

DISTRICT COURT OF QUEENSLAND

CITATION: *Belmont v McDonalds Australia Limited* [2020] QDC 319

PARTIES: **SUSAN BELMONT**
(Plaintiff)
and
MCDONALDS AUSTRALIA LIMITED ACN 008 496 928
(Defendant)

FILE NO: D16/19

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court, Ipswich

DELIVERED ON: 11 December 2020

DELIVERED AT: Ipswich

HEARING DATE: 8 and 9 October 2019

JUDGE: Horneman-Wren SC DCJ

ORDER: **1. The defendant have judgment against the plaintiff.**
2. The parties are to file submissions as to costs by 1 February 2021.

CATCHWORDS: TORTS – PERSONAL INJURIES – LIABILITY – whether the occupier of premises failed to provide or maintain adequate lighting to entrance of premises – where carpark lights were not working – where lighting was adequate – where plaintiff’s fall was caused by her own inattention – where defendant not liable – where claim dismissed

LEGISLATION: *Civil Liability Act 2003* (Qld) ss 9, 13, 14, 23, 24, 55
Civil Liability Regulation 2014 (Qld) sch 4

COUNSEL: R J Oliver with G Shepherd for the Plaintiff
M T O’Sullivan for the Defendant

SOLICITORS: RP Law for the Plaintiff
Sparke Helmore Lawyers for the Defendant

Introduction

[1] On Sunday 9 October 2016, the plaintiff, Susan Belmont, while walking in the carpark to the entry of a McDonald’s restaurant owned by the defendant, fell

heavily on the ground. She had stepped onto a bollard¹ in the carpark and, immediately before her fall, was stepping from that bollard onto the concourse outside the store entry. In an attempt to break her fall, she extended her left arm sustaining a fracture of her proximal left humerus. Initially, her injury did not progress well and she later developed a frozen shoulder. Her injuries interfered with her capacity to work and her participation in, and enjoyment of, recreational pursuits in which she had previously engaged.

- [2] The plaintiff claims that her injuries were sustained as a result of the defendant's negligence and seeks damages.
- [3] For the reasons explained below, her injuries were not caused by any negligence, or breach of duty, on the part of the defendant. Rather, she sustained the injuries as a consequence of her failing to pay attention as to where she was walking.
- [4] Her claim must be dismissed.

The pleaded cases

- [5] The plaintiff pleads that her fall was caused by the defendant's negligence alleged as follows:²
- (a) Failing to ensure the front of the restaurant was lit or adequately lit;
 - (b) Allowing the lights, which normally illuminated the carpark in front of the restaurant, to fall into disrepair because they were not fully operational;
 - (c) Failing to ensure there was sufficient lighting from the carpark towards the restaurant so customers, in particular the plaintiff, could judge the distance between the parking bollard and the concourse of the restaurant;
 - (d) Failing to maintain the lights in the carpark that illuminate the front of the restaurant;
 - (e) Failing to ensure that the concourse at the front of the restaurant was sufficiently lit from the carpark;

¹ Referred to as a 'bollard' in the proceedings, actually a cement tyre stop permanently fixed to the carpark.

² Statement of claim, paragraph 6.

- (f) It knew, or ought to have known, that the inadequate lighting in the front of the restaurant could cause customers to trip or fall;
 - (g) Failing to respond to memos/text messages from staff about the carpark lights not working from staff of the restaurant.
- [6] By its defence, the defendant denies the allegations of negligence and says that such allegations are untrue, unsubstantiated or cannot be admitted because:³
- (a) The plaintiff stepped between the bollard and the concourse and says that the plaintiff stepped from the bollard to the bitumen surface while looking not at the path ahead but at her handbag or in circumstances where her vision was obstructed by the handbag she was carrying;
 - (b) There was no lack of lighting where the plaintiff fell to the ground;
 - (c) If it is determined by the Court, the left foot of the plaintiff did not land fully or firmly, then this circumstance was caused by the inattention and/or misjudgement of the plaintiff in respect to her foot placement and/or her path of travel;
 - (d) The negotiation by the plaintiff of the clearly marked bollard and the bitumen surface of the carpark area posed obvious risks of misjudgement and of failing unless one gave attention to the ones foot placement and/or the path ahead (henceforth “the obvious risks”) that would have been obvious to a reasonable person in the position of the plaintiff in accordance with s 13 of the *Civil Liability Act 2003*;
 - (e) The obvious risks were voluntarily assumed by the plaintiff as she moved towards the front of the restaurant of the defendant in accordance with s 14 of the *Civil Liability Act 2003*;
 - (f) Further and alternatively, the plaintiff caused her own fall and any consequential injury, by reason of her contributory negligence, as pleaded below, and particularly in failing to take care in the placement of her feet or to survey the path ahead and her damages should be reduced, at common law, or in accordance with ss 23 and 24 of the *Civil Liability Act 2003*, by 100% or such lesser sum determined by the Court.

