SUPREME COURT OF QUEENSLAND

CITATION:	*Woolworths Limited v Grimshaw* [2016] QCA 274
PARTIES:	**WOOLWORTHS LIMITED** **ACN 000 014 675** (appellant) **v** **JUNE ANN GRIMSHAW** (respondent)
FILE NOS:	Appeal No 10671 of 2015 DC No 165 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville – Unreported, 25 September 2015
DELIVERED ON:	28 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2016
JUDGES:	Margaret McMurdo P and Applegarth and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to amend the notice of appeal is granted.** **2. The appeal is allowed.** **3. The judgment in favour of Ms Grimshaw is varied by substituting the sum of $437,037.26 for the sum of $491,037.26.** **4. The parties have leave to make submissions as to costs of the appeal and the trial, in accordance with Practice Direction 3 of 2013, paragraph 52.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where the respondent slipped on a grape near a grape display in the appellant's store – where the appellant contends the judge erred in concluding it should have placed a mat adjacent to the grape display as this would have probably prevented the fall – where judge applied *Wyong Shire Council v Shirt* and held a reasonable employer, in the appellant's position, could have foreseen the risk of injury and would have placed mats in front of the grape display to

reduce this risk – whether the appellant was negligent in not placing mats in front of the grape display

TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – ADMISSIBILITY OF EVIDENCE – where the appellant contends expert evidence was inadmissible as it was not provided with reference to objectively ascertainable criteria that could be independently verified – where the expert evidence was in a field of specialised knowledge concerning identified and proved facts which the judge found were established on the evidence – whether the expert evidence was admissible

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the appellant contends the respondent was trained in risk assessment, was aware of the risk and knew to keep a lookout for grapes, and her failure to keep a lookout was not mere inadvertence – where the appellant should have, but did not, place mats next to the grape display – where the appellant could not expect employees to scan the floor for fallen grapes at every step – whether the respondent was contributorily negligent

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – LEGAL PRINCIPLES – where the appellant contends the respondent failed to mitigate her losses by not taking steps to secure alternative employment and by refusing the appellant's offer of vocational assistance – where the appellant contends the judge failed to sufficiently discount past and future economic loss for contingencies and adopted an incorrect starting figure for the calculation of economic loss – where the appellant's offer for rehabilitative assessment was not genuine and was made after it was clear that the respondent could not continue in her pre-injury employment – where the respondent's prognosis was poor and there was evidence that she was permanently unable to work – where the judge discounted the respondent's claim for future economic loss by 20 per cent due to a pre-existing degenerative condition – where the appellant's contention that the discount should have been at least 30 per cent is not made out – whether the judge erred by taking into account future wage increases in determining future economic loss

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 5, s 9, s 220, s 230, s 231, s 232, s 267, s 268, s 289, s 305C(b), s 306L(2)

Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649; [1968] HCA 9, cited
Elford v FAI General Insurance Company Limited [1994] 1 Qd R 258; [1992] QCA 41, cited

Qantas Airways Limited v Fisher [2014] QCA 329, cited
Todorovic v Waller (1981) 150 CLR 402; [1981] HCA 72, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: C C Heyworth-Smith QC for the appellant
J A Greggery for the respondent

SOLICITORS: Dibbs Barker for the appellant
Connolly Suthers for the respondent

[1] **MARGARET McMURDO P:** The respondent, June Ann Grimshaw, was working at the appellant, Woolworths', Castletown, Townsville store as a checkout operator on 14 May 2012 when she slipped on a grape adjacent to the grape display on her way to the lunchroom. She was then 53 years old and had worked for Woolworths since she was 16. She had not passed any subject in year 10 and had no formal education or qualifications. She injured her back and brought an action in negligence for damages. The primary judge ordered Woolworths pay her $491,037.26, together with costs.

[2] Woolworths has appealed against the judge's findings on both liability and quantum. Its grounds of appeal traverse five pages but in essence there are four issues as to liability and three issues as to quantum. It challenges the judge's finding that Ms Grimshaw was reliable and credible. As to liability, it contends that the judge erred in admitting and taking into account the evidence of engineer, Mr Roger Kahler; in finding that it should have placed a mat adjacent to the grape counter; in finding that the mat would more probably than not have prevented Ms Grimshaw's fall; and in applying *Wyong Shire Council v Shirt*.[1] Alternatively, it challenges the judge's finding that Ms Grimshaw was not contributorily negligent. As to quantum, it contends that his Honour wrongly rejected its argument that Ms Grimshaw failed to mitigate her losses, either in not seeking suitable alternative employment and/or in not taking up Woolworths' offer of vocational assistance. It contends that the judge failed to sufficiently discount the past and future economic loss component of the damages award for contingencies, and adopted an incorrect starting figure for the calculation of future economic loss.[2] It has applied for leave to file and rely on an amended notice of appeal so that it can also argue that the judge erred in failing to reduce the past economic loss award by $5,511.60 to reflect two months of post-economic loss when Ms Grimshaw would not have worked due to an unrelated accident for which it was not responsible.

[3] Ms Grimshaw does not oppose the application for leave to amend but contends that, if Woolworths is unsuccessful on its original grounds, it should not be given leave to amend as the amount involved is too small to warrant allowing the appeal.[3]

[4] If Woolworths is successful in its liability appeal, Ms Grimshaw applies for an extension of time to file a notice of contention. She wishes to argue that the trial judge rightly found Woolworths was negligent and Ms Grimshaw not contributorily negligent, as Woolworths failed to establish, implement and enforce a system of inspection and cleaning of the area around the grape display at intervals not greater

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1 (1980) 146 CLR 40.
2 Woolworths' abandoned ground 3(f): see Draft Amended Notice of Appeal.
3 *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258.

than 20 minutes. Woolworths does not oppose the extension of time. It will be necessary to consider this application only if Woolworths is successful in its appeal against liability.

[5] For the following reasons I would allow the appeal but only on one of the many grounds argued, namely that the judge erred in assessing future economic loss by adopting an incorrect starting figure for the calculation. I would reduce the damages amount by $54,000.00.

The complainant's credibility

[6] As the judge's finding that the complainant was an honest and credible witness[4] affects Woolworths grounds of appeal on both liability and quantum, it is sensible to deal first with this contention.

