DISTRICT COURT OF QUEENSLAND

CITATION:	*Welsh v Boutique Venues Pty Ltd* [2020] QDC 18
PARTIES:	**KATELYN WELSH** (plaintiff) v **BOUTIQUE VENUES PTY LTD AS TRUSTEE OF THE BOUTIQUE VENUES TRUST TRADING AS CHA CHA CHAR (ABN 79 114 808 596)** (defendant)
FILE NO.:	3355/18
DIVISION:	Trial Division
PROCEEDING:	Civil
DELIVERED ON:	5 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	25, 26, 27 November, 5 December 2019 and 19 February 2020
JUDGE:	Rosengren DCJ
ORDER:	**Judgment for the plaintiff against the defendant in the sum of $36,326.85**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where the plaintiff claims damages for injuries suffered in the course of employment with the defendant – where both liability and quantum of damages are in contention TORTS – NEGLIGENCE – BREACH OF DUTY – where the plaintiff was employed by the defendant as a chef – where the plaintiff sustained burn injuries to her forearms when retrieving a tray with hot water in it from the oven – where it was the plaintiff's case she could not see into the contents of the tray because the oven was too high and she thought it had bread in it – whether the risk of injury was foreseeable and not insignificant – whether the defendant breached its duty of care to the plaintiff TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – OBVIOUS RISK – where the defendant

pleaded that the risk was an obvious risk for the purpose of a finding of contributory negligence – whether the conduct of the plaintiff amounted to a misjudgement or to negligence on her part

DAMAGES – MEASURE OF DAMAGES FOR AN ACTION IN TORT – PERSONAL INJURIES – GENERAL DAMAGES – where there is a dispute as to the consequences of the injuries caused by the incident – whether the plaintiff's dominant injury is peripheral nerve damage or disfigurement – where the parties are in dispute as to the appropriate level of ISV

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNING CAPACITY – where a claim is made assuming full time employment as a pastry chef until the age of 67 - where the plaintiff voluntarily terminated her employment with the defendant – where the plaintiff started working in childcare shortly after the incident - what the plaintiff's likely employment would have been had she not been injured

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305I, s 305B(1), s 305B(2), s 305C, s 305D, s 305E, s 305F(1), s 305F(2), s 305H, s 305H(1)(f), s 305H(2), s 306N(1)
Workers' Compensation and Rehabilitation Regulation 2014 (Qld), sch 9, sch 12

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301, cited
Council of the City of Greater Taree v Wells [2010] NSWCA 147, applied
Czatyrko v Edith Cowan University [2005] HCA 14, applied
Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18, applied
Kennedy v Queensland Alumina Limited [2015] QSC 317, cited
Glad Retail Cleaning v Alvarenga [2013] NSWCA 482, applied
March v E & MH Stramere Pty Ltd (1999) 171 CLR 506, applied
McLean v Tedman (1984) 155 CLR 306, applied
Mount Isa Mines v Pusey (1970) 125 CLR 383, applied
O'Connor v Commissioner for Government Transport (1954) 100 CLR 225, applied
Perkovic v McDonnell Industries Pty Ltd (1887) 45 SASR

455, cited
Qantas Airways Limited v Fisher [2014] QCA 329, applied
S J Sanders Pty Ltd v Schmidt [2012] QCA 358, applied
Smith v The Broken Hill Proprietary Company Limited (1957) CLR 337, applied
State of New South Wales v Mikhael [2012] NSWCA 338, cited
State of Queensland v Kelly [2014] QCA 27, cited
Strong v Woolworths Ltd (2012) 246 CLR 182, applied
Vairy v Wyong Shire Council (2005) 223 CLR 422, applied

COUNSEL: MT O'Sullivan for the plaintiff
S McNeil for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
BT Lawyers for the defendant

Introduction

[1] The defendant owns and operates Cha Cha Char ('the restaurant') at Eagle Street in Brisbane. The plaintiff was employed as a chef in the kitchen at the restaurant. In April 2017 she was retrieving a tray from an oven when the hot water in it spilled over the side of the tray burning her forearms ('the incident').

[2] In September 2018 the plaintiff commenced this proceeding against the defendant for damages and other orders. Both liability and quantum are in dispute.

Undisputed background

[3] In late 2013 the plaintiff completed a Certificate II in Hospitality. Shortly thereafter she commenced her apprenticeship training as a chef in the kitchen at the restaurant on a casual basis. The plaintiff primarily undertook pastry work for the duration of her employment with the defendant. There would be occasions where she would assist in other parts of the kitchen.

[4] There were a number of different sections of the kitchen. The larder section was used to prepare salads and cold entrees. There was also the grill, pastry and pans sections. A map of the kitchen is exhibit 31. The plaintiff worked with a number of different chefs including William Dix and Pramod Bairachayra. Angelo Valante was the head chef at the restaurant from mid-2016. They each gave evidence which I will discuss in detail below.

[5] For the first year or so when the plaintiff was employed at the restaurant she worked at the larder bench. The pastry preparation work was later moved to the front bench of the pastry section.

[6] There were four ovens in the kitchen. One of these oven being a Combi oven. This is depicted in the photographs which are exhibit 1.[1] It was located at the end of the larder bench. The lowest part of the window to the Combi oven is approximately one and a half metres from the floor. There are multiple shelves in the oven at heights above this. The plaintiff is 158 centimetres tall.

[7] There was also a further oven in the pastry section of the kitchen ('the pastry oven'). It was located under the front bench and is depicted in photograph (iii) in exhibit 1 and in the second photograph in exhibit 6. The remaining two ovens were powered by gas and were in the grill and pans sections of the kitchen ('the gas ovens').

[8] The plaintiff left her employment with the defendant for a brief period in mid-2015. She worked at the Kedron Wavell Services Club for a few days.[2] Her now husband, Nicholas Rewko had been working at the restaurant with her and had moved overseas to work. As she was missing him, she thought a change of employment may help her. However, she did not enjoy her work at the Kedron Wavell Services Club and she subsequently returned to work with the defendant at the restaurant.

[9] In mid-2016, Angelo Valante became the head chef at the restaurant. He would hold a morning briefing with the chefs shortly after commencing their shifts at 10am. The workload would be allocated so that if one section was busy and another one was not, the chef in the quieter section would assist the chef in the busier section. Each chef would have an allocated two hour break in the afternoon, commencing at either 2pm or 3pm and these breaks would be assigned during this briefing.

[10] Dinner service for the restaurant was the busiest time of the shift. Therefore, the bulk of the preparation would be undertaken prior to the commencement of lunch service. This would include the making of crème brûlées and parfaits which were both relatively time consuming.

[11] It was Mr Valante's impression when he commenced working for the defendant that the plaintiff was a talented and dedicated chef. He was concerned that she had been provided limited opportunities to work in sections of the kitchen apart from the pastry section. He spoke to her about this and then he made arrangements for her to broaden her experience by working in these other sections.[3]

[12] It is not in dispute that by late 2016, the plaintiff was no longer enjoying working for the defendant. Mr Valante was noticing a decline in her work performance. The plaintiff gave evidence that she was applying for other jobs. Mr Valante said that by early 2017, the plaintiff's '*care factor*' and her passion for the job had disappeared. He described her work performance as having become *'lacklustre'*.[4] The plaintiff acknowledged that this was due to her frame of mind at the time. There were conversations had between the plaintiff and Mr Valante about her

[1] Photographs (ii) and (iv).
[2] Exhibit 16.
[3] T1-77, ln 1-4.
[4] T4-12, ln 6-10.

work performance. Both witnesses were somewhat vague as to the number, the dates and the specific contents of such discussions.

[13] The incident occurred on 4 April 2017. This is discussed in detail below.

[14] Following the incident, the plaintiff returned to work on 21 April 2017. Within days of returning she had a further discussion with Mr Valante regarding work related issues. She resigned and left her employment with the defendant on 28 April 2018.

Pleadings

[15] The pleaded claim of the plaintiff is that at about 5pm on 4 April 2017 she was performing duties in the restaurant. She was in the process of retrieving a tray from a shelf in the hot Combi oven in the kitchen. It was not the only tray in the oven and she was unable to see the contents of it due to the height of the oven. It contained a parfait and hot water. She reached up with both hands above eye level and as she was removing the tray from the Combi oven, hot water spilled over the sides of it burning her forearms.[5]

[16] The defendant admits that the plaintiff was retrieving a tray with hot water in it at the relevant time and that hot water spilled over the side of the tray burning her forearms. It is further admitted by the defendant that the plaintiff sustained superficial burns to both her forearms with minor residual scarring. It is denied that she suffered nerve damage or irritation to her arms.

[17] It is further denied in the defence that by virtue of the plaintiff's height and the positioning of the tray in the Combi oven, that she was unable to see the contents of the tray as she was retrieving it.[6] It is also denied that the tray contained a parfait. The defendant pleads that it in fact contained crème brûlées.