³ Amended defence, paragraph 2(d)-(i).

- [7] The defendant further pleads that if it was negligent the plaintiff's own negligence and failure to take care for her own partly caused, or contributed to her injury and any loss or damage suffered by her. It particularises that allegation as follows:⁴
- (a) Failing to take the marked path to the restaurant;
 - (b) Taking a short cut through the marked disabled car space, resulting in the Plaintiff having to step over the bollard;
 - (c) Stepping on to the bollard;
 - (d) Stepping off the bollard whilst looking at or into her handbag or, in the alternative, when her vision was obstructed by the handbag;
 - (e) Stepping off the bollard without looking in her direction or travel;
 - (f) Stepping off the bollard whilst engaged in conversation with the person her right;
 - (g) Failing to take any or any sufficient care for her own safety; and
 - (h) Failing to take sufficient care for her own safety.
- [8] The plaintiff, by her reply, denies that she was looking into her handbag. Rather, she says that she was looking at the path ahead to see where was going to step onto the bollard and then onto the concourse. She says that, as she fell, her head dropped down as though she was looking into her handbag. She denies that the path taken by her posed an obvious risk.
- [9] It can be seen from the summary of the competing pleaded allegations the case turns upon the condition of the lighting in the carpark, any risk created thereby, and whether the plaintiff's fall was caused by such risk or her own inattention.

The plaintiff's evidence as to the fall

⁴ Defence, paragraph 5(b).

- [10] The plaintiff attended at the restaurant to collect her daughter, Jessica, who worked there. The plaintiff parked her car in a parking space near the entry of the restaurant. Having parked, the plaintiff moved from the driver's side of the car to the passenger's side because Jessica was a learner driver and was to drive the vehicle home.
- [11] At the completion of her shift, at about 7pm, Jessica came to the vehicle. She brought with her an ice cream. After a discussion about the plaintiff also wanting an ice cream, they decided to go back into the restaurant to buy one.
- [12] The plaintiff got out of the passenger side of the car. She carried her mobile telephone in her left hand. She put the strap of her handbag over her left shoulder and adjusted it. The bag itself was on her right hip.
- [13] She walked around the front of the car. Jessica was on her right hand side, a step or two in front of her. She said that because Jessica was at the end of the bollard, she could not walk around it, so she walked directly across the bollard. When asked exactly how she stepped onto the bollard, she said, *"So I walked across the – the bollard. Jess was on the end of the bollard, so I couldn't kind of walk around, because she – that's where she was. So I walked directly across the bollard"*.
- [14] When asked if she recalled whether she looked down to her feet, she said, *"Yeah, I do. I recall actually looking where I was going. Yeah. It was --- It was dark and I remember thinking – like, looking specifically at where my feet were going because it was dark and it was a step, and I – so I specifically remember looking where I was going. My --- At my feet. And I can visually remember my – looking. Yeah."*
- [15] When asked to say how dark it was, she said, *"Well, I remember – when I was sitting in the driver's seat, I remember thinking it was dark. Darker than, I guess, I would expect. As I was watching people go past. And as I stepped across, it – I just – I remember it just being – like, the – the ground – where I was stepping on the bollard, the – the step itself was dark. And it – yeah. It was – the area itself was dark, so I don't know. It was – I don't know how to explain how dark it was ---Yeah. It wasn't what – it wasn't – yeah. It just ---Yeah. It wasn't pitch black but it wasn't like a day – like, it wasn't daytime. It was – it was darker than – I*

remember thinking it was darker than – than I would expect. Like, darker than usual. Yeah.”.