[7] The primary judge noted that Ms Grimshaw was injured at work on 14 May 2012.[5] She was unable to return to her pre-accident duties for any significant period and last worked for Woolworths on 27 February 2013. She took annual leave, long service leave and sick leave until about 1 August 2013. In February 2014 Woolworths told her she could not return to work unless medically certified 100 per cent fit for duties. She was on leave without pay until, on 12 January 2015, her employment was terminated to take effect from 16 February 2015.[6] She had been happy at work, was well-liked by her co-workers and well thought of as an employee, at least until her injury.[7] The judge found that she went on a lunch break at about 1.00 pm on 14 May 2012. She collected her wallet from her locker, purchased lunch via the quick service checkout, and walked through the fruit and vegetable section on the way to the lunchroom. She was walking quickly because she was hungry and suddenly fell flat on her back. She saw a squashed grape right near the grape display. There was no mat on the floor.[8] On 1 June 2012 she completed an Injured Worker Statement Form[9] which stated, "slipped on grape + landed on back".[10] She also applied that day for workers' compensation, completing a form signed by her and a Woolworths' representative recording that she had slipped on a grape and had reported that to Woolworths on Monday, 14 May 2012 at 1.05 pm.[11] A Safety Incident Report dated 4 June 2012,[12] part of Woolworths' investigative record, noted that the cause of her fall was, "slipped on grape on floor whilst walking through produce [section] on way to lunch".[13] His Honour noted she appeared to be in significant pain whilst giving evidence.[14]

[8] His Honour stated that when cross-examined about signing forms which acknowledged she had completed certain risk assessment training, she said the forms were brought to her at the checkout to sign. She acknowledged she signed them and ticked that

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4 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015) [1].
5 Above, [1].
6 Above, [3].
7 Above, [4] – [5].
8 Above, [6].
9 Exhibit 2, AB 297 – 299.
10 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [7].
11 Above, [8].
12 Exhibit 23, AB 1015 – 1018.
13 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [9]; Exhibit 23, AB 1017.
14 Above, [14].

she had watched a risk assessment DVD[15] but she did not think she had seen it. The judge found that Woolworths' employee, Ms Vanessa Anderson, did not directly contradict her as Ms Anderson was not responsible for having the forms signed. The person who was responsible was neither identified nor called. Both Ms Grimshaw's and the manager's signatures appeared on the form but it was not clear whether the manager signed before or after Ms Grimshaw.[16] The judge noted that Woolworths asserted Ms Grimshaw was untruthful when she said she had not seen the video. His Honour did not consider it surprising that Ms Grimshaw could not remember every video she saw over her 38 years of employment. The judge noted that she was cross-examined on the assumption that she had seen various documents when they had not been used in her training so that those who provided instructions to Woolworths' counsel were inaccurate in their recollections.[17]

[9] The judge referred to Woolworths' contention that Ms Grimshaw was lying when she spoke with the physiotherapist. When cross-examined on this issue she was confused about whether she was explaining the true position, or what she was alleged to have told the physiotherapist. His Honour found it unsurprising that three years after the event there were deficiencies in her recollection of what she said to the physiotherapist whose notes were brief and expressed in a way that was not recording Ms Grimshaw's words but his understanding of what she said.[18]

[10] His Honour determined that, after giving careful consideration to Ms Grimshaw's presentation as a witness and the details of her evidence and cross-examination, "she was doing the best that she could to give an honest account of herself whilst dealing with the painful consequences of her injury."[19] The judge accepted her evidence that she fell on a grape, close to the grape display, in an area which would have been covered by a mat had mats been in use. No matter where she fell, the floor surface upon which she fell was unsatisfactory absent mats and had since been replaced.[20]

[11] Woolworths emphasises that, when Ms Grimshaw was cross-examined about her conversations with her GP and physiotherapist following her injury, her recollection of those conversations differed from that recorded in their notes. It contends that, because of these differences, the judge should have found Ms Grimshaw an unreliable witness.

[12] Ms Grimshaw's cross-examination on this matter[21] is consistent with his Honour's conclusion that she was having difficulty distinguishing between her recollection of her pain levels when she was visiting her GP and physiotherapist, and her recollection as to what she told them. Although she sometimes appeared to understand that distinction, given her limited education there is no reason to gainsay his Honour's conclusion that she did not. The notes on which Woolworths place reliance are consistent with a patient trying very hard and doing all she can to improve. The physiotherapist was funded by Woolworths and, perhaps unconsciously, his notes focussed on improvements in her condition. He would

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15 Exhibit 9, AB 662.
16 Above, [15].
17 Above, [16].
18 Above, [17].
19 Above, [20].
20 Above, [21].
21 T1-44 – T1-60, AB 44 – 60.

have wanted his treatment to be successful, not only to assist her but also to obtain further referrals from Woolworths. This may have affected the tone and emphasis of his note taking. The accuracy of the GP's notes is questionable given they record she initially slipped on a pea. Any suggestion that Ms Grimshaw was not in significant pain at this time is inconsistent with the many other medical reports which Woolworths seems to accept[22] and its own notes concerning its management of her rehabilitation.[23] The evidence unquestionably established that she was not pain-free or able to work full-time in her former position with Woolworths on completion of her physiotherapy. This conclusion was also consistent with Woolworths' record of her leave[24] and its direction to her in February 2014 that she could not return to work unless certified 100 per cent fit. The GP and physiotherapist notes on which Woolworths relies did not require the judge to find Ms Grimshaw an unreliable witness.

[13] Nor did Ms Grimshaw's completing and signing a Training Completion Record, when she had no recollection of doing the training, require the judge to reject her evidence. Woolworths' counsel asserts that she must have either falsely signed the form or lied in court. But another conclusion, well open on the evidence and accepted by the primary judge, was that she may have done the training but forgotten she did it. In any case, Ms Grimshaw's account of not having seen the risk assessment DVD was not directly contradicted by the only relevant witness called by Woolworths, Ms Anderson. As her counsel points out, she readily admitted to seeing the much more relevant training video specifically relating to the dangers of fallen grapes,[25] even though this was unhelpful to her case. This contention does not assist Woolworths.

[14] As the judge noted, her account that she slipped on a grape in the way she described received support from the forms she completed for workers' compensation on 1 June 2012 and from Woolworths' Safety Incident Report of 4 June 2012.[26] There was no reliable contradicting evidence and there was no reason not to accept her account on this critical issue.

[15] The assertion that the trial judge failed to use or palpably misused his advantage in accepting her evidence generally and that his Honour's findings as to credit were glaringly improbable and contrary to compelling inference is not made out.

Liability

Mr Kahler's evidence

[16] Woolworths contends that Mr Kahler's evidence was inadmissible as it was not expert evidence provided by reference to any objectively ascertainable criteria which could be independently verified for accuracy. It also contends that as Ms Grimshaw did not plead a claim arising out of a defective or inappropriate floor surface, the judge erred in not upholding its objection that his evidence was irrelevant. Mr Kahler considered the shop floor would have been slippery when wet and anticipated that he would return to conduct a slip test but did not do this. Nor

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22 Exhibit 13, 15, 16, 20, 21 and 22A.
23 Exhibit 27, AB 1038 – 1053.
24 See [7] of these reasons.
25 Exhibit 6.
26 See [7] of these reasons.

did he take measurements. His opinion, based on unestablished assumptions, Woolworths contends, should be excluded.