[18] The defendant further pleads the following:

(i) the plaintiff had been trained in the course of her apprenticeship and also by other chefs at the restaurant to remove each crème brûlée from the hot water bath rather than removing the entire tray;
(ii) the plaintiff had previously used the pastry oven and not the Combi oven to cook crème brûlées;
(iii) as a qualified chef, the plaintiff had been authorised and entrusted by the defendant to organise her work duties.

[19] The defendant admits in paragraph 7(d)(iii)(C) of the defence that the Combi oven was not appropriate for the use of trays with hot water in them.

[20] The plaintiff's case on breach of duty as argued, is that the defendant had not:

(i) provided any instruction in respect to the safe way in which trays of hot water were to be retrieved from the ovens;
(ii) implemented an adequate system which ensured that open trays of hot water were not placed in the Combi oven (which had been installed above eye and shoulder height).

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[5] Statement of claim, para 4; plaintiff's written submissions.
[6] Defence, para 4(c).

[21] In these circumstances, the plaintiff contends that she was exposed to a risk of injury that was foreseeable and not insignificant and that the defendant should have taken precautions against it.

[22] The defendant has defended the liability aspect of the claim on the basis that:
(i) it did not foresee, and it was not reasonably foreseeable that the plaintiff would use the Combi oven and attempt to remove the tray of hot water from it;
(ii) it had provided a safe system of work in that it had trained the plaintiff;
(iii) there was a below bench pastry oven in the pastry station where the plaintiff worked which she could have used;
(iv) alternatively, the risk of the plaintiff sustaining an injury in the manner alleged was insignificant and thereby not requiring the defendant to take additional precautions to prevent its occurrence;
(v) alternatively the plaintiff entirely contributed to her own injuries in that it was an obvious risk pursuant to s 305I of the *Workers Compensation and Rehabilitation Act* 2003 ('the Act'), it was a risk that the plaintiff knew or ought to have known of and was caused solely by her failure to comply with her training and her failure to use the pastry oven.[7]

Plaintiff's credibility

[23] A critical issue in this trial is whether the plaintiff was an honest and reliable witness. It is my view that many aspects of her evidence were selective and were coloured by a desire to support her interests in this litigation. It follows that I do not accept her evidence in all respects. Examples of the plaintiff's evidence that I do not accept (for reasons detailed below), include the following:
(i) that she had placed a tray with a parfait in it, in the Combi oven;
(ii) that she had been told by another chef that there was bread in the Combi oven;
(iii) as to the frequency of her consumption of Lyrica;
(iv) of having reported burn related symptoms to general practitioners, which symptoms are not recorded in the relevant records;
(v) that prior to the incident she had not told work colleagues of her desire to work in the childcare industry rather than as a chef.

[24] Wherever possible, I have sought to resolve conflicts between the plaintiff and other witness accounts, by reference to the exhibits or to the inherent probabilities of the case. Where this has not been possible, it has been necessary to resort to concepts of onus of proof. The plaintiff bears the onus of proof to satisfy the Court on the balance of probabilities that her claim should be accepted. Where appropriate, I have indicated below the extent to which I have accepted or rejected the evidence of particular witnesses.

The incident

[25] On 4 April 2017, the plaintiff commenced her shift at approximately 10am. She performed her usual duties including assisting with preparation, lunch service,

[7] Defence, para 7(e) & (f).

pack down, tidy up and she was assisting in the kitchen preparing for dinner service.

[26] According to the plaintiff, at about 4pm Mr Valante came over and spoke to her just as he was leaving the restaurant. He requested her to prepare a duck liver parfait for a menu tasting for the following day. She had no previous experience in making such a parfait and as a start she had to find a recipe. She described making the parfait into a shape similar to a small loaf of bread. At approximately 5pm, she wrapped it in alfoil and placed it in a small bain-marie. She then placed the small bain-marie with the wrapped parfait into a larger bain-marie ('the parfait tray') and placed it onto a shelf around the middle of the Combi oven. She then filled a jug with water and used a milk crate that was in the kitchen to stand on so that she could pour the water from the jug into the parfait tray to make a water bath. She returned to performing other duties.

[27] Approximately one hour later she went back to the Combi oven. She said that the reason she did this was that dinner service was just starting and a waiter had requested bread, which she had thought was in a tray in the oven ('the bread tray').

[28] The plaintiff could not recall how many trays were in the Combi oven when she went to retrieve the bread tray. There was the following exchange with her counsel in evidence in chief:

> *"All right. And then tell us in your own words what happened when you got to the oven. What did you do? You opened the door?---*
>
> *So when I got to the oven, it was a bit stressful at this time, because we were still setting up and dockets were coming through, and the waiters were, you know, "bread". So I quickly went to the oven to retrieve the bread. I opened the door. I grabbed the tray, thinking that it's going to be light because it's just bread, and I pulled it out like I would normally pull out a tray of bread.*
>
> *Okay. And what happened?---*
>
> *Then the tray was water, and the water tipped down both my arms and onto my chef whites and apron, and causing burns to both my arms. On my left arm, mostly on the upper side of my arm, and then on my right arm, mostly on the bottom half, just because of how I was pulling the tray out.*
>
> *All right. And when you were taking the tray out, were you standing on anything at all?---*
>
> *No, because I just thought it was bread."*[8]

[29] There was this further subsequent exchange:

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[8] T1-23, ln 6-20.

> *"All right. And then – so when you came back to get the – what you understood the bread – did you extract, then, the tray from that level?---*
>
> *Yeah, so the – whoever placed the bread in put it quite close to the bain marie of water, and I got a little bit confused with all the trays, and I thought – I was, like, really sure that that tray was bread - - -*
>
> *Okay?--- - - -*
>
> *that I pulled out.*
>
> *And so you pulled it out and down?---*
>
> *Yes.*
>
> *And then you ended up burning yourself?---*
>
> *Yes."*[9]

[30] I accept the plaintiff's evidence that the incident occurred around 6pm.[10] It is consistent with the time recorded in the Form 15 - Record of First Aid Treatment.[11] This was completed by Mr Dix on the day of the incident. He had assisted the plaintiff immediately after the incident.

[31] The plaintiff further explained in evidence that one of her co-workers had told her that there was bread in the oven. I do not accept this. She could not recall who the co-worker was. She thought that another chef, Jeremy, was working in the larder section. However, the evidence establishes that it was Mr Dix who was working in that section and the bread was his responsibility. He said that he had not put the bread in the oven. It was not suggested to him in cross-examination that he had told the plaintiff that there was bread in the oven.

[32] Having said this, it is entirely plausible that the plaintiff thought there was bread in the Combi oven at the time. There are four reasons for this. First, given I am satisfied that the incident occurred around 6pm, this coincided with the commencement of dinner service when waiters would be requesting bread. Second, the Combi oven would be used from time to time to heat bread for dinner service. Third, the trays used for bread were similar to the crème brûlée tray the plaintiff ended up retrieving from the oven. Fourth, within two days of the incident, the plaintiff told a WorkCover representative, that she had thought there was bread in the oven. This version was repeated by the plaintiff when she attended upon Dr Cockburn for a medical examination in April 2018. It follows that I am satisfied that the plaintiff had been asked by a waiter for some bread and that it was a bread tray she had gone to retrieve from the Combi oven.

[33] The fact that the plaintiff had intended to retrieve the bread tray, explains why she did not request assistance from a taller co-worker even though such assistance

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[9] T1-24, ln 9-19.
[10] T2-67, ln 27-30.
[11] Exhibit 45.

was readily available.[12] This is what the plaintiff said she would usually do when retrieving trays with water in them from this oven.[13] Mr Bairachayra confirmed that some chefs were not sufficiently tall to use the Combi oven and would request assistance from other chefs.

[34] I am satisfied that the plaintiff was one of those chefs that was not sufficiently tall enough to safely use the Combi oven without assistance. Given her height relative to the positioning of the Combi oven, I am satisfied she had to reach up to retrieve the tray that was at or above eye level and that she could not see into the contents of it.

[35] There is a factual dispute as to whether the tray the plaintiff was holding at the time she was burnt contained crème brûlée or the parfait. I am not persuaded by the plaintiff's evidence that it was parfait. The first occasion that the parfait was mentioned was when the plaintiff was medically examined by Dr O'Toole on 31 January 2018, some 10 months after the incident.[14] Mr Valante denied having requested the plaintiff to make a duck parfait. I prefer Mr Valante's evidence on this point. There are a number of reasons for this. The plaintiff had never made a parfait before and another chef, Urs Buagmarter usually made the parfaits. Further, preparing and cooking a parfait was time consuming and was usually undertaken in the morning prior to lunch service. In addition to this, Mr Valante had been dissatisfied with the plaintiff's work performance. It seems implausible that against this background, he would request her to make something that she had never made before, at a time approaching dinner service where she would be pressed for time to make it.