[16] Her description of how she stepped onto the bollard was as follows, *“I stepped onto the bollard with my right foot, and then I put my left foot down. I centred myself, and then I stepped across with my left foot.”.*

[17] She indicated that she centred herself on her right foot to get balance to step across. She described stepping across as follows, *“I fell and I – my foot – it was – I didn’t reach across far enough because it was – like, that edge wasn’t lit enough ---And it was dark and I didn’t reach across and centre my foot. I remember my foot not being centred on the pavement, on the kerb. ---And so my toes hit the edge and I fell. --- I fell forward.”.*

[18] She said that when she stepped onto the bollard she was not talking to Jessica. She said her handbag was at her side, she had her phone in her left hand and she was holding the strap of her bag. When asked if she was looking in her handbag, she said, *“No, I absolutely wasn’t.”.*

[19] When asked had she looked in her handbag, she said, *“No. I had no reason to go into my handbag at that stage.”.*

[20] She explained that her keys were in her handbag as the car had keyless entry and keyless ignition. So there was no need to get her keys in or out. When asked about money for the ice cream, she said, *“Brassall has security guards for a reason, so there’s no way I would take my purse out. So I hadn’t taken my purse out and I wouldn’t take it out even until I got – and I was ordering. So I hadn’t even considered at that point, which is – I think even – like, when I’m hanging – when I’m holding onto my handbag and I’m holding onto the strap, I’m kind of securing my phone and my handbag to my side because I’m walking – you know, it’s a – it’s a place that, you know, kind of young people hang out and ---Yeah. So just to keep it safe.”.*

[21] She said that after her fall, a member of the defendant’s staff, Emma, attended to her. She was introduced as the shift manager. Emma asked if she was okay and she explained that she had fallen. She said Emma said words to the effect of, *“No wonder it’s – no wonder you’ve fallen, it’s dark.”.*

- [22] An ambulance was called. She said that she recalled that there was further conversation and Emma had said that the lights had been broken for some time. She said, *“Emma was saying that the lights had been broken for a – for a long – for a while, a long time. That she’d told management, they hadn’t done anything about it, and she’d been worried that somebody was going to get hurt. She’d told them that somebody was going to get hurt, so she knew this was going to happen.”*.
- [23] She went on to say that Emma and Jessica, *“were talking about the lights and how dark it was, and there was just conversation going on between those people about that it’d been dark, it’s been dark for a while, it’s been dark for some time, the light’s broken.”*.

The CCTV footage

- [24] The closed circuit television camera is located outside of the entrance to the restaurant. The plaintiff’s movement from her car, across the carpark and towards the entry was recorded. A lengthy recording extracted from the CCTV is Exhibit 5. The material moments of the plaintiff’s movements toward the restaurant and her fall are found at about 58 minutes into the recording. Exhibit 10 is a series of 15 still frames extracted from the CCTV footage.
- [25] The footage was played in the course of the trial and I have had the benefit of being able to replay and review it, several times, in consideration of the evidence. It provides the most accurate evidence of what occurred.
- [26] The following are my findings of what is evidenced in the CCTV footage.
- [27] The footage shows the plaintiff’s vehicle parked adjacent to a disability car space, immediately to the right of that car space, as one views the footage. Immediately to the left of the disabled car space is a marked walkway leading to the concourse. Other vehicles are visible in the carpark, including one with its headlights illuminated and pointing in the direction of the restaurant.
- [28] The internal light of the plaintiff’s vehicle illuminates. At that point, the driver’s side door of the vehicle remains closed, suggesting the passenger side door, which cannot be seen, has been opened. Shortly after that, the driver’s door opens and the

plaintiff's daughter can be seen exiting the vehicle. She commences walking towards the restaurant across the disabled car space.

[29] The plaintiff then emerges from in front of the parked vehicle. When she first appears she has her handbag slung from her left shoulder across to her right hip. She is apparently attending to her handbag in some way. What exactly she was doing is unclear, however, it is unnecessary to resolve that as a matter of fact. What is relevant is that the plaintiff's attention is directed towards her handbag. Her head is positioned in such a way as to demonstrate her looking at her handbag, if not in her handbag.

[30] The plaintiff proceeds towards the bollard, her right hand still attending to her handbag. Her head lifts, taking her gaze away from her handbag. She then appears, briefly, to look at her path of travel. She places her right foot behind the bollard, followed by placing her left foot on the bollard. She then steps onto the bollard with her right foot, such that she is standing on the bollard with both feet. She then moves her head upward and to the right. As she does so, she is not looking either toward the ground or in the direction of her travel. It is at that point that she steps off the bollard with her left foot. Her left foot does not land on the concourse and she commences her fall. It is only after her fall commences that her head turns forward and in the direction of the restaurant entry. She then falls heavily onto the concourse.