[17] Mr Kahler has a Bachelor of Mechanical Engineering with Honours and is a registered professional engineer. He is a member of the International Society for Fall Protection, the Safety Institute of Australia and the Human Factors & Ergonomics Society of Australia. Since 1996 he has been a director of InterSafe, a company specialising in accident analysis, hazard studies, audits, occupational health and safety systems, industry training, and legal professional advice.

[18] In his report[27] he stated that, in 2014 he visited the store where Ms Grimshaw fell. She identified for him the type of smooth vinyl-tiled floor surface on which she fell. That flooring was present in some parts of the store but was no longer in the area where she fell. After her fall, a new floor surface was installed in the fruit and vegetable section.

[19] He stated that injury from slipping and falling is a high risk and can result in serious injury or fatality. High level control measures to prevent slipping and falling include improved friction properties on the floor surface to deal with expected contaminants. Low level control measures include an inspection regime to minimise the exposure time of people to contaminants.[28] It is also possible to place mats in areas where spillage is most likely to occur. If grapes are loosely stacked for display they will predictably spill. In the absence of pre-packaging of the grapes, it would be desirable to place a mat on the smooth vinyl floor in front of the grape display where Ms Grimshaw fell, to offset the low coefficient of friction of the vinyl tile. Mr Kahler photographed a mat used in some areas of the store where the flooring had been changed since Ms Grimshaw's fall.[29]

[20] In his experience, an inspection interval of 15 to 20 minutes is generally considered reasonable for the industry but he questioned the effectiveness of inspections in managing slips and falls.[30] He concluded that it was entirely probable that someone in the role and activity of Ms Grimshaw would not note the presence of a green grape at floor level and could slip and fall. It was desirable to reduce the likelihood of this happening by improving the floor surface's friction properties and supporting this with an inspection regime.[31]

[21] Mr Kahler also gave evidence at trial. He stated that it was reasonable to hypothesise that the highest density of grape spillage is where they are transferred into baskets and trolleys. The floor surface in front of the grape display cabinet was a critical area. Desirably you would treat the whole shop floor but, in terms of allocation of financial resources, the point of display and customer transfer area was most important. Mats with a surface texture which enhance friction are highly effective in the presence of contaminants. They can absorb 200 or 300 per cent of their weight in fluid. Had there been such a mat on the floor where Ms Grimshaw fell it was almost impossible that she would have slipped. There was a readily

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27 Exhibit 14, AB 691 – 732.
28 Above, p 20, AB 712.
29 Above, p 22, figure 26, AB 714.
30 Above, p 23, AB 715.
31 Above, p 29, [7], AB 721.

available safety vinyl with very satisfactory friction properties that could have been used.[32]

[22] In cross-examination he agreed that the pre-packaging of grapes in plastic bags would be a very high level control. He understood that had a mat of the kind photographed in his report[33] been placed in the location of Ms Grimshaw's fall, that would have been a very strong control. He also agreed that, if she had fallen at a distance beyond the width of such a mat then the mat would not have been effective in stopping her fall. He did not take measurements because the layout around the grape display counter had changed since the accident.[34] He did not consider that the entire shopfloor should be carpeted with mats but he believed that the whole fruit and vegetable area should be treated with an appropriate vinyl, as it had been since the incident.[35] He agreed that Ms Grimshaw had told him that her upper torso was very close to the grape stand in her final fallen position, effectively parallel to its long edge.[36]

[23] His Honour accepted Mr Kahler's evidence about liability issues[37] and was satisfied the fall probably would not have occurred if a mat or suitable flooring of the type depicted in his report had been in place when Ms Grimshaw slipped.[38]

[24] Mr Kahler's evidence was in a field of specialised knowledge concerning identified and proved facts as discussed in *Makita (Australia) Pty Ltd v Sprowles*.[39] Woolworths has not demonstrated that Mr Kahler's reasoned expert opinion, based on clear facts which the judge found were established on the evidence, should have been either rejected or given diminished weight.

[25] As to the contention that Mr Kahler's evidence should be rejected as he did not return to conduct a slip test or take measurements, this would have been pointless as the flooring and set up had been changed since the fall.[40] He stated that he was experienced with smooth vinyl of the type on the floor at the time and was familiar with its friction properties in the presence of a liquid contaminant like a squashed grape.[41] The contention that these matters required the rejection of Mr Kahler's evidence is not made out.

[26] The judge rejected Woolworths' contention that Ms Grimshaw had not pleaded the issue of floor surface, noting that, in any case, its counsel did not press the submission at the conclusion of the evidence.[42]

[27] Woolworths now renews its contention that, as Ms Grimshaw did not plead a claim based on inappropriate floor surface, Mr Kahler's evidence was irrelevant. Like the primary judge, I find this submission difficult to apprehend in light of the way the

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32 T2-32 – T2-33, AB 111 – 112.
33 Exhibit 14, p 22, AB 714.
34 T2-33 – T2-35, AB 112 – 114.
35 T2-41, l 31 – l 35, AB 120.
36 T2-42, l 45 – l 48, AB 121.
37 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [34].
38 Above, [35].
39 (2001) 52 NSWLR 705, 743 – 745, [83] – [86].
40 T2-35, l 19 – l 22, AB 114.
41 T2-35, l 30 – l 40, AB 114.
42 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [29] – [30].

trial was conducted. In any case, Ms Grimshaw pleaded that the display created a foreseeable risk of injury to persons arising from slips and falls caused by grapes deposited upon the floor[43] and that that foreseeable risk required Woolworths to ensure a non-slip mat was placed in the immediate vicinity of the display.[44] The statement of claim included that:

> "The incident and [Ms Grimshaw's] injuries were caused by the negligence of [Woolworths], in that:-
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> ...
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> (d) [Woolworths] failed to ensure a non-slip mat was present at the grape display."[45]

[28] Ms Grimshaw pleaded that Woolworths was negligent in not placing a mat on the floor at the grape display.[46] The judge found it negligently failed do this. Even if the evidence and findings about the flooring itself being defective are removed from consideration, this would not effect the legitimacy of the judge's findings concerning the shortcoming as to the mat, an issue pleaded by Ms Grimshaw and found proved by the judge. The failure to plead a claim arising out of defective or inappropriate flooring does not assist Woolworths.

[29] Woolworths' contentions concerning Mr Kahler's evidence are not made out.

Would the mat more probably than not have prevented the fall (ground 1(e))

[30] The primary judge accepted Ms Grimshaw's evidence that she fell close to the grape display[47] and that the fall probably would not have occurred if the mat had been in place.[48]

[31] Woolworths contends that Ms Grimshaw did not plead where she fell in terms of her proximity to the grape stand; her evidence was that she might have fallen one or two feet from the grape stand; this was inconsistent with Mr Kahler's evidence that there was "no separation distance" between where she ended up after the fall and the grape stand, with her right arm against the edge of the display. It also contends that, as the aisle next to the grape stand was three to four metres wide, she would have had to walk unnaturally close to it to fall at this position. It contends it was far more likely she would have walked down the centre of the aisle where there was no need to place a mat. For these reasons it contends that it was unlikely her version was true.