[36] Further, Mr Dix went to assist the plaintiff after the incident occurred. His evidence was that he looked into the tray and it contained crème brûlées.[15] Given my finding above, namely that Mr Valante did not request the plaintiff to make a duck parfait, there was no reason for her to have done so. She was a pastry chef who had never previously made a duck parfait. On the other hand, she routinely made crème brûlées. For all these reasons, I am persuaded that the tray the plaintiff was retrieving at the time the water spilled over and burned her contained crème brûlées ('the crème brûlée tray').

[37] In summary, I have made the following factual findings regarding the incident:

(i) the plaintiff had placed a crème brûlée tray around the middle of the Combi oven prior to the incident;
(ii) around 6pm a waiter asked the plaintiff for bread and she went to retrieve it from the Combi oven thinking that it would be in there;
(iii) the tray that the plaintiff thought had bread in it was on a shelf around the middle of the Combi oven;
(iv) the plaintiff went to retrieve the tray that she thought had bread in it, but mistakenly retrieved the crème brûlée tray in circumstances where she was unable to see the contents of the tray;

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[12] T2-59, ln 26-27; T2-72, ln 17-19.
[13] T1-30, ln 16-24; T2-53, ln 5-14; T2-58, ln 30-32.
[14] Exhibit 26, page 2.
[15] T3-62.

(v) as the plaintiff was lifting the crème brûlée tray from the Combi oven, water spilled over the side of the tray burning her arms.

[38] The plaintiff was wearing a long sleeved chef's jacket at the time. The sleeves of the jacket were rolled up and she had a tea towel over one arm. The water splashed onto both of her forearms below the elbow and just above the elbow on her left arm.

Liability

Duty of care and breach

[39] While this claim is governed by the Act, the common law continues to apply to determine the content of the relevant duty of care. In general terms, it is a 'duty to take reasonable care to avoid exposing the plaintiff to unnecessary risk of injuries'.[16] The duty encompasses the provision of a safe place of work. This includes obligations to take reasonable care to devise, implement and maintain a safe system of work and to train or otherwise instruct employees in how to safely carry out their work. [17]

[40] As von Doussa J said in *Perkovic v McDonnell Industries Pty Ltd:*

> "Each case will turn on its facts. Generally speaking, the greater the degree of danger inherent in the work, the more likely will be the need for instruction and warning. Even the most skilled employees in their familiarity with the work, or because of the speed or the circumstances under which the work is performed, may be prone to take shortcuts, to disregard obvious precautions, or to be unmindful of dangers. The employer's duty to exercise reasonable care for the safety of his employees will often require that skilled employees be reminded periodically about the risks of their work and the need to guard against them." [18]

[41] It is well established that what is a reasonable standard of care for the safety of an employee is 'not a low one'.[19] When determining whether a defendant has exercised reasonable care, the actions and conduct of the defendant have to be assessed prospectively and not in hindsight.[20] The duty of an employer is not fully discharged unless in the provision of safeguards, it has taken into account not only that particular tasks necessarily involve particular risks, but also that conduct short of negligence on the part of the worker, such as inattention or inadvertence are common features of everyday work.[21]

[42] Having identified the content of the duty of care, it is necessary to consider the provisions of the Act. Pursuant to s 305B(1), an employer does not breach a duty

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[16] *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25; *Czatyrko v Edith Cowan University* [2005] HCA 14.
[17] *McLean v Tedman* (1984) 155 CLR 306 at 313; S *J Sanders Pty Ltd v Schmidt* [2012] QCA 358 at [29].
[18] (1887) 45 SASR 455 at 554.
[19] *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 230.
[20] *Vairy v Wyong Shire Council* (2005) 223 CLR 422.
[21] *Smith v The Broken Hill Proprietary Company Limited* (1957) CLR 337 at 342.

to take precautions against a risk of injury to a worker unless the risk was foreseeable, not insignificant and in the circumstances a reasonable person in the position of the employer would have taken the precautions. Section 305B(2) provides that in determining whether a reasonable person would have taken precautions against a risk of injury, the Court is to consider (amongst other relevant things), the probability that the injury would occur if care were not taken, the likely seriousness of the injury and the burden of taking precautions to avoid the risk of injury.

[43] These statutory provisions direct the Courts attention to the identification of the relevant risk of harm. It is not necessary for the precise harm to have been foreseeable, provided the harm is of the same kind or type as that which was reasonably foreseeable.[22] It is also not necessary for the precise sequence of events by which the harm came about to have been foreseeable. It is sufficient if the consequence of the same general character, as that which followed the negligence, was reasonably foreseeable.

[44] In the circumstances of this case, the relevant risk of harm was that the plaintiff may mistake the crème brûlée tray for a bread tray and in retrieving the crème brûlée tray from the Combi oven, sustain a burn injury from hot water spilling over the side of the tray.

[45] In my view, this risk was clearly foreseeable and it was also not insignificant. In arriving at this conclusion, I am mindful that this test is more demanding than the common law test of 'not far-fetched or fanciful'.[23] Mr Valante was well aware of the danger of using the Combi oven to cook crème brûlées. He said as much in cross examination.[24]

[46] In these circumstances, it was incumbent on the defendant to take reasonable measures to meet that risk of injury. In assessing whether a breach of duty has occurred, consideration must be given to s 305C of the Act. This includes the principle that the fact a risk of injury could have been avoided by doing something in a different way, does not itself give rise to or affect liability in relation to the risk.

[47] The measures the plaintiff asserts the defendant ought to have taken were to train her and to have in place a system of work that meant that the Combi oven was not used for open trays with hot water in them.

[48] It was the evidence of Mr Dix that when he commenced employment with the defendant in early 2016, the then head chef, Sam Roberts told him that the Combi oven was not to be used for the preparation of large or hazardous objects, such as water baths or roasting items. The reason he was given for this is that the Combi oven was positioned too high.[25] The plaintiff said she was not a recipient of such training. Indeed, it is not pleaded that she was and there is no evidence that she was. I am satisfied that the plaintiff did not receive any such training or instruction.

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[22] *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 390.
[23] *State of New South Wales v Mikhael* [2012] NSWCA 338 at [79].
[24] T4-27, ln 35-40.
[25] T3-63, ln 8-34.

[49] The defendant contends that it had an appropriate system for cooking crème brûlées, as there was a pastry oven in the pastry section. In my view, if this is the system that had been implemented, it was not adequately monitored or enforced. Mr Dix said that he did not only use the pastry oven when cooking crème brûlées. He would also use the gas ovens.[26] The plaintiff had not used the pastry oven since 2014 to cook crème brûlées. The reason for this is that a previous experience with it had been sub-optimal in that some of the tops of the crème brûlées had split.[27] On this earlier occasion she had also found the pastry oven to be too slow. The plaintiff said that she had not been required to seek permission from anyone to use the Combi oven. She further said that she had never been told not to use it, or that the pastry oven was to be her designated oven.[28]

[50] It is pleaded in paragraph 7(c) of the defence that the plaintiff was a qualified chef and entrusted to organise her work duties. If she was, than she should not have been. This is particularly so in circumstances were she had not been trained and no adequate safe system of work had been maintained and/or enforced.

[51] In conclusion, a reasonable person in the positon of the defendant would have taken steps to train chefs not to use the Combi oven when using a tray with hot water in it and to enforce a system of work which prohibited that practice. These steps were obvious in prospect and would in no way have impeded the performance of the task. They could have been easily undertaken. There could be no suggestion that they involved any conflict with the defendant's other responsibilities. In these circumstances, the defendant breached its duty of care to the plaintiff.

[52] It is pleaded in paragraph 5 of the defence that the plaintiff had been trained to remove each individual crème brûlée from the tray while the tray remained in the oven, rather than removing a tray containing multiple crème brûlées and hot water from an oven. This training is alleged to have been provided to the plaintiff in the course of her apprenticeship and also by Mr Dix and Mr Valante. Even if such training had been provided to the plaintiff, it is irrelevant given that I have found that the plaintiff was intending to retrieve bread and not the crème brûlée tray. Further, I am not satisfied that she was provided with such training. She said she was not.[29] There is simply no evidence that she was. Indeed Mr Dix said that he had not been trained or otherwise instructed to remove crème brûlées from a tray in this way. He went as far to describe it as an *'unsafe practice'*.[30] I tend to agree.

Causation

[53] Having established that the plaintiff was owed a duty of care and that the duty was breached, in order to recover compensation, the plaintiff must also establish that the failure to exercise due care caused the damage complained of. The requirements to establish causation are set out in s 305D of the Act. The practical effect of this provision is to require the court to state expressly the reasons why

[26] T3-57, ln 30-39.
[27] T1-28, ln 27-31.
[28] T31, ln 10-14.
[29] T1-27, ln 39-47; T2-55, ln 13-15.
[30] T3-64, ln 42-47; T 3-65, ln 6-9.

causation has been established in any case. It is to be assessed as a matter of common sense and experience.[31] Pursuant to s 305E of the Act, the onus of proving any fact relevant to the issue of causation is on the plaintiff, applying the balance of probabilities test.