[31] On those findings, the following observations can be made. Contrary to the plaintiff's pleaded case and her evidence, she was, at least initially, looking at her handbag (if not in) and not specifically at where her feet were going throughout her passage from the car park to the concourse. She appears to have looked toward her feet at the time at which she placed her left, then right, foot on the bollard, however, her gaze was diverted away from her path of travel as she stepped from the bollard. Contrary to her pleaded case, her head does not drop as though she was looking into her handbag after she commences her fall.

Conclusions as to the plaintiff's fall

[32] The plaintiff, simply, failed to pay attention to where she was stepping and fell.

- [33] In her evidence-in-chief, the plaintiff recounted, with precision, her journey from the car to the moment she fell in a way which suggested a clear recollection of that journey consistent with her having paid attention to where she was walking. However, as was demonstrated in cross-examination, the precision with which she expressed that journey was inaccurate. Until shown the still photographs, the sequence of which was confirmed by playing to her the CCTV footage, the plaintiff had been adamant that she had first stepped onto the bollard with her right foot, followed by her left foot and, having centred herself to get balanced, stepped off with her left foot. The CCTV footage and the extracted still images demonstrate, as she accepted, that the sequence which she had recounted, so adamantly, was wrong.
- [34] It would be entirely unsurprising if the plaintiff did not have a precise, independent recollection of that brief journey across the carpark. Until the moment she fell, it was nothing more than a very ordinary, everyday human activity.
- [35] The plaintiff's evidence that she did have such a precise and accurate recollection may, if accepted, be consistent with her taking particular care on that occasion because of the lighting conditions in the carpark. In my view, the plaintiff gave that evidence with the intention of establishing that she was taking such particular care, for that reason. I do not accept that she was paying particular attention. Nor do I accept that the lighting conditions in the carpark necessitated her doing so. That she was not paying particular attention is demonstrated by the imprecision of her evidence as to the sequence of steps onto the bollard.
- [36] In my view, her evidence of that sequence, given in evidence-in-chief, that is, right, left, right, is a reconstruction based upon her having viewed the CCTV footage. When one views that footage, one may think, on an initial viewing, that the step with her right foot immediately preceding her stepping onto the bollard was, itself, onto that structure. I am satisfied that the plaintiff's evidence before me was reconstructed on that basis. When viewed more closely, it is clear that the step with the right foot, immediately preceding her placing her left foot on the bollard, is placed behind that structure. That true sequence of steps, and thus the plaintiff's reconstruction, is what was demonstrated, by reference to the CCTV footage and the still images, in cross-examination.

- [37] The plaintiff may have persuaded herself as to her reconstructed version of events, including that she was paying careful attention to where she was walking, but the more reliable evidence clearly establishes otherwise.
- [38] In concluding that the plaintiff had reconstructed events, I have not placed any reliance on the Queensland Ambulance Service report of the evening which records, *“pt states she fell over yellow tyre stop on ground.”*
- [39] The plaintiff was cross-examined about that. She said she remembered telling the ambulance officer that she had fallen at that point and maybe they had misunderstood what she had said. I accept that evidence. The mechanism of injury as recorded by the ambulance officer may well have been an interpretation of what she said. No matter what she said at the time, the CCTV footage remains the best evidence of what actually occurred. Clearly, she did not fall over the bollard.
- [40] That such notes may be interpreted is demonstrated by the Ipswich Hospital Emergency Department Clinical Summary from later that night. It records, “pt tripped and fell collecting daughter from work. Unsure exact mechanism of fall”. Obviously enough, that is an interpretative expression by the treating doctor of what they were told. For the same reasons as above, I have not placed any weight upon that piece of evidence in reaching my conclusion that the plaintiff reconstructed events.

Was there inadequate lighting?