[32] The primary judge was entitled to accept Ms Grimshaw's evidence as to how and where she fell. It sat comfortably with Mr Kahler's evidence of the account she gave him. If she slipped one or two feet away from the grape display, then it is entirely plausible that she landed up against the display. It was not improbable that she walked close to the grape display, rather than down the centre of the aisle, because of the presence of other persons in the aisle. The judge did not have to find that

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43 Statement of Claim, [3], AB 1056.
44 Above, [6(b)], AB 1057.
45 Above, [10(d)], AB 1057 – 1058.
46 Above, [10(d)], AB 1058.
47 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [21].
48 Above, [35].

Ms Grimshaw would have taken the most direct route from the checkout down the middle of the aisle, where there were no mats, to the lunchroom. The judge was entitled to accept Mr Kahler's and Ms Grimshaw's evidence and conclude that, had a mat been placed in front of the grape display, the fall probably would not have occurred. This contention is not made out.

The application of Wyong Shire Council v Shirt

[33] The trial judge noted that Woolworths' system of training was reasonably adequate in that it highlighted the risk of fallen grapes and the need for vigilance and careful inspection[49] but it seemed to cast the onus on the worker rather than reducing the risk by the placement of mats.[50] A consideration of the surface onto which grapes might fall was central to the risk they posed.[51] The new surface installed on the floor since the accident was much more satisfactory.[52] The risk posed by falling grapes could be reduced by packaging them in bags, by positioning mats appropriately, or by providing a suitable floor surface to the whole of the fruit and vegetable area. The absence of the mats at the time of the injury was unexplained.[53] There was no reason to consider the expense of replacing the flooring was prohibitive.[54] As I have noted, the judge accepted Mr Kahler's evidence about liability issues[55] and was satisfied that Ms Grimshaw probably would not have fallen if the mat had been in place.[56] His Honour considered that it was "clear beyond doubt" that Ms Grimshaw must succeed on liability. She fell in an area that should and would have been covered by mats if Woolworths' usual practice had been followed.[57]

[34] Woolworths contends the primary judge did not properly apply the *Shirt* calculus.[58] It submits that the primary judge's findings did not properly take into account Mr Kahler's evidence about the helpfulness of pre-packaging the grapes, which heavily reduced the necessity for mats. In addition, Woolworths emphasises, it warned staff to look out for grapes on the floor and to pick them up. The presence of a grape on the floor was unfortunate for Ms Grimshaw but did not in itself give rise to the conclusion that Woolworths had been negligent. Section 305C(b) *Workers' Compensation and Rehabilitation Act* 2003 (Qld) provides that the fact that a risk of injury could have been avoided by doing something differently does not of itself give rise to or affect liability for the way in which the thing was done. The fact that Woolworths could have done even more to prevent the fall by placing a mat on the floor did not, it argues, render it negligent.

[35] *Shirt* required the judge to consider whether a reasonable employer in Woolworths' position would have foreseen that its conduct involved a risk of injury to Ms Grimshaw. If so, the court must determine what a reasonable person would do to respond to that risk. This calls for a consideration of the magnitude of the risk, the degree of probability

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49 Above, [24].
50 Above, [25].
51 Above, [27].
52 Above, [28].
53 Above, [31].
54 Above, [33].
55 Above, [34].
56 Above, [35].
57 Above, [36].
58 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 – 48; *Workers' Compensation and Rehabilitation Act* 2003 (Qld) s 305C(b).

of its occurrence, the expense, difficulty and inconvenience of taking alleviating action, and all Woolworths' other conflicting responsibilities.[59]

[36] It was commendable that Woolworths had made considerable efforts to avoid slips and falls as a result of grapes on the floor by educating its employees and customers about the dangers and making some efforts to pre-package the grapes. But its published fact sheet for employees[60] noted that in the 2009 financial year it had 1,463 incidents in stores where employees or customers slipped on fallen grapes; about 10 per cent of all customer injuries were specifically grape-related. The fact sheet warned that grapes fall to the floor when customers bag them and if the bags are not tied, grapes may fall from the trolley while the customer is shopping. It warned that grapes could fall anywhere in the store, not just where they are displayed.

[37] Under a factsheet heading "What can you do to prevent people from slipping on grapes in your store?", the fifth of seven suggestions was, "Place mats in front of your displays to help if customers do drop grapes whilst selecting their fruit."[61] Woolworths admitted that mats were available for use in the fruit and vegetable section.[62] The unchallenged evidence was that there were no mats on the floor when Ms Grimshaw slipped on a grape next to the grape display. In terms of *Shirt*, a reasonable employer in Woolworths' position would have foreseen that its conduct in not placing mats near the grape display involved a risk of injury to Ms Grimshaw. In response to Ms Grimshaw's fall, a safety incident report recorded that one recommended action was to place mats near the grape display. Mr Kahler's evidence was that the highest density of grape spillage was where they were handled and moved to baskets and trolleys. This was precisely the area where Ms Grimshaw slipped on a grape.

[38] Woolworths is right in contending that the grapes were pre-packaged to some extent and that Mr Kahler conceded this would significantly reduce the risk of slips and falls from grapes. The evidence, however, does not suggest that the plastic bags were closed or permanently sealed which is what I apprehend Mr Kahler had in mind. Grapes could easily fall from the open packaging onto the floor, particularly when being moved from the display into baskets or trollies.

[39] The evidence established that there was a foreseeable risk of a slip injury to employees and customers from grapes falling to the floor, particularly at the grape display; Woolworths knew this; it also knew that mats in front of the grape display would help reduce that risk. But it did not put down mats in front of the grape display, even though they were not costly; were available; and could easily have been utilised. There was no evidence of any reason not to put down the mats. Woolworths has not demonstrated that the primary judge incorrectly applied *Shirt* and nor is it assisted by s 305C(b). These contentions are not made out.

Conclusion on liability

[40] As Woolworths has not established error on the part of the judge in finding it liable for Ms Grimshaw's injury, the appeal against liability must be dismissed and it is unnecessary to consider Ms Grimshaw's notice of contention.

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59 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 – 48.

60 Exhibit 1, AB 292.

61 Above, AB 292 – 293. See also Exhibit 1A, AB 294 – 295 another fact sheet about grapes and Exhibit 6, a USB containing grape training and "Move smart stay safe manual handling" videos.

62 Woolworths' response to notice to admit facts and documents, AB 1091.

Contributory negligence

[41] Woolworths submitted at first instance that, if it were liable, Ms Grimshaw should be found 25 to 35 per cent contributorily negligent as she was trained in risk assessment; knew of the risk; knew to keep a lookout for grapes, particularly in the produce department; was in a hurry and not keeping a proper lookout; and could have avoided walking in the area near the grapes. Woolworths has repeated those submissions in this appeal. It emphasised that Ms Grimshaw was trained and had a duty to lookout for grapes as part of her employment so that her failure to do so was not mere inadvertence.