[54] The plaintiff must show that 'but for' one or both of the defendant's abovementioned articulated breaches of duty, her burn injuries would not have occurred.[32] I am satisfied the plaintiff has discharged her onus in relation to this hypothetical inquiry with respect to the provision of training and the enforcement of safe procedures for the performance of the task. The plaintiff was using the Combi oven in circumstances where the defendant considered that it was too dangerous to be used in the way that it was. Training and the maintenance and enforcement of a safe system of work would have prevented or minimised the risk of injury. This is because such measures would have brought to the plaintiff's attention the inadvisability of using the Combi oven to cook crème brûlées. This would have meant that the crème brûlée trays would not have been in the Combi oven, removing any potential for a mistake of the kind made by the plaintiff.

[55] In terms of factual causation, there is no dispute that the hot water from the tray the plaintiff was retrieving caused the burn injuries. The nature and extent of those injuries are in issue and are addressed in detail below.

[56] I find causation to be established and thereby negligence has been proved.

Contributory negligence

[57] The further question is whether the plaintiff should bear some responsibility for the incident and subsequent injuries. The particulars relied on by the defendant in its allegation of contributory negligence are as follows:

(i) removing the crème brûlée tray from the oven rather than the individual crème brûlées while the tray remained in the oven;
(ii) failing to cover the crème brûlée tray when removing it to prevent spillage;
(iii) failing to request Mr Dix to assist her in removing the crème brûlée tray;
(iv) failing to use the pastry oven, or one of the gas ovens in circumstances where the Combi oven was the only one of the four ovens placed at an elevated height;
(v) failing to take account of an obvious risk of injury when removing a tray of hot water from an oven at an elevated height.

[58] In *Bankstown Foundry Pty Ltd v Braistina* Mason, Wilson and Dawson JJ explained the relevant principles to apply at common law:

> "The law is that the damages recoverable by the [worker] by reason of the fault of the [employer] "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage": Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 10(1). A worker will be guilty of

[31] *March v E & MH Stramere Pty Ltd* (1999) 171 CLR 506.
[32] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18].

> contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage: see *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 493– 4; 59 ALR 529 at 532." [33]

[59] These reasons were explained in *Kennedy v Queensland Alumina Limited* by McMeekin J in the following way:

> "As those reasons explain in judging an injured worker's conduct it is important to bring into account that it is the employer who has failed to use reasonable care to provide a safe system of work thereby exposing the plaintiff to an unnecessary risk of injury. There is a heavy obligation on an employer. Mason J explained why in speaking of the non-delegable duty of care owed by an employer to an employee in *Kondis v State Transport Authority*:
>
> > "The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters [with the] consequence … in these relevant respects the employee's safety is in the hands of the employer; … [i]f [the employer] requires his employee to work according to an unsafe system he should bear the consequences.""[34]

[60] Pursuant to s 305F(1) of the Act, the same principles that are applied in determining breach of duty by the defendant are engaged in determining contributory negligence by the plaintiff. These are found in ss 305B and 305C of the Act. The standard of care required of the plaintiff is that of a reasonable person in her positon. It is to be decided on the basis of what the plaintiff knew or ought reasonably to have known without the benefit of hindsight.[35] Section 305H(1) of the Act provides for a number of instances in which a court may make a finding of contributory negligence against a worker. These are not exhaustive.[36]

[61] The particulars of contributory negligence in paragraphs 57(i) to (iii) above are based on the premise that the plaintiff knew that she was retrieving the crème brûlée tray and that she had been trained in how to remove crème brûlées from trays with hot water in them. For the reasons explained above, I do accept either of these assertions. It follows that I am not satisfied the defendant has discharged

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[33] (1986) 160 CLR 301.
[34] [2015] QSC 317.
[35] s 305F(2) of the Act.
[36] s 305H(2) of the Act.

its onus in establishing that the plaintiff was guilty of contributory negligence on these grounds.

[62] Turning to the particular of contributory negligence in paragraph 57(iv) above, the defendant's claim in this regard as pleaded in the defence is inconsistent and somewhat confusing. While it is pleaded at paragraph 9(c) that the plaintiff should have used one of the three other ovens, it is pleaded in paragraph 7 that the only oven the plaintiff should have been using to cook the crème brûlées was the pastry oven. Putting this inconsistency to one side, as explained in paragraphs 48 to 51 above, there was no instruction or system in place as to which oven should have been used. If the defendant had any concerns with the plaintiff using the Combi oven (as she usually did when cooking crème brûlées), then it had an obligation to raise it with the plaintiff and to comply with its legal obligations, including the maintenance and enforcement of a safe system of work. In my view, the fundamental problems were the lack of training and the inadequacy of the system. The plaintiff should not be rendered responsible in part for the damage on this basis.

[63] The final particular of contributory negligence in paragraph 57(v) above, engages s 305H(1)(f) of the Act whereby a court may make a finding of contributory negligence if the worker undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account of the obvious risk.

[64] The defendant contends that the conduct of the plaintiff was an obvious risk for the purposes of s 305I of the Act. This is a risk that, in the circumstances would have been obvious to a reasonable person in the position of the plaintiff. The test is objective and all relevant circumstances must be brought into account.[37] The plaintiff's evidence is relevant to the assessment of what a reasonable person would know about the risk.[38]

[65] In *State of Queensland v Kelly*[39] Fraser J said the following in relation to 'obvious risk' in the *Civil Liability* 2003 (Qld), which is defined in virtually identical terms:

> Obviousness of risk was "merely a descriptive phrase that signifies the degree to which risk of harm may be apparent: *Consolidated Broken Hill Ltd v Edwards*. The relevance of obviousness of risk was that "persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards": *Brodie v Singleton Shire Council; Ghantous v Hawksbury City Council. In Wyong Shire Council v Vairy* Tobias JA (Mason P agreeing) adopted the definition of "obvious" in the commentary to [343A] of the Restatement (Second) of Torts (1965) as meaning "that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the [plaintiff], exercising ordinary perception, intelligence, and judgment …"; in that definition "'condition' refers to the factual scenario facing the

[37] *Council of the City of Greater Taree v Wells* [2010] NSWCA 147 at [75]–[76].
[38] *Glad Retail Cleaning v Alvarenga* [2013] NSWCA 482.
[39] [2014] QCA 27.

> plaintiff …". In *Jaber v Rockdale City Council* Tobias JA referred to *Vairy* and observed that the focus of the enquiry was not upon the putative tortfeasor but upon a reasonable person in the tortfeasor's position and that whether or not a risk was "obvious" may well depend upon the extent to which the probability of its occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff …". [citations omitted]

[66] I accept that retrieving a tray containing hot water from an elevated height in circumstances where the contents of the tray cannot be seen involves an obvious risk of injury. However, in my view, the combination of circumstances that unfolded here militate against a conclusion that the risk was so clear that it would have been 'obvious' to a reasonable person in the plaintiff's position. The crucial findings in arriving at this conclusion are these:

(i) the plaintiff had not received any training prohibiting the use of the Combi oven for crème brûlée trays;
(ii) the defendant had not maintained or penforced a system whereby crème brûlées were cooked in the pastry oven, with the consequence that chefs were using a variety of ovens to cook crème brûlées;
(iii) it was the plaintiff's experience that the Combi oven was the best of the four ovens provided by the defendant to cook crème brûlées;
(iv) for some years prior to the incident the plaintiff had been regularly using the Combi oven to cook crème brûlées and had done so without incident;
(v) the Combi oven had been used to cook other food items containing hot water and other hot liquids.

[67] The cumulative effect of these factors exposed the plaintiff to the risk of injury, in the absence of unremitting care on her part. On this particular occasion, it was compounded in that the plaintiff mistakenly thought she was retrieving a bread tray when it was in fact the crème brûlée tray. This was understandable given that the kitchen had become busy. As the plaintiff explained, she was feeling under pressure because preparation for dinner service was not complete, orders were starting to come through from the restaurant and waiters were asking for bread.[40] In my view, against this background the plaintiff's actions did not go beyond misjudgement. The real problem lay in the fact that there was nothing in the defendant's processes to cater for the mistake she made.

[68] I conclude that the defendant has not established that the plaintiff was guilty of contributory negligence.

Quantum

[69] The plaintiff was born on 18 March 1996. She was 21 years of age at the time of the incident. She is now 23 years of age.

[70] The treating general practitioner of the plaintiff was and continues to be Dr Himali Athuraliya. She treated the plaintiff from prior to the subject incident until July 2018 at the Lowood Medical Centre ('the Lowood MC'). She has treated her at the Stellar Medical Centre (the Stellar MC') subsequent to this time.