- [41] At the time at which the plaintiff fell, the lights in the car park of the restaurant were defective and were not working. Therefore, any illumination which would be provided by those lights was not present on the night in question.
- [42] The evidence does not otherwise establish to what extent the carpark lights, if on, added to the illumination of the relevant area. The plaintiff’s daughter, Jessica, who gave evidence of there being four downlights in the awning outside the restaurant. She said those lights only projected downwards and did not reflect much light at all onto the carpark. When asked how she knew that, she said, *“Because I work there, and I did quite a few overnight shifts, so part of that role was to go out the front and sweep and mop quite late at night, I would say around – yeah, anywhere from after 9 pm especially, and I would mop – sweep and mop that area all the way out the*

front, so, at that time at night, it's quite dark when you walk out the front anywhere, like, coming near the bitumen --- It's really dark out there."

- [43] She confirmed that, "*The awning only illuminates, like, the direct entrance.*".
- [44] Jessica's evidence, in that regard, was as to the usual state of illumination in the relevant area based upon her experience, having worked there for some time. I understood her evidence, as to the darkness of the area, as being a statement about conditions ordinarily and not about the night in question. Her evidence does not suggest to me that the relevant area was markedly more illuminated at times when the carpark lights were on.
- [45] The plaintiff not paying particular attention as to where she was walking or placing her feet is consistent with the front of the restaurant being adequately lit. That the area was adequately lit is demonstrated by the plaintiff stepping, with apparent ease, onto the bollard before attempting to step onto the concourse. The evidence demonstrates that the concourse, onto which the plaintiff attempted to step, was no less illuminated or visible than the bollard.
- [46] The CCTV footage and other still photographs extracted from it, which are Exhibit 11, show numerous patrons, including children, both before and after the plaintiff's fall, walking away from the restaurant and stepping onto the bollard from the concourse. There is also one patron who walks toward the restaurant entrance, stepping first onto the bollard and from there onto the concourse.⁵ The patron entering was from earlier in the evening, when there appears to be more natural light. There was also Jessica's evidence that lights were located in the ceiling above the concourse casting light back toward the carpark.
- [47] Even allowing for those matters, none of that evidence suggests that the entrance, including the bollard and edge of the concourse, was inadequately lit.
- [48] Emma Wilson, the shift manager, gave evidence. Following the incident she wrote an incident report. In it, she provided the following description of the incident:

"Lady was coming in to the Restaurant from the car park, has not seen yellow pillar/ car bumper in front car parks of the Restaurant and has tripped over

⁵ Exhibit 11, photos 1 – 5.

and fallen face first to the ground. Ambulance was called as the lady was in a great deal of pain and she was then taken to Hospital. Car park quiet [sic] due to the lights not working.”

[49] In a section of the report headed, “Action already taken by Restaurant”, she said:

“Memos/ Text Messages have been sent, prior about the Carpark lights not working.”

[50] In another section headed, “Future Action to be taken by Restaurant”, she said:

“Action a plan to get the Carpark lights fixed ASAP to avoid future injuries.”

[51] In her evidence, Ms Wilson said that she was are that some of the lights were not working. She thought that when she took an order out, *“that’s when I notices that just some of the ones in the centre were out”*.

[52] When asked about the notes as to action already taken, she said, *“They weren’t officially from me. At the time, there was another manager who’d just come in for her shift, and she had told me that she had sent a text and a memo to the store manager informing her, like, I can’t exactly remember when, but, yeah, that she had told her that they were broken or, like, playing up”*.

[53] She said that the future action plan, “were just my words”. She that when incident reports get filed out they get emailed to head office.

[54] In cross-examination, she that in providing the description of the incident, *“I just pretty much wrote what was being said at the time from other people”*, and that she didn’t she didn’t see the fall, *“So, it wouldn’t be for me to say.”*

[55] The existence and content of that incident report when considered with all the other evidence, particularly the CCTV footage and the still photographs extracted from it, does not lead to me to conclude that the relevant area of the restaurant was inadequately lit.

[56] From all of this, I conclude that the plaintiff has not proven that the defendant failed to ensure the front of the restaurant was lit or adequately lit. The plaintiff has not proven that the defendant failed to ensure there was sufficient lighting from the

carpark towards the restaurant so customers, including the plaintiff, could judge the distance between the parking bollard and the concourse of the restaurant.

[57] In terms of s 9(1) *Civil Liability Act 2003*, the plaintiff has failed to prove that there was a not insignificant, foreseeable risk of harm in respect of which a reasonable person in the position of the defendant would have taken reasonable precautions.