[42] His Honour found that, given the unsatisfactory nature of the flooring and the ease with which Woolworths could have remedied the situation, Ms Grimshaw's failure to observe the grape before she stepped on it was mere inadvertence. Woolworths could be expected to realise that people passing through the area may be distracted and could not pass responsibility to its employee simply by alerting her to the danger. For those reasons his Honour concluded there was no sensible basis for a finding of contributory negligence.[63]

[43] Woolworths should have, but did not, place mats next to the grape display to avoid employees slipping on fallen grapes. It could not expect that, because it had alerted employees to the dangers of fallen grapes and encouraged them to pick them up, employees heading to the lunchroom on a break would necessarily scan the floor at every footstep for fallen grapes. Woolworths has not demonstrated any error on the part of the judge in his discretionary evaluation that Ms Grimshaw was not contributorily negligent. This contention is without basis.

Quantum

[44] Woolworths contends the awards for past and future economic loss were excessive because Ms Grimshaw failed to mitigate her losses in not taking steps to secure alternative employment and in not taking up Woolworths' offer of vocational assistance. The judge failed to sufficiently discount past and future economic loss for contingencies. It also contends that his Honour adopted an incorrect starting figure for calculating future economic loss.

Failure to mitigate and to sufficiently discount past and future economic loss

[45] The judge rejected Woolworths' case that Ms Grimshaw failed to mitigate her loss because she refused its proposed vocational assessment and assistance and rehabilitation under the *Workers' Compensation and Rehabilitation Act* and failed to comply with s 267(2) of that Act. His Honour noted that the matter arose only after Woolworths dismissed Ms Grimshaw from her employment and considered that its offer of vocational assistance was appropriately seen as disingenuous by her lawyers for the reasons set out in their letter of 18 August 2014.[64] She did not reject the suggestion outright but expressed a preference for being examined by an occupational therapist who would travel to or was based in Townsville. His Honour considered, having regard to the passage of time, that Woolworths had determined she was unable to return to her pre-accident or other duties in its employment, and had sought her resignation; its

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63 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [37] – [39].

64 Exhibit 26, AB 1034 – 1035, relevantly set out at [52] of these reasons.

offer was an attempt to create evidence rather than to genuinely comply with its statutory obligations. That conclusion, he considered, was consistent with the very tight timeframe imposed in Woolworths' letter of 5 November 2014.[65]

[46] Woolworths submits that a reasonable person in her position would have accepted its offer and that, had she done so, there was a reasonable chance she may have been employable, at least in part time work, thereby reducing the damages for past and future economic loss. It contends the judge should have discounted her past and future economic loss because of this failure to mitigate. It also contends the judge erred in not reducing her damages for the loss of the chance that her condition would have improved with rehabilitation so that she would have been able to obtain at least part time work. Woolworths contends the primary judge erred in stating that its motive was relevant. Even if it had made an earlier decision to terminate her employment, it resiled from that position in writing to her lawyers in June 2014. Nothing in the Act, it contended, supported the primary judge's finding that it was reasonable to reject an offer of rehabilitation once litigation commenced. It emphasises that compliance with s 267 was mandatory. There was no evidence that it was reasonable for her not to undertake the offered assistance which would have mitigated her losses. She wanted to return to work at Woolworths, had only limited pain and discomfort, and her psychiatric condition was in remission. It contends that the judge erred in considering only the parties' correspondence. His Honour should also have considered Ms Grimshaw's failure to take any steps to secure alternative employment, notwithstanding her residual earning capacity, and that she rejected Woolworths' offer of functional and rehabilitative vocational assessment, the aim of which was to enable her to return to employment. Woolworths submits that it was probable that the rehabilitation it offered would have succeeded and, to reflect this, the judge should have reduced the past and future economic loss by 50 per cent.

[47] In discussing Woolworths' contentions, it is helpful to set out relevant aspects of the correspondence between the parties and the Act[66] which established a Queensland workers' compensation scheme providing benefits for workers killed or injured in the course of their employment. Under Chapter 4, Injury management, Part 3, Responsibility for rehabilitation, Division 1, (also headed, Responsibility for rehabilitation) s 220(1)[67] "An insurer must take the steps it considers practicable to secure the rehabilitation and early return to suitable duties of workers who have an entitlement to compensation." Under s 220(2), the insurer was "responsible for coordinating the development and maintenance of a rehabilitation and return to work plan in consultation with the injured worker, the worker's employer and treating registered persons."

[48] Chapter 4, Part 5, Worker's mitigation and rehabilitation obligations, applied "to a worker who has sustained an injury and is required to participate in rehabilitation".[68] It contained:

> "**231 Worker must mitigate loss**

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65 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [50] – [53]; Exhibit 26, AB 1036, relevantly set out at [53] of these reasons.

66 *Workers' Compensation and Rehabilitation Act* (as at 23 September 2013).

67 Above, s 5.

68 Above, s 230.

(1) The common law duty of mitigation of loss applies to the worker.

(2) The worker's duty may be discharged by participating in rehabilitation.

(3) Without limiting subsection (2), a worker must satisfactorily participate in any return to work program or suitable duties arranged by the insurer or the Authority.

(4) The worker's duty under this section is in addition to any duty the worker may have under section 267.

232 Worker must participate in rehabilitation

(1) The worker must satisfactorily participate in rehabilitation—

(a) as soon as practicable after the injury is sustained; and

(b) for the period for which the worker is entitled to compensation.

(2) If the worker fails or refuses to participate in rehabilitation without reasonable excuse, the insurer may, by written notice given to the worker, suspend the worker's entitlement to compensation until the worker satisfactorily participates in rehabilitation.

(3) If the insurer suspends the worker's entitlement to compensation, the worker may have the decision reviewed under chapter 13."

[49] Woolworths, in its correspondence with Ms Grimshaw, before the primary judge and in this Court relies on provisions in Chapter 5, Access to damages, Part 3, Mitigation of loss and rehabilitation, which relevantly provide:

"**267 Mitigation of loss**

(1) The common law duty of mitigation of loss applies to all workers in relation to claims or proceedings for damages.

(2) The worker must satisfactorily participate in rehabilitation.

(3) Without limiting subsection (2), a worker must satisfactorily participate in any return to work program or suitable duties arranged by the insurer or the Authority.

(4) The worker's duty mentioned in this section is in addition to any duty the worker may have under section 231.

268 Provision of rehabilitation

(1) An insurer may make rehabilitation available to a worker on the insurer's own initiative or if the worker asks.

