounts to the various medical experts as to the history of onset of bladder, bowel and sexual dysfunction symptoms. To some he claimed these were suffered within days of the accident, to others it was 12 months later. In oral evidence he accepted that he did not begin to have anything that sounded like those problems until 2016.

- (9) There was no corroborative evidence from his family although he was living with them throughout the period since his accident.
- (10) Mr Karaoglu did not tell the whole truth in his evidence as to the extent of his riding of pocket motor bikes. The evidence showed that he drove not insignificant distances to participate in this activity. The primary judge found that this gave a snapshot of his lifestyle that was inconsistent with the large measure of disability he claimed.

71 In oral submissions, senior counsel for Mr Karaoglu sought to challenge the primary judge's finding at [70] above in reliance upon what he characterised as contemporaneous complaints which would corroborate Mr Karaoglu's account of having physical symptoms from an early stage. The first matter relied upon was complaints apparently made by Mr Karaoglu in 2015/2016 to Mr Stanford. During cross-examination Mr Stanford was asked whether he recalled "a couple of conversations with Deniz [Mr Karaoglu] in about 2015/2016" where he asked for a copy of the Incident report. Mr Stanford's response was that he did not recall but it was possible. It was put to Mr Stanford that this was "because he was still having troubles with his neck and back" to which Mr Stanford responded "Yes, that's reasonable". Mr Stanford then said that he recalled Mr Karaoglu asking if he should sue Fitness First and he agreed that that conversation was in the context of Mr Karaoglu complaining about some ongoing difficulties with his back. When asked whether that was in 2016 he said that that was "reasonable".

72 That evidence does not undermine the primary judge's conclusions, based as they are upon numerous inconsistencies and the absence of any evidence from Mr Karaoglu's family who had the opportunity closely to observe his functioning over the period after the Incident. It is not clear from Mr Stanford's evidence when, or how often, Mr Karaoglu mentioned neck or back troubles, or what he said. Reference to back pain in 2016, necessarily at least 6 months after the Incident, in the context of a discussion about suing Fitness First does not provide a reliable foundation for a conclusion as to the nature and extent, or indeed genuineness, of Mr Karaoglu's pain at that point in time. Contrary to the

submissions made on behalf of Mr Karaoglu, it is not “significant and material corroboration that he was suffering from ongoing difficulties in that period”.

73 The second contemporaneous complaint that was relied upon on appeal was complaint to Dr Harvey, on 22 July 2016, of less urge to defecate and constipation, which precipitated a referral to Dr Brimage, neurologist. Dr Brimage arranged for further investigations, one of which was an MRI which was reported on 19 December 2016 as showing normal appearances apart from scoliosis (which is not suggested to be in any way related to the Incident). Nerve conduction studies (performed in 2018) were suggestive of an L5 nerve root lesion, however, as set out by Dr Kinny (and accepted by the primary judge) the lumbar spine symptoms were not caused by the Incident.

74 Mr Karaoglu subsequently saw Dr Brimage on a number of occasions. In November 2016 he saw him because of pain which came on recently after doing push ups. In October 2017 he saw Dr Brimage who noted that “one day this year” he lost control of his bladder and was complaining of substantially increased pain.

75 At most this evidence shows that Mr Karaoglu complained of constipation in July 2016. Again that does not provide any significant corroboration of the genuineness of the complaints made by Mr Karaoglu. Having regard to the matters relied upon by the primary judge, it does not stand in any material way against the primary judge’s conclusion that a conversion disorder was not more likely than the inference that Mr Karaoglu was feigning his disability. For completeness, nor does Mr Karaoglu’s attendance on Dr Wan on 4 October 2015 complaining of constipation, especially if he eats junk food, provide any support for the contentions on behalf of Mr Karaoglu on appeal. There is nothing to suggest that that was persistent or that it was in any way related to the Incident.

76 Nor do either of the matters relied upon in the submissions advanced on behalf of Mr Karaoglu on appeal support the conclusion that any conversion disorder was caused by the Incident. As the primary judge recorded, Dr Dinnen’s

conclusion was predicated upon the concerning symptoms having arisen within at most a few months of the Incident. A complaint of constipation to Dr Harvey in July 2016 does not fall within that description. Moreover, to the extent that the concern related to incontinence, that was (as the primary judge correctly found) something which was quite different to constipation. Thus, the occurrence of constipation in July 2016 did not suggest that any of the symptoms of incontinence had occurred more proximally to the Incident.

77 In these circumstances, grounds 5 and 6 should be rejected.

### Conclusion

78 Having regard to my conclusions, as set out above, there is no need to consider the notice of contention. The following orders should be made:

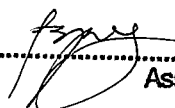
- (1) The appeal is dismissed.
- (2) The appellant is to pay the respondent's costs of the appeal.

79 **SIMPSON AJA:** I agree with Stern JA.

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I certify that the preceding <sup>79</sup>..... paragraphs are a true copy of the reasons for judgement herein of the Honourable Justice Kristina Stern and of the Court.

3.10.2023  
DATED

  
.....  
Associate