[58] I record for completeness that even had I concluded that there was inadequate lighting of the relevant area, I would nonetheless have remained of the view that the plaintiff's fall was not caused by such inadequacy or any risk created by it. I would remain of the view that the plaintiff fell because she did not pay attention to where she was stepping as she stepped from the bollard toward the concourse.

The issue of obvious risk

[59] The issue of the assumption of an obvious risk by the plaintiff, raised by the defendant in its defence, may be dealt with very briefly. I reject it.

[60] From all that I have said already, and particularly the apparent ease with which people attending the restaurant, including the plaintiff, could see and step onto the bollard, and the further ease which those paying attention could step from it onto the concourse, I could not conclude that engaging in that activity posed an obvious risk.

Quantum

[61] Although the plaintiff's claim is to be dismissed because she has failed to prove the defendant's liability, I should assess the quantum of damages which I would have awarded.

[62] Following the fracture of her proximal left humerus, the plaintiff attended the Ipswich Hospital. She was referred to the fracture clinic. She was treated conservatively with her arm being placed in a sling. She was referred for physiotherapy.

[63] She continued to suffer pain and restricted movement of her left arm. Later, she developed a frozen shoulder. This condition required surgical intervention performed by an orthopaedic surgeon, Dr Mark Shillington, on 22 March 2017. Dr Shillington continued to monitor her progress, which he considered slow, and on 17

October 2017 referred her for a subacromial steroid injection. That provided some relief but it was not long lasting. The steroid injection was repeated on 2 March 2018.

[64] On 4 July 2018, Dr Shillington recommended another arthroscopic subacromial decompression. At that time, Dr Shillington also noted that she had carpal tunnel syndrome in her right hand. On 1 August 2018, she underwent further decompression and also a procedure for her carpal tunnel syndrome. Medical opinion establishes that the carpal tunnel syndrome was unrelated to her injury and no compensation is sought in respect of it.

[65] The plaintiff has undergone no further treatment. When symptomatic, she takes medication, including Targin and Celebrex. Sleeping was always painful for her and at the time of trial she said that she could still not sleep on her left side. Following her injury, she required assistance, particularly from her partner and daughter, with daily activities such as dressing, putting her hair up, cooking and cutting her food.

[66] She could not participate in recreational activities, which she had previously enjoyed, such as camping and fishing. More recently, she has been able to return to fishing but not to the extent she previously enjoyed. For example, she is restricted to using light gear and attempts to cast with her right arm. She has not been able to return to camping.

[67] There is evidence before the court from two orthopaedic surgeons, Associate Professor Nusen and Associate Professor Steadman. Neither was required for cross-examination. There is little difference in their opinions. Dr Nusen assesses a whole person impairment of 4% and Dr Steadman assesses a whole person impairment of 5%.

[68] Following the injury, the plaintiff was off work for a period of nine months. Her qualifications and experience are in early childhood and community sectors. Before the injury, she worked closely with children in foster care, as an Intensive Intervention Placement Support (IIPS) Case Worker. This was quite active work, in which she worked closely with children including participating in physical activities with them. She described her work in this way, *“So I drive to foster carer’s houses and I would meet with the foster carers and the children in their homes. I would*

engage with children, form a rapport with children, so that I could gain their trust and work out what was going on for them. Those kinds of activities would be things like sitting on the floor, playing with activities, jumping trampoline, taking them to the park, taking them swimming and different activities. I would also spend time with foster carers, training and talking to them face to face about what was happening. Sometimes transporting them in cars to appointments. I would go to schools, hospitals, wherever other appointments are necessary in order to be able to – I basically describe it like a jigsaw puzzle. It's missing pieces and I would have to work out what was missing and help put those pieces back together.”.

[69] Following her injury, she found that she was unable to participate, at least fully, in that work. In her evidence, she illustrated this, saying, *“A lot of physical interaction. In fact, I had a young person who wouldn't work with me because I wouldn't jump on the – I couldn't jump on the trampoline with him after I broke my shoulder.”.* She further said, *“We had girls' group, boys' groups, so we'd take them on camps. We would take them out for – for – out for the day, where we would take them – things like high ropes or things to build their self-esteem and confidence and to support them in terms of being foster kids together. I wasn't allowed to go on those activities though.”.*

[70] She said further, *“Caring for children requires – it's very physical. It requires a lot of lifting and carrying of children, and you can't engage with the child if you can't get to their level. I need to be able to sit on the floor and, you know, you need to be able to play activities and I have a lot of trouble with any of that, kind of, physical type of work. I don't believe I would be able to work with children again.”.*

[71] More recently, the plaintiff has changed positions and was working, still with the same employer, Mercy Community Services, in a training role. She considered this as part of her progression but described it as a lateral move rather than an upward move. Her current position involves driving considerable distances, which she finds causes her arm to be painful. She is also required to set up training rooms, including moving tables and chairs, carrying water jugs, plates of food and training material. These activities also cause her some difficulty.