> (2) If the insurer makes rehabilitation available to a worker before admitting or denying liability for damages, the insurer must not be taken, only for that reason, to have admitted liability.
>
> (3) If—
>
> (a) liability has been admitted for damages; or
>
> (b) the insurer has agreed to fund rehabilitation without making an admission of liability;
>
> the insurer must, if the worker asks, ensure that reasonable and appropriate rehabilitation is made available to the worker. ...
>
> (7) The insurer must make rehabilitation available to the worker, and the worker must satisfactorily participate in rehabilitation, in sufficient time to enable the insurer and the worker to comply with parts 5, 6 and 7." (Chapter 5, Part 5 is headed Pre-court procedures; Part 6, Settlement of claims; and Part 7, Start of court proceedings.)

[50] Section 269 sets out how the insurer can have a court take the cost of rehabilitation into account in the assessment of damages payable to a worker.

[51] Ms Grimshaw's Claim and Statement of Claim was filed on 2 June 2014. It must have been served soon after as on 24 June 2014, Woolworths wrote to her solicitors stating:

> "We acknowledge receipt of your client's Claim and Statement of Claim. We note that our client's Notice of Intention to Defend and Defence is due by 1 July 2014.
>
> We are instructed that our client wishes to both obtain functional and vocational assessment of your client and to provide your client with rehabilitative vocational assistance. The aim of this is, in light of your client's injury, to return her to sustainable employment.
>
> ...
>
> Noting the objects of the WCRA, and the parties' obligations, our client wishes to arrange for your client to be assessed by Sanja Zeman of Empact. This assessment will be undertaken, and any return to work programme implemented, with the benefit of having Ms Zeman take into account all specialist comment to hand and also taking into account all comments obtained from your client.
>
> Ms Zeman advises us that she is available to undertake an assessment of your client in Townsville on 28 or 29 July 2014, or otherwise in Brisbane. Please obtain your client's instructions in this regard.
>
> ..."[69]

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69 Exhibit 26, AB 1032.

[52] On 18 August 2014, Ms Grimshaw's lawyers responded in terms which included:

> "We note that section 220 imposes the responsibility on your client to take steps it considers practicable to secure our client's rehabilitation and early return to suitable duties after lodging a notice of claim, unless your client is satisfied that, as a result of the injury, our client will not be able to participate in such a program.
>
> **Return to work**
>
> On 26 June 2012 our client had returned to full working hours (38 hours per week) with restrictions described as follows:-
>
> > "express service within restrictions; return stock to shelf single item; smoke shop within restrictions" and "lifting weight 5kg occasional; no bending/twisting/squatting; occasional pushing/pulling; rest when back becomes tight- stretch."
>
> On 13 September 2012 your client had our client assessed by Dr Brett Halliday.
>
> On 17 September 2012 he provided a report which stated amongst other things her restrictions as follows:-
>
> > "*Miss Grimshaw would be best suited to limited periods of time in a sustained standing role of up to two hours, restricted weight lifting of 10 kilograms, as well as avoiding repetitive lifting and twisting and avoiding carrying of heavy weights"*
>
> On 18 September 2012 Jahna McKeown speaks to our client about the outcome of the report by Dr Halliday, the assessment of permanent impairment, lump sum offer and the closure of her claim.
>
> On that same day Ms McKeown speaks to HR rehab at WW Castletown (Karen Debney) about the report of Halliday and in particular the restrictions.
>
> Karen states:-
>
> > "*Worker is only on express; she does not have to lift anything like 10kg, has drill down for heavy items; currently working 1 hour then facing up, tidying stock; generally would not need to remain at register for more than 2 hours; does not carry heavy loads any distance; most of those things are what she has done her whole working life; W does not like change so we have worked around her"*
>
> Jahna states:-
>
> > "*so store could accommodate these things? Is already accommodating these things?"*
>
> Karen states:
>
> > "*would have to double check with SM (Richard Matthews) and HRS*."
>
> Jahna states:-

> "*I can follow up HRS – could you talk to SM?; if HRS is in agreement, I will arrange OT visit; expectation is that W will improve over time, however she will need to be active, help herself; at the moment, her pain focus might limit her progress; she is concerned for her job but will need to push herself*"

Jahna then telephones Kerry White.

On 27 September 2012 Kerry White meets with our client and informs her that unless she has a 100% medical clearance, they could not accommodate her. You client then helpfully sends the report by Dr Halliday to Dr Coxon.

On 28 September 2012 our client attends with Dr Paul Coxon who has received the report of Dr Halliday and notes the restrictions, then recommends continued physiotherapy, exercised and massage therapy. He does not give her 100% clearance to return to work.

Our client was unable to return to work because Dr Coxon would not give her a 100% clearance.

In December 2012 our client develops a secondary psychiatric injury.

On 28 March 2014 you noted our client had not worked in any capacity with your client since September 2012 and your client had determined that she was unable to return to neither her pre-accident duties nor any duties with your client. Accordingly, your client sought her resignation.

Our client successfully participated in a return to work program as she was working full hours in her pre accident duties at the time your client prevented her from returning to work. Your client then decided not to engage an OT despite the recommendation by Ms McKeown. Your client placed a condition on her return to work which it knew, in light of the report by Dr Halliday, she would never be able to satisfy. Your client calculatedly provided the report of Halliday to Dr Coxon on 27 September 2012 so that he too would not in good conscience provide her with the 100% clearance to return to full duties.

This current attempt by your client to rehabilitate and return our client to work is disingenuous.

Functional and vocational assessment

We do not object to our client being assessed by an occupational therapist for an IME of her functional and vocational capacity. Please provide us with a panel of three (3) occupational therapists with their respective CV's so that we can nominate one to undertake the assessment.

Our preference is for an OT's who will travel to Townsville or is based in Townsville,"[70] (errors in the original).

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70 Above, AB 1034 – 1035.

[53] On 5 November 2014 Woolworths' lawyers responded in terms which included:

> "Regardless of your views as to our client's motives (which views are obviously denied by our client), both of our clients have obligations under the WCRA as we outlined above. Further, our client is not proposing an independent medical examination, rather an assessment for the purposes of developing a return to work program in accordance with section 220 of the WCRA. As such our client is not required to, and will not, put a panel forward for your client's consideration.
>
> We are advised that Ms Zeman can meet with your client in Townsville on **Thursday, 4 December 2014** with a view to developing a plan to assist your client to return to work in a role which matches her capability.
>
> We require confirmation from you no later than close of business on **Friday, 7 November 2014** that your client will attend this appointment, as we do not have intend to have Ms Zeman hold another appointment indefinitely.
>
> If we do not receive confirmation by the time nominated, or if you confirm that your client will not attend on the bases you have previously advanced or other grounds, our client does not intend to agitate the issue any further.
>
> However, our client will be relying upon your client's failure to attend the appointments which we have proposed in pleading that your client has failed to take steps to mitigate her loss pursuant to her obligations in the WCRA. We will seek our client's instructions to amend its defence to plead your client's failure to comply with her obligations specifically. We will bring this and other correspondence exchanged with your firm in relation to this issue to the court's attention in advancing that pleading at trial." (errors and emphasis in the original).[71]

[54] It is uncontentious that Ms Grimshaw did not take up Woolworths' offer on 24 June 2014 of rehabilitative vocational assistance under the Act.