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[40] T1-23, ln 6-20.

[71] In the hours after the subject incident, the plaintiff attended the Lowood MC. She was seen on this occasion by Dr Paul Crowley. She attended upon him shortly after 8.15pm. The record of the consultation indicates that both of her arms were red, with the redness on her left arm being more pronounced when compared to her right arm. Some blisters had started to form on her left arm. A burn ointment was applied and dressings were placed over the burns.

[72] The dressing that had been applied to the plaintiff's arms were irritating her. For this reason she returned to the Lowood MC the following day and was seen by Dr Athuraliya. There was redness to her arms above and below her elbows. There was a fifty cent size blister on her posterior upper left arm. The dressings were removed and reapplied to her left arm. The plan was for the plaintiff to be reviewed the following week.

[73] The plaintiff returned to be medically reviewed in accordance with this plan. She attended upon Dr Crowley on 9 April 2017. The redness to her upper limbs was still present. The wounds were inspected, treated and redressed. She re-attended the following day and was seen by Dr Athuraliya. There was pus present around the plaintiff's left elbow. She was also experiencing some numbness around the wounds and they were peeling. The plaintiff was diagnosed with an infection. The wounds were redressed again and set for review in a week.

[74] When the plaintiff was reviewed by Dr Athuraliya on 18 April 2017 the infection had settled. However her left elbow was still red and she was experiencing tingling and numbness which Dr Athuraliya thought could be explained by nerve irritation. It was recommended that the plaintiff attempt to return to work for half days in the following weeks.

[75] The plaintiff next attended upon a medical practitioner on 1 July 2017 for ongoing treatment of her symptoms. The consultation was with Dr Crowley at the Lowood MC. The plaintiff reported that she was working in the childcare industry and studying a diploma of childhood education. She complained of left arm pains after driving and typing. Dr Crowley referred the plaintiff for an ultrasound of her left elbow, the results of which showed no abnormality.

[76] The next consultation for ongoing burn related symptoms was on 29 October 2017 when the plaintiff attended upon Dr Athuraliya at the Lowood MC. The entry records that the plaintiff's pain in her right arm was now in her right wrist and hand. An ultrasound of her right wrist and hand was undertaken with no abnormality detected. These symptoms continued and on 3 December 2017, Dr Crowley referred the plaintiff to Dr John Corbett, neurologist for nerve conduction studies. These too revealed no abnormality.

[77] The plaintiff re-attended upon Dr Crowley on 21 December 2017 complaining of ongoing pain in her hands and forearms. The records for the entry indicate that Dr Crowley thought it was difficult to understand how the burn injuries could account for the ongoing symptoms.

[78] Since September 2018 the plaintiff has attended the Stellar MC. Dr Athuraliya has remained her treating doctor and she attended upon Dr Athuraliya on 20 September 2018. The relevant entry suggests that the plaintiff reported that her

arm pains had been worse since the previous week and she had been experiencing problems driving.

[79] The next attendance in the Stellar MC records for burn related symptoms is 6 January 2019. On this day the plaintiff again attended upon Dr Athuraliya. The entry records that the plaintiff's pains in her arm were 'bad again'. By the time of this consultation she had stopped taking her Lyrica medication which she had commenced taking in February 2018. Dr Athuraliya recommenced her on a low dose of it.[41]

[80] The plaintiff most recently attended upon a medical practitioner in relation to her burn related symptoms on 23 June 2019. The record indicates that the plaintiff complained to Dr Athuraliya that her arms had been 'hurting a lot lately with cold weather' and that she had run out of Lyrica two weeks earlier. Dr Athuraliya provided a further prescription of Lyrica.[42]

General damages

[81] The plaintiff claims that as a consequence of the incident she has suffered burns, including second degree burns to both arms resulting in disfigurement and also nerve damage or irritation to her arms. She has been examined by a number of medical experts with respect to these injuries including neurosurgeons, a hand surgeon, a plastic and reconstructive surgeon, as well as by a pain management physician and an occupational physician.

[82] As to the disfigurement on the plaintiff's arms, the consensus from the medical experts is that it is mild only. WorkCover arranged for the plaintiff to be assessed by Dr Robin O'Toole on 31 January 2018. Dr O'Toole described observing scarring along both forearms that was barely discernible from the surrounding skin.

[83] The plaintiff's solicitors arranged for her to be examined by Dr William Cockburn, a plastic surgeon on 18 April 2018. Dr Cockburn provided a report on the same date. She told him that the scarring bothered her and that she covered it up by folding her arms or wearing long sleeved clothing. On examination, Dr Cockburn considered that there was an area of hyperpigmentation affecting most of the circumference of both arms. He described it as being '*mild and not very vivid to the naked eye*'. He assessed a four percent whole person impairment. He thought that the scarring would continue to improve with time. He opined that her affected tissues would be susceptible to thermal injuries and that she may need to apply more protection and moisturisers in the future.

[84] Dr Scott Campbell, neurosurgeon examined the plaintiff at the request of her solicitors on 16 May 2018 and he has provided a report dated the same. Dr Campbell noted that the scarring had mostly faded over the months and that it was likely to continue to fade with time.

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[41] Exhibit 5, page 192.
[42] Exhibit 5, page 190.

[85] The plaintiff was examined by neurologist Dr Noes Saines, at the request of the solicitors for WorkCover on 26 June 2018. Dr Saines observed minor depigmentation of the skin, which he considered should improve with time.

[86] At the request of the plaintiff's solicitors, Dr Marc Walden, pain management specialist, examined the plaintiff on 25 October 2018 and he has provided a report dated 2 November 2018. His report describes little noticeable scarring and minimal discolouration to the skin of the plaintiff's right elbow and to the skin of the lateral aspect of her left forearm.[43] Despite this description of the disfigurement, Dr Walden assessed an eight percent whole person impairment. I do not accept this.

[87] WorkCover arranged for the plaintiff to be assessed by Dr Couzens, upper limb surgeon on 8 November 2018. He has provided a report dated 13 November 2018. He observed minimal alteration and pigmentation of the plaintiff's skin.

[88] In all the circumstances, I consider a two percent whole person impairment properly reflects the likely ongoing permanent impairment consequential upon the disfigurement. While Dr Cockburn's report records the plaintiff having told him that she scarring bothered her and that she took steps to cover it, she did not report this to any other medical expert and she did not give evidence of this. The totality of the medical evidence is that the disfigurement to the plaintiff's forearms is barely visible and that it will continue to improve even further with time.

[89] Turning to the plaintiff's claim for nerve damage or irritation to her arms, the plaintiff told Dr O'Toole in January 2018 that she had intermittent pain in her wrists radiating up her forearm. She said it was aggravated by forceful gripping, repeated movements and lifting. On examination there was a mild loss of sensation over the dorsal-radial aspect of her forearm. Dr O'Toole assessed a two percent whole person impairment.

[90] The plaintiff told Dr William Cockburn in April 2018 that she experienced pain in her arms, particularly to changes of temperature.

[91] Approximately one month later, the plaintiff complained to Dr Campbell of pain and altered sensation of both arms. She said this pain was aggravated by general use of her upper limbs when performing domestic tasks. She also told Dr Campbell that computer work and keyboarding exacerbated her pain. She said that her symptoms were aggravated with preparing food, lifting trays and supervising children resulting in decreased efficiency at work.

[92] Dr Campbell's examination of the plaintiff revealed no tenderness, weakness, swelling or joint dysfunction. He considered there was altered sensation over the medial left elbow region in a non-dermatomal distribution. He diagnosed second degree burns to both upper limbs resulting in local nerve damage. He considered the prognosis was for persisting symptoms in the future. In his report Dr Campbell assessed a four percent whole person impairment divided equally between her upper limbs. However, in cross examination he conceded that it

[43] Exhibit 18, page 3 & 9.

should have been a two percent impairment for persisting pain and numbness of her left arm and a zero impairment of her right arm.[44]

[93] The plaintiff told Dr Saines in mid-2018 that she experienced pain in her upper limbs which extended from her dorsal forearm to the elbow joint on her left forearm. The pain was in the nature of an ache and was increased with repeated use, driving, hanging out clothes and in cold weather. On examination, there was a subjective difference to light touch over the dorsal aspect of the plaintiff's left forearm extending to her hand and also to her right elbow.

[94] Dr Saines considered that while most superficial burns of the type sustained by the plaintiff usually heal, there is a small cohort of patients who suffer nerve damage resulting in altered sensation, hypersensitivity and pain. He did not consider the plaintiff fell into this cohort. The main reason for this is that patients with such neural injuries tend to have a sharp, stabbing or burning pain. The plaintiff did not use such descriptors. Rather, her complaint was one of discomfort. Dr Saines considered there was no permanent impairment.