[72] In assessing an injury scale value (ISV) for the injury, consideration is to be given to the range of ISV's in Schedule 4 of the *Civil Liability Regulation 2014*. Item 97

provides for a moderate shoulder injury. The plaintiff submits that her injuries do not sit comfortably in any of the descriptors within item 97 but that some are partially applicable. She submits that the court, applying s 9 of the *Regulation*, would take into account other matters in determining an appropriate ISV, including the impact on her general wellbeing and recreational and other social activities. She submits she has suffered multiple injuries because she later developed a frozen shoulder as a consequence of the initial fracture.

[73] The range of ISV's for a moderate shoulder injury under item 97 is 6 to 15. The plaintiff contends that she would be assessed at the top of that range. The defendant contends that an ISV of 10 would be ascribed.

[74] The *Regulation* provides additional comment about the appropriate level of ISV for item 97. It provides that an ISV at or near the bottom of the range will be appropriate if there is whole person impairment for the injury of 6%. Adopting the most favourable whole person impairment assessment for the plaintiff, being Dr Steadman's 5%, the appropriate ISV would be towards the bottom of the range. The defendant's ISV of 10, therefore, seems appropriate. Even with a 25% uplift for multiple injuries, it would remain an ISV of between 10 to 15. General damages for an injury arising in October 2016 would be \$17,760 under Table 7.

[75] Past economic loss is agreed at \$35,000 including interest.

[76] Past loss of superannuation on that amount would be \$3,237.50.

[77] Special damages are agreed at \$30,000.

[78] The plaintiff claims future medical expenses at \$10 per week over a life expectancy of 40 years. She therefore claims, in round terms, \$10,000, assuming a deterioration as she ages. This is based upon two GP visits per year, medication taken five times per week and five heat packs being purchased each year. The defendant says the claim is probably worth about half that amount but provides no particular reasoning as to why that was so. I would allow \$8,000 for future medical expenses.

[79] The most contentious issue is future economic loss. The only basis on which this head of damage can be assessed is a global basis under s 55 of the *Civil Liability Act 2003*.

- [80] The plaintiff claims an amount of \$125,000, on the basis that if she was to lose her current position she will be at a disadvantage in the labour market and particularly, that she will have limitations in looking for other working in the child care sector.
- [81] By contrast, the defendant submits that the plaintiff has recovered well, has returned to work and is presently not suffering any loss of income. Consequently, it submits that no award should be made for future economic loss.
- [82] I am required to state the assumptions and reasons upon which I make any assessment of damages for future economic loss under s 55.
- [83] At the time of trial the plaintiff was 46 years of age. She stated her intention was to work until she was 70. That seems realistic. Whilst she currently suffers no loss of income as a consequence of her injury, I am satisfied that her present work, because of the nature and extent of her duties, causes her some ongoing discomfort. There is, I conclude, even in the absence of direct evidence, some potential that she would not be able to continue in her current role until her proposed retirement age. It is apparent, on the evidence, that the full extent of her former work in child care would not be available to her if she was to return to the labour market in that area of work. She would, therefore, be at some disadvantage.
- [84] To be balanced against that, is the fact that her current position is one of progression. By virtue of the physical nature of her former position, I would conclude that her current position is one which would become more desirable as she grows older.
- [85] There is, on the evidence, no real basis to place, with any precision, a value upon her disadvantage in the labour market. I can see that no basis upon which the figure claimed by the plaintiff could be derived. Allowing \$25 per week, projected over her working life of 24 years, would, in my view, compensate her for a potentiality which may never eventuate. That would result in an award of \$31,200. Superannuation on that figure would amount to a further \$3,588. In the circumstances, I would make a global award, including superannuation, of \$40,000.

Disposition

- [86] The defendant have judgment against the plaintiff.

[87] The parties are to file submissions as to costs by 1 February 2021.