[55] It is clear that the parties' statutory obligations under Chapter 4, Part 3, Division 1 s 220 and Part 5, ss 231 and 232 apply only to compensation under Chapters 3 and 4,[72] not to claims for common law damages. Those obligations passed once Ms Grimshaw's entitlement to compensation under the Act ended, although her common law obligations continued. Any refusal to cooperate in rehabilitation would be relevant to her common law duty to mitigate and her statutory obligations under Chapter 5, Part 3, ss 267, 268 and 269. As to her obligations under s 231(3), she participated in a return to work program arranged by Woolworths and appeared to have made genuine and determined efforts to rehabilitate. As to her obligations under s 267(1), (2) and (3), Woolworths was obliged, under s 268(7), to make rehabilitation available to her in sufficient time for the parties to comply with their obligations under the Act dealing with the 'Pre-court procedures', 'Settlement of

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71 Above, AB 1036 – 1037.

72 *Workers' Compensation and Rehabilitation Act* (as at 23 September 2013), s 9.

claims', and 'Start of court proceedings'.[73] Woolworths' request on 24 June 2014 that she participate in a further round of rehabilitation came only after she commenced this court action. She, her lawyers, and the judge were entitled to conclude that she had met her common law and statutory obligations by her earlier rehabilitative efforts and her attempt to return to work at Woolworths prior to being told in February 2014 that she could not work there unless medically certified 100 per cent fit for duties. Even so, she did not close the door in August 2014 to a further assessment by an occupational therapist of Woolworths' choice, but it did not pursue this.

[56] As the primary judge stated, Woolworths' late interest in this rehabilitative assessment just after Ms Grimshaw commenced her court action smacked of a self-serving paper trail for litigious purposes rather than a genuine attempt to assist her rehabilitation. Woolworths was by this stage in possession of a great deal of detailed medical information about Ms Grimshaw's condition, much of which made clear that she was unfit to return to her previous employment. It should have appreciated that, having told her in writing in February 2014 that she could not work for it without a medical clearance that she was 100 per cent fit for duties, it would be difficult for her to obtain like employment elsewhere, even part time. She was a woman in her late 50's, with limited education or skills, whose employer for the past 38 years would no longer employ her because of her injuries. There was no evidence that further rehabilitation was likely to have advanced her employment prospects. Indeed, the evidence was to the contrary. Occupational therapist, Ms Andrea Jones, prepared a report in January 2014 and gave evidence at trial. She did not consider vocational assistance from trained assessors or occupational therapists would be of benefit to Ms Grimshaw in obtaining employment. Ms Jones considered that if Woolworths, who had employed Ms Grimshaw for 38 years, was not prepared to accommodate her restrictions, it was unlikely another employer would. Ms Jones also noted that Ms Grimshaw had volunteered at Lifeline but was unsuccessful because of her injuries.[74] Orthopaedic surgeon, Dr Brett Halliday, in his report of 4 March 2014 stated that she could not lift more than 10 kilograms repetitively, lift and twist, or stand for more than one hour without a rest, and this condition was permanent.[75] He agreed with Ms Jones that Ms Grimshaw was no longer suited to her pre-injury work.[76] Orthopaedic surgeon, Dr John Maguire, in his report of 31 October 2013 prepared for Woolworths, also considered that Ms Grimshaw's prognosis was poor and she was permanently unable to work.[77]

[57] Ms Grimshaw did not fail to comply with s 267(2) but Woolworths failed to comply with s 268(7). Woolworths has not demonstrated that the judge erred in finding Ms Grimshaw did not fail to mitigate her past and future economic loss or that, had she cooperated with Woolworths, she may have had some residual earning capacity. This contention is not made out.

The discount for contingencies in assessing past and future economic loss

[58] The primary judge found that Ms Grimshaw would have had great difficulty in returning to work in the open labour market, having regard to her age, qualifications

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73 Above, ch 5, pts 5 – 7.
74 T2-58, l 21 – l 34, AB 134.
75 Exhibit 13(b), p 8, AB 682.
76 T2-10, l 13 – l 16, AB 89.
77 Exhibit 15, p 6, AB 738.

and experience, overlayed with the serious and permanent consequences of her injury so that she did not retain any useful capacity for commercial employment. His Honour considered that Woolworths' assertion of a 50 per cent reduction was entirely unrealistic given the orthopaedic evidence.[78] His Honour referred to the possibility her significant, though asymptomatic, pre-existing degenerative disease would have caused incapacitating symptoms at some time after the age of 60. His Honour stated that he "would discount her claim for future economic loss by 20% rather than the usual 15% having regard to the nature of the degenerative condition and her rather ambitious plan to work until age 67".[79]

[59] Woolworths maintains on this appeal that the discount of past and future economic loss for this and other contingencies should have been no less than 30 per cent, given her pre-existing degeneration which may commence in three years.

[60] The determination of the discount to be given to reflect the contingencies that a plaintiff may at some future point have suffered a disability for some reason other than the injury will always depend on the relevant evidence in each case. There is no single, correct figure or percentage and no "usual discount".

[61] Dr Halliday noted that an x-ray showed mild degenerative change in Ms Grimshaw's lumber spine.[80] When asked, if the work injury had not occurred, when would she have reached her current level of work incapacity, he responded that this was impossible to answer accurately. It was likely she may have had symptoms which would limit heavier physical activity by the age of 60.[81] He considered that heavy repetitive lifting may have become difficult in her early 60's. He also stated that it was possible she may not have suffered any symptoms precluding her from working until 67.[82]

[62] The fact that she may have had symptoms which would limit heavier physical activity did not mean she would have been unable to continue working in her current position where she had been a valued employee. Woolworths may well have accommodated her needs through flexible working conditions and hours so that she was able to work until 67.

[63] Ms Grimshaw was 57 years old at trial so there was no evidence from Dr Halliday obliging the judge to discount past economic loss. Although another judge may have further discounted the future economic loss award, it was open on the evidence to settle upon a discount of 20 per cent for the contingency that Ms Grimshaw may have been in the position she is now in at some future point prior to her planned retirement at 67, irrespective of this accident. Woolworths' contention that there should have been a discount of at least 30 per cent on past and future economic loss is not made out.

Was the judge entitled to take into account the uncertainties of wage increases in determining future economic loss

[64] In assessing future economic loss, the judge stated:

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78 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [81].