[95] When the plaintiff was examined by Dr Walden in October 2018 she reported pain in the mid-part of her upper arms distally down her forearm. The pain was described as a hypersensitivity of the skin with the feeling of pins and needles and areas of reduced sensation and numbness. It was more prominent on the right side. Dr Walden considered the plaintiff had cutaneous hypersensitivity to the front and back portions of her forearm and to the base of her right thumb. In relation to the plaintiff's left arm, Dr Walden's examination revealed cutaneous hypersensitivity in a narrow band of skin over the lateral aspect of her forearm.

[96] Dr Walden considered the pain to be neuropathic in nature. There were two principal reasons for this. The first was that the descriptors the plaintiff used to describe her altered sensation were typical of neuropathic pain. I am not persuaded by this. She has described it in various ways to the different doctors. Further, Dr Walden considered the sensory impairment described by the plaintiff to be in relation to specific dermatomes, namely C6 and T1. However, he conceded in cross-examination that it would be his expectation that sensory impairment consequential upon burns of the type sustained by the plaintiff, would be non-dermatomal rather than in relation to specific dermatomes.[45]

[97] The second reason why Dr Walden considered the plaintiff's pain to be neuropathic is because she reported that her symptoms improved when she was taking Lyrica. I am not persuaded by Dr Walden's reasoning in this regard. There are well known placebo effects of medications. Further, for the reasons detailed below I am not satisfied the plaintiff gave reliable evidence regarding the frequency of her consumption of Lyrica. In addition, I accept Dr Campbell's evidence that Lyrica is used as a mainstream medication for pain other than neural pain. He explained that he would not diagnose a nerve injury because a patient had previously been prescribed Lyrica by a general practitioner and the patient had reported receiving a benefit from it.[46]

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[44] T1-87, ln 9-23.
[45] T2-34, ln 30-32.
[46] T1-87, ln 39-42.

[98] Dr Walden opined at page 13 of his report that the plaintiff was somewhat affected in her ability to dress herself. I do not accept this because it is inconsistent with the contents of a table at page 6 of his report, which records no such difficulties.

[99] There is another inconsistency in Dr Walden's report as to his assessment of whole person impairment. It is stated to be 16 percent at paragraph 1.6 of his report and 14 percent at Appendix 3 of his report. Dr Walden explained in evidence that the correct figure is 14 percent.

[100] Of the 14 percent, Dr Walden attributed eight percent to the disfigurement with respect to the plaintiff's arms, which I have discussed above. Of the remaining six percent, four percent and two percent were assessed as the sensory impairment in relation to the plaintiff's right and left upper limbs respectively. These are based on the *American Medical Associations Guide to the Evaluation of Permanent Impairment 5th Edition* ('the AMA Guide'). The relevant excerpts of this are exhibit 20. Dr Walden used Table 16-10 of the AMA Guide for the purpose of this assessment. This table provides a classification for determining impairment of the upper extremity due to a sensory deficit or pain resulting from a nerve disorder. The left hand side of the table includes grades of between 0 and 5 in relation to sensory deficit or pain, with 5 being the least severe and 0 being the most severe. In his report, Dr Walden stated in this report that the plaintiff's sensory deficit is classified as grade 2 in relation to both upper arms. However, he conceded in cross-examination that this was an error and that he should have classified it as grade 3.

[101] The AMA Guide provides that Table 16-10 is to be used for pain that is due to a nerve injury that has been documented with objective physical findings or electro-diagnostic abnormalities. Dr Walden conceded in cross-examination that there were no objective physical findings or electro-diagnostic abnormalities to support the plaintiff's complaints of neural related pain and other symptoms.[47] Therefore, the plaintiff does not meet the criteria with respect to Table 16-10 of the AMA Guide.

[102] Dr Walden considered the plaintiff's prognosis to be good. He thought that her nervous system was continuing to recover from the burn injuries. He opined that with further time and treatment, the hypersensitivity she was experiencing would dissipate.

[103] In November 2018, the plaintiff told Dr Couzens that she had discomfort over the ulnar part of her hands, which was worse at night time. She said that she experienced cold sensitivity particularly when she was adding cold milk to scones. She also reported variable pins and needles which would occur when she was washing dishes at work. She said the pins and needles would sometimes extend into her hands.

[104] In cross examination, Dr Couzens accepted that there can be deep secondary burns bordering on small third degree burns that can cause hypersensitivity and pain. Having said this, he was unable to account for all of the plaintiff's ongoing

[47] T27, ln 34-45.

complaints of pain and paraesthesia. For example, he explained that he was unaware that healed second degree burns would be associated with any degree of persistent hypersensitivity which would cause paraesthesia.

[105] As to the plaintiff's prognosis with respect to the resolution of her reported symptoms, Dr Couzens expected it to be excellent. He assessed a two percent whole person impairment by reference to Class 1 of Table 8-2 of the AMA Guide. This table provides the impairment criteria for all skin disorders. It estimates the extent of impairment on whole person functioning in the context of activities of daily living. The range for Class 1 impairments is 0 to 9%.

[106] Dr Saines was provided with the reports of Drs Walden and Couzens and has provided a supplementary report dated 1 March 2019. Dr Saines explained that while he accepted that peripheral nerve endings and other tissues can be involved from partial thickness burns of the skin, these usually recovered with superficial injuries, similar to those sustained by the plaintiff. Dr Saines concurred with Dr Couzens' whole person impairment of two percent.

[107] All medical experts, apart from Dr Walden, concur that the plaintiff's ongoing symptoms, which are predominantly of intermittent pain in her arms and hands particularly when they are exposed to extreme temperatures, equate to a two percent whole person impairment. I am not persuaded by Dr Walden's diagnosis and/or impairment assessment for the reasons set out above. Ultimately I am satisfied that the plaintiff experiences few limitations in performance of activities of daily living on account of her intermittent ongoing symptoms. The preponderance of the medical evidence is that her symptoms are likely to improve with time.

[108] The plaintiff claims $8,910 for general damages. This equates to an ISV of 6 in accordance with Item 102 of the *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld) ('the Regulation'). This item is for injuries that will cause moderate long-term disability but do not require protracted surgery. It provides that an ISV at or near the bottom of the range of 6 will be appropriate if there is DPI for the injury of five percent. Examples of such an injury are nerve palsies from which a worker has made a good recovery, a fracture that has required open reduction and internal fixation, from which the worker has made a reasonable recovery.

[109] In my view, no more than a four percent whole person impairment properly reflects the likely ongoing permanent impairment consequential upon both the disfigurement and the intermittent pain.

[110] As explained above, I have come to the conclusion that the plaintiff's injuries are continuing to have only a relatively minor impact on her. In recent times she has seldom attended upon medical practitioners for management of her symptoms. She has also been able to continue working 75 hours per fortnight and has effectively required no time off work on account of her symptoms. While the plaintiff's mother, Karen McLaughlin gave evidence as to the difficulties the plaintiff was having performing chores around the house, the plaintiff told Dr Walden in September 2018 that she was able to perform all home chores and laundry. Further, such difficulties are somewhat inconsistent with the plaintiff

having performed multiple cleaning tasks at the Childcare Centre when working in the kitchen, which cleaning tasks I am satisfied she was able to perform with minimal problems. The plaintiff's husband gave evidence of the plaintiff having difficulty driving. However, she reported to Dr Walden that she was having no such difficulties.[48] He also gave evidence of her having difficulties holding an IPad. The plaintiff gave no such evidence.

[111] In my view, Item 103, minor elbow injury (ISV 0-5) and Item 154.4, minor scarring to the body other than the face (ISV 0-3) are applicable. The dominant injury is the minor elbow injury. Taking into account the plaintiff's youth and the abovementioned matters, I consider an ISV of 4 is appropriate to reflect the adverse impact of the minor disfigurement and the intermittent pain. Schedule 12 of the Regulation produces a figure of $5,560.

[112] Pursuant to s 306N(1) of the Act, a court cannot award interest on general damages.

Special damages

[113] The parties agree that the plaintiff's past out of pocket expenses are $860.16. The refund to Medicare is $835.70.[49] WorkCover expenses amount to $2,056.79.[50]

Interest on out of pocket expenses

[114] It is not in dispute that the plaintiff is entitled to interest on $860.16. Interest on this sum at the agreed rate of two percent for a period of 2.92 years is $50.

Past economic loss

[115] The premise of the plaintiff's claim for economic loss is that but for the incident she would have pursued a career as a pastry chef. It was her evidence that her grandmother was a chef and that she had always enjoyed working with food. She said that prior to the incident she had not thought about changing careers.[51] She said it had been her intention to return to TAFE and complete a Certificate IV as a pastry chef. This further study would have taken three to four years to complete.