79 Above, [83].

80 Exhibit 13(b), p 4, AB 678.

81 Above, p 9, AB 683.

82 T2-9, l 1 – l 6, AB 88.

> "[I]t seems to be appropriate to proceed on the basis of the weekly figure nominated by [Ms Grimshaw] or something like it, because [Woolworths'] figure assumes to change the earnings for the relevant period, and that is contrary to common experience and commonsense. Assuming a rate of $800.00 net per week for the future, making some allowance for the uncertainties of wage increases and adopting 20% for contingencies, I arrive at a figure of $264,256.00 for future economic loss, and I would round that off to $265,000.00. That would result in $30,024.50 being allowed for future loss of superannuation."[83]

[65] Woolworths emphasises that it is uncontentious that, as at the date of trial, Ms Grimshaw would have been earning $688.95 net per week if she had continued in her pre-injury employment. In *Todorovic v Waller*[84] the High Court determined that wage increases and inflation should not be taken into account, save by applying the relevant discount to reach present value. Ms Grimshaw submitted at trial that the judge should take into account future wage increases in assessing future economic loss so that the assessment should be made on an average of $813.15 net per week. Woolworths contends that, applying *Todorovic*, damages should have been assessed at $688.95 per week for 10 years, discounted at five per cent[85] (with a multiplier for 10 years of 413), resulting in an amount of $284,536.35, rounded up to $285,000.00. This amount, discounted at 20 per cent for contingencies, reduced the award to $227,629.08, rounded down to $227,500.00, a difference of $37,500.00. With the consequential changes to the award for future superannuation, the damages award should be reduced by about $54,000.00.

[66] Ms Grimshaw contends that *Todorovic* is not authority for the proposition that increases in wages should not be taken into account in assessing future loss of earning capacity; the point under consideration was the highly speculative effect of inflation upon the assessment of future economic loss when converted to lump sum present day values. She cites the observations of Barwick CJ in *Arthur Robinson (Grafton) Pty Ltd v Carter*[86]in support of the proposition that, in considering loss of future earning capacity, the rates of wages being earnt and those likely to be earnt in the future afford a basis for assessing compensation. She contends that the assessment of loss of future earning capacity must take into account the potential to earn income and not be limited by reference to a weekly wage rate, relying on this Court's decision in *Qantas Airways Limited v Fisher*.[87]

[67] In *Todorovic* the High Court (Gibbs CJ, Stephen, Mason, Aickin, Wilson and Brennan JJ, Murphy J dissenting) held that, in a claim for damages for personal injuries, evidence as to the likely course of inflation, or of possible future changes in rates of wages or prices, is inadmissible. Where there has been a loss of earning capacity which is likely to lead to future economic loss, the present value of that loss should be discounted at three per cent, (subject to any relevant statutory provisions). This rate is to allow for inflation, for changing rates of wages and prices, and for tax (either

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83 *Grimshaw v Woolworths Limited* (Unreported, District Court of Queensland, Baulch DCJ, 25 September 2015), [86].

84 (1981) 150 CLR 402.

85 *Workers' Compensation and Rehabilitation Act* (as at 23 September 2013) s 306L(2).

86 (1968) 122 CLR 649, 658.

87 [2014] QCA 329, [20].

actual or notional) upon income from investment of the sum awarded. The appropriate statutory discount rate in this case is five per cent.[88]

[68] *Qantas Airways Limited v Fisher*[89] does not assist Ms Grimshaw; the primary judge in that case did not assess future loss of earning capacity by reference to predicted future increases in the plaintiff's income had he continued working in the same position with the defendant.[90] Nor do Barwick CJ's observations in *Arthur Robinson*, that what must be assessed is loss of earning capacity, not loss of earnings, assist Ms Grimshaw. Those observations sit comfortably with the High Court's subsequent decision in *Todorovic*.

[69] The primary judge erred in failing to apply *Todorovic* and taking into account Ms Grimshaw's future predicted wage increases had she continued in her pre-injury position with Woolworths in determining her future loss of earning capacity. On his Honour's approach, he should have assessed future economic loss on the basis of what she would have been earning at Woolworths in her pre-injury employment at the date of trial, discounted on the five per cent tables. This error has resulted in her obtaining judgment for $54,000.00 more than she should. The appeal must be allowed and her award reduced by this amount.

Application to amend the notice of appeal

[70] Woolworths has filed material to explain why an additional ground of appeal it now seeks to argue was not originally included in its notice of appeal. It wishes to argue that the judge failed to reduce Ms Grimshaw's past economic loss by $5,511.60 to reflect a period of two months when she would not have worked in any event due to an unrelated injury. It seems that the judge delivered his 16-page reasons for judgment orally on 25 September 2015 in Townsville. Counsel for Woolworths was based in Brisbane. The judge refused her application to appear by telephone, no doubt because his Honour expected the delivery of reasons would take some time. Concerningly, the judge, the Court is told, did not then publish his revised reasons, or at least Woolworths did not receive them, until the final day of the appeal period. I consider that, in those regrettable circumstances, the interests of justice require that leave be given to Woolworths to amend its notice of appeal to add that ground.

The effect on past economic loss of an unrelated injury

[71] This ground of appeal arose because Ms Grimshaw was burnt on her right arm and thigh in a lawnmower explosion on 2 April 2013, during the past economic loss period. Dr Halliday considered she would have required two months off work in respect of that injury which was completely unrelated to the workplace injury. The issue was not, as far as I can see, specifically canvassed by the parties in their submissions at trial which is probably why his Honour did not deal with it in his reasons. Her treating doctor on 9 May 2013 described her "excellent progress" and that she no longer needed regular surgical follow-up in relation to this injury.[91]

[72] I accept Ms Grimshaw's contentions that, but for her workplace injury, she may well have been able to return to work at Woolworths after less than two months. I also accept her submission that, but for having taken all her sick leave to

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88 *Workers' Compensation and Rehabilitation Act* (as at 23 September 2013) s 306L(2).
89 [2014] QCA 329, [20].
90 Above, [14].
91 Exhibit 22A, AB 846.

accommodate her workplace injury, she would have been able to take sick leave in respect of her burn injury.

[73] For those reasons, Woolworths has not demonstrated that her past economic loss should be reduced because of the burn injury. This contention is not made out.

Orders:

[74] The appeal must be allowed and the judgment given in favour of Ms Grimshaw varied by substituting the sum of $437,037.26 for the sum of $491,037.26. Woolworths at the hearing of the appeal asked for leave to make submissions as to the appropriate costs orders, presumably both in respect of the trial and the appeal. I propose the following orders:

1. The application to amend the notice of appeal is granted.
2. The appeal is allowed.
3. The judgment in favour of Ms Grimshaw is varied by substituting the sum of $437,037.26 for the sum of $491.037.26.
4. The parties have leave to make submissions as to costs of the appeal and the trial, in accordance with Practice Direction 3 of 2013, paragraph

[75] **APPLEGARTH J:** I have had the advantage of reading the comprehensive reasons of McMurdo P, with which I agree. I also agree with the orders proposed by her Honour.

[76] **FLANAGAN J:** I have had the advantage of reading the reasons of McMurdo P, with which I agree. I also agree with the orders proposed by her Honour.