[116] It is agreed by the parties that if the Court is satisfied that the plaintiff would have continued working as a chef, the figure for past economic loss is $3,650.54. This is inclusive of WorkCover payments in the sum of $863. This reflects the difference between the amount the plaintiff would have continued earning as a chef if she had not been injured and the amount she has in fact earned since the incident.

[117] I am of the view that the plaintiff is unlikely to have continued working for the defendant irrespective of the injuries. I am also not persuaded that she would have undertaken further study and otherwise further progressed her career as a pastry chef.

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[48] Exhibit 18, page 6.
[49] Exhibit 7.
[50] Exhibit 8.
[51] T2-97, ln 4-8.

[118] It is the plaintiff's evidence that after she returned to work on light duties on 21 April 2017, Mr Valante was unhappy that she was unable to work for a full shift. She said he would refuse her requests to leave early. There is no dispute that they had a conversation within days of her returning to work. According to the plaintiff, Mr Valante gave her the choice of resigning her employment or having it terminated. She opted to resign so that she would be paid her holiday leave.[52]

[119] Mr Valante categorically denied having given the plaintiff any such ultimatum. To the extent to which this inconsistency in the evidence between the plaintiff and Mr Valante needs to be resolved, I prefer the evidence of Mr Valante. Having said this, I accept that at the time the plaintiff was experiencing ongoing symptoms on account of her burn injuries. These injuries were making it challenging for her to work as a chef, and consequently she left her employment with the defendant.

[120] The approach to the assessment of economic loss is to compensate the plaintiff for loss of earning capacity. The plaintiff must not only establish a diminution of earning capacity, but also that the diminution is or may be productive of economic loss.[53]

[121] The plaintiff had completed a Certificate III in Children's Services in her final year at school which enabled her to work in the childcare industry. She commenced employment with LEAD Childcare at Tingalpa ('the Childcare Centre') on 9 May 2017. She remains in this employment.

[122] By late 2016 or early 2017 the plaintiff was sufficiently unhappy in the workplace that she was making plans for alternative employment. Support for this can be found in the contents of the resignation letter which is exhibit 13. In that letter it is stated that she would be leaving her employment at the restaurant on 13 November 2016 to pursue new challenges. While it appears that the plaintiff did not end up terminating her employment with the defendant at this time, it shows that she was contemplating alternative employment. There is also the entry in the Lowood MC records from 7 March 2017.[54] Further, Mr Valante's evidence was that by this time he was unhappy with the quality of the plaintiff's work and that he had spoken to her on more than one occasion about this. In addition, the plaintiff gave evidence that around this time she had taken steps to apply for jobs at the Sofitel and Le Bon Choix.

[123] There is a factual dispute as to whether there had been discussions between the plaintiff and other chefs prior to the incident regarding her desire to leave the hospitality industry and pursue employment opportunities in the childcare industry. The chefs who gave evidence of having had such discussions with the plaintiff about this were Mr Valante, Mr Dix and Mr Bairachayra. The plaintiff denied partaking in any such discussions with any of these chefs.

[124] Mr Dix was adamant that on multiple occasions the plaintiff had discussed with him her desire to leave the restaurant industry.[55] Mr Bairachayra said in evidence

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[52] T1-31, ln 18-34.
[53] *Qantas Airways Limited v Fisher* [2014] QCA 329.
[54] Exhibit 3, page 59.
[55] T3-38, ln 12-28.

that he could recall the plaintiff telling him on a couple of occasions that she wanted to work in childcare. He could not recall further specifics of the conversation.[56] It was Mr Valante's evidence that the plaintiff repeatedly expressed to him and to others in his presence, her desire to have a career change.[57]

[125] There are no exhibits that assist in resolving this factual dispute. In these circumstances, I have sought to resolve conflicts in these witness accounts by reference to the inherent probabilities of the case.

[126] Mr Valante was cross examined to the effect that he had fabricated his evidence regarding his conversations with the plaintiff regarding her future employment intentions. The motivation for this was said to be an attempt to *'cover up'* his behaviour surrounding the termination of the plaintiff's employment in May 2017.[58] There are two points about this. First, as explained above, I am not persuaded by the plaintiff's evidence about the circumstances in which her employment with the defendant came to an end. Second, even if I was, it would be difficult to believe that Mr Valante would then attempt to cover it up by giving deliberately false evidence to the court.

[127] It was also suggested to Mr Dix in cross-examination that he had '*made up'* his evidence about his discussions with the plaintiff on this issue.[59] I do not accept this. There is no readily apparent motivation for him to have done this and I can think of no other reason why Mr Dix would deliberately give false evidence to the court.

[128] Further, Mr Valante, Mr Dix and Mr Bairachayra gave broadly consistent evidence regarding their respective discussions with the plaintiff about these matters.[60] I am in no way persuaded that they colluded together to concoct their evidence. Mr Bairachayra is the only one of them who continues to work for the defendant. I did not get the impression that he would let this fact interfere with his duty to the Court. He was not cross-examined to the effect that it had. Mr Bairachayra was asked in cross-examination as to whether he had ever told Mr Valante about his abovementioned discussions with the plaintiff. He said that he had not and I accept his evidence.[61] It was also suggested to him that he may have been mistaken as to his recollection of his discussions with the plaintiff regarding her work intentions on account of the passage of time since. He conceded that he could not recall the specifics of the discussions. However, he was confident she had told him of her intentions about this on more than one occasion.[62]

[129] Mr Dix was cross-examined to the effect that he was friends with Mr Valante and discussed with him their respective conversations they had with the plaintiff

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[56] T3-124, ln 32-44; T3-135, ln 4-6.
[57] T4-33, ln 4-25.
[58] T4-37, ln 12-14.
[59] T3-88, ln 23-31; T3-89, ln 29-40.
[60] T3-84, ln 42-44; T3-124, ln 42-44.
[61] T3-134, ln 34-43.
[62] T3-134, ln 18-46 to T3-135, ln 1-6.

about her future employment aspirations. He denied this and I accept his evidence. Mr Valante was not cross-examined about this.

[130] The plaintiff attaches significance to the fact that Mr Valante and Mr Dix had provided statements which made no reference to these conversations. However, the contents of those statements are of course dependent on the questions asked of these witnesses by the lawyer and investigator taking those statements and their understandings of what information was relevant to give. I accept Mr Dix's evidence that he was not asked about this issue and that he thought his statement was meant to address his knowledge regarding the circumstances surrounding the incident.[63] The lawyer and investigator who took their respective versions may well not have appreciated the significance of these details now relied on by the plaintiff and so have had them address what has proved to be some important matters from the plaintiff's perspective. In my view nothing turns on this.

[131] In oral submissions, counsel for the plaintiff pointed to an inconsistency between the contents of Mr Dix's statement dated 19 September 2018 and his evidence. In his evidence he referred to having offered to help the plaintiff, which offer she declined. There was no mention of this in his earlier statement. I do not consider this to be significant.

[132] In short I find that prior to the incident, the plaintiff had repeatedly expressed to these other chefs her intention to leave the hospitality industry and to work in childcare and that it was her intention to do so.

[133] Since May 2017 the plaintiff has remained working for the Childcare Centre on a permanent part-time basis. Katrina Bira was the manager and Krissy Buckman was the assistant manager of the Childcare Centre when the plaintiff commenced working there. They interviewed the plaintiff for her job. There is a factual dispute as to whether the plaintiff told them during the interview that she was wanting to leave the restaurant industry and move into the childcare industry. Ms Buckman, who is a very good friend of the plaintiff, could not recall such a discussion. Ms Bira said the plaintiff did tell them this. The plaintiff denied this. To the extent the factual issue needs to be resolved, I prefer the evidence of Ms Bira. This is in circumstances where it is consistent with the discussions the plaintiff had been having with the defendant's chefs, as detailed above. However, given that this conversation occurred subsequent to the incident and in the context of a job interview, I have not relied on it in determining what the plaintiff's future employment intentions were.

[134] The Childcare Centre is busy. It can take up to 75 children and has been at or near capacity since the plaintiff commenced working there. Meals are provided onsite for all the children. The nature of the plaintiff's work there has changed over time. She initially worked in the dual capacity of a cook and an assistant educator, with the majority of the day spent in the kitchen. Her work cooking and otherwise preparing meals for 75 children was demanding. The kitchen had a freezer, fridge and oven. She was required to unpack the food delivery from Coles each Monday and place some of it in the freezer and fridge. She was also required to prepare, cook and serve morning tea, lunch, afternoon tea and a late

[63] T3-88, ln 17-21-47 to T3-89, 1n 1-16-40.

snack. It included cutting up fruit; making and baking cakes, slices, scones, bread and muffins; making the pastry and fillings for pies; making dips, cutting meat and vegetables and making sandwiches. In carrying out these duties she was required to intermittently remove and return food items from the fridge and freezer. The other component of the plaintiff's work duties in the kitchen was to clean it regularly. This included cleaning the fronts of cupboards, benches and the floor. She was also required to regularly clean the fridge and freezer.

[135] In late 2018 the plaintiff ceased being the cook and moved into the position of an assistant educator for the children at the Childcare Centre. She is currently working in the Junior Kindy room caring for children of ages two and three. There are three other educators working in the room with the plaintiff. As part of her duties she is required to assist the children in packing up toys and activities. She said that her co-workers *'understand my situation, and they help me quite a lot'*.[64] While this assistance may be provided to the plaintiff, I have no doubt it is a relatively physically demanding job working with numerous children of such a young age.

[136] The plaintiff has given evidence of her burn injuries having had a relatively significant impact on her abilities to perform her duties at the Childcare Centre. I accept that the plaintiff experienced some burn related symptoms when performing some of her duties in the kitchen at the Childcare Centre. Support for this can be found in the evidence of Ms Buckman. However, I am not persuaded that the burn injuries have or are continuing to adversely impact upon her work at the Childcare Centre to the extent that she has sought to have the Court believe. There are a number of reasons for this.

[137] First, Ms Bira as the plaintiff's direct manager, had regular contact with the plaintiff. She would check on the plaintiff on a daily basis. I accept her evidence that she did not observe the plaintiff experience any difficulties when performing her job and the plaintiff did not complain about an inability to perform any of her duties. I also accept that the first time Ms Bira became aware of the incident and associated burn injuries was in approximately August 2018 when she was informed by Michelle Tuffley that the plaintiff had made this claim. The Tingalpa Childcare Centre was one of 13 centres operated by LEAD Childcare and Ms Tuffley was the chief operating officer for the entire business. Ms Tuffley explained in her evidence that it was around August 2018 that she first received a letter from the plaintiff's lawyers informing her of this claim and requesting information regarding the plaintiff's employment since the incident.[65]

[138] Second, the records from the Lowood MC and Stellar MC reveal that since the plaintiff commenced working at the Childcare Centre, she has been certified unfit for work on 15 occasions for a period of 27 days in total. Only one of the days was potentially for symptoms associated with the burn injuries. This is on 25 January 2018. This medical certificate was provided by Dr Athuraliya at a consultation on 30 January 2018. It is not clear the condition for which this medical certificate was provided. It is noted that at that same consultation, the plaintiff was provided with a further medical certificate to attend a medical

[64] T1-54, ln 40-42.
[65] T3-97, ln 21-29.

appointment on 31 January 2018. This coincides with her appointment with Dr O'Toole which had been arranged by WorkCover to assess the plaintiff's degree of permanent impairment. The remaining 25 or so days when the plaintiff was certified unfit for work were for conditions such as the flu, tonsillitis and a urinary tract infection.

[139] Third, the Lowood and Stellar MC records indicate that the plaintiff attended upon a general practitioner on two occasions only in 2019 for symptoms related to her arms. These were on 6 January and 23 June 2019. It was the plaintiff's evidence that she would mention her arm symptoms on each occasion that she attended upon a general practitioner.[66] I do not accept this. It is highly improbable that such symptoms would be reported and not recorded in the medical records.

[140] Fourth, the plaintiff would have the Court believe that she has taken Lyrica effectively twice daily since she was first prescribed it in February 2018. When cross-examined about this she said that she might not have taken it on a couple of days.[67] She said that a box of 56 tablets would last her approximately a month and would cost $10. In re-examination, she said that after she had been prescribed a higher dose and realised that it was making her feel sick, that she took only one rather than two tablets a day for a short time.

[141] The plaintiff's evidence that she has taken Lyrica this frequently and consistently is not supported by a number of pieces of evidence. Between February and 8 November 2018, she was dispensed Lyrica on three occasions by the Chemist Warehouse at Windsor. Between 1 January and 8 November 2018 she was dispensed Lyrica on one occasion only by the Chemist Warehouse at Tingalpa. The agreed schedule of pharmaceuticals includes Lyrica being dispensed on an additional occasion, being 8 November 2019. The PBS is a summary of prescription medications dispensed to the plaintiff up to November 2018. It includes one additional occasion, being 21 June 2018. The combination of these records show the plaintiff has been dispensed a total of six boxes of 56 tablets of Lyrica since February 2018.

[142] According to the plaintiff, there were a couple of additional occasions when she provided a prescription for Lyrica in a pharmacy at the same time as providing a prescription for another medication that had been prescribed for her mother.[68] She said that after the Lyrica had been dispensed she realised that it had her mother's Medicare number on the label rather than her own.[69] This seems implausible to me.

[143] The parties agree that the plaintiff earned a net weekly income of $804 in the 45 weeks in the 2017 financial year up until the date of the accident. She returned to work on 21 April 2017 and left her employment with the defendant on 28 April 2017. She then commenced working at the Childcare Centre on 9 May 2017.

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[66] T1-49, ln 39-44 to T1-50, ln 1-3.
[67] T2-83, ln 10-11.
[68] T2-85, ln 29-33.
[69] T2-93, ln 44-47.

[144] Given my findings above, I have allowed a net weekly loss of $804 over the nearly four week period between 4 and 20 April 2017 and between 29 April and 9 May 2017. This results in a figure of approximately $3,200.

Interest on past economic loss

[145] The plaintiff has received approximately $607 from WorkCover by way of net weekly compensation. Therefore, interest should be awarded on the shortfall of past economic loss of $2,593 from 20 April 2017, being the date her WorkCover compensation benefits ceased. This a period of 2.83 years at a rate of 1.8%. The resulting figure is approximately $132.

Fox v Wood

[146] The *Fox v Wood* component is agreed at $256.

Past loss of superannuation

[147] The parties agree that the appropriate rate is 9.25%. The allowance for loss of past superannuation is $296.

Future economic loss

[148] The plaintiff's claim for future economic loss is for approximately $207,000. It is claimed on a global basis, or alternatively calculated on an ongoing net weekly loss of $228 until age 67 discounted by 5% for contingencies. Once again it is premised on the assumption that but for the plaintiff's injuries she would have continued working as a chef.

[149] For the reasons explained above, I do not accept the plaintiff genuinely was intending to continue pursuing a career as a chef. I also do not accept her evidence that she harboured a desire to return to TAFE and complete a Certificate IV in order to advance her career as a pastry chef.

[150] While I do not consider the disfigurement to the plaintiff's arms will be productive of future loss of income, the same cannot be said with total confidence in relation to her residual symptoms of intermittent pain, particularly when her hands and arms are exposed to changes in temperature. The plaintiff gave an example of this occurring when she was working in the kitchen at the Childcare and was kneading the flour and cold butter to make scones.

[151] Overall I am persuaded that the plaintiff's earning capacity has been diminished by reason of the ongoing intermittent pain and that such diminution may be productive of economic loss. While I am satisfied that the plaintiff's intentions were to leave the restaurant industry and work in the childcare industry, she is still young. I do not consider that she would be precluded from working as a chef should she choose to return to this type of work in the future. However, the reality is that she may well be less efficient in such a job on account of her injuries, which may place her at some disadvantage on the open labour market. Having regard to the nature of her residual symptoms, her youth, her work history as a chef and the fact that she has sustained a permanent impairment, albeit small,

I assess the future economic loss at $25,000, on a global basis, inclusive of superannuation.

Future out of pocket expenses

[152] The plaintiff's claims for future expenses is limited to the cost of pharmaceuticals. A total of nearly $7,000 is claimed. This figure is arrived at by allowing $28 per month until age 70.

[153] This claim is undoubtedly excessive. Her total claim for pharmaceuticals since the incident is only $142.20.[70]

[154] Dr Walden considered the plaintiff would benefit from an increase in her dose of Lyrica. I am not persuaded by this evidence. There are two reasons for this. The plaintiff has attempted this on a previous occasion and she reported that she could not tolerate the side effects associated with such an increase. Further, for the reasons set out above, I do not accept Dr Walden's opinion that proof of the effectiveness of the plaintiff taking Lyrica can be found in her evidence of the assistance it gives her.

[155] I accept that the plaintiff may require ongoing pain relief medication on an intermittent basis moving forward. I allow $1,000 on a global basis.

Summary of damages award

Head of damage	**Award**
General damages	$ 5,560.00
Past economic loss	3,200.00
Interest on past economic loss	132.00
Fox v Wood	256.00
Past loss of superannuation	296.00
Future economic loss inclusive of superannuation	25,000.00
Special damages	3,752.65
Interest on out of pocket expenses	50.00
Future out of pocket expenses.	1,000.00
Subtotal	**$39,246.65**

[70] Exhibit 7.

Less WorkCover Refund	2,919.80
Total	**$36,326.85**

Orders

[156] There will be judgment for the plaintiff against the defendant for $36,326.85.

[157] I direct that any submissions in respect of costs, or alternatively a proposed draft order if the parties are agreed, be filed within twenty-one days.