DISTRICT COURT OF QUEENSLAND

CITATION:	*Norsgaard v Aldi Stores (A Limited Partnership)* [2022] QDC 260
PARTIES:	**LUCY VICTORIA NORSGAARD** (plaintiff) **v** **ALDI STORES (A LIMITED PARTNERSHIP)** **(ABN 90 196 565 019)** (defendant)
FILE NO:	1872/21
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	22 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	13 – 15 July and 5 August 2022
JUDGE:	Jarro DCJ
ORDER:	**Judgment for the plaintiff in the amount of $157,767.71.**
CATCHWORDS:	TORTS – NEGLIGENCE – BREACH OF DUTY – where the plaintiff was employed by the defendant as a store person – where the plaintiff sustained an injury to the lumbar spine – where it is the plaintiff's case that the injury was a consequence of the defendant failing to adequately train the plaintiff in manual handling techniques, an activity which the plaintiff says carried with it a clear risk of injury – whether adequate practical & module manual handling training was conducted. DUTY OF CARE – employer's liability – unnecessary risk of foreseeable injury – whether employer took reasonable steps to provide a safe place of work and a safe system of work – *Workers' Compensation and Rehabilitation Act* 2003 (WCRA) ss. 305B & 305C – whether duty of care has been breached under s. 305B of the WCRA. DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES
LEGISLATION:	*Workers' Compensation and Rehabilitation Act* 2003 Qld ss. 305, 305B & 305C *Workers' Compensation and Rehabilitation Regulation* 2014

Qld Sch 8

CASES:

COUNSEL: R J Lynch and N I Congram for the plaintiff
S McNeil for the defendant

SOLICITORS: Kartelo Law for the plaintiff
BT Lawyers for the defendant

[1] The plaintiff in this matter seeks recovery of damages for injuries said to have been sustained in the course of her employment, as a store person, with the defendant on 28 June 2019. Both liability and quantum are in dispute. For the reasons that follow, it is my view that liability has been proven and the plaintiff's damages are assessed in the amount of $157,767.71.

Background

[2] In around May 2018, the plaintiff commenced part-time employment as a store person at the defendant's store in the suburb of Brassall. As part of her duties, she was required to undertake the unloading and stacking of stock from what is known as an "ambient pallet". That task, she says, was required to be completed in no more than 20 minutes.

[3] It is largely not in contest what occurred on the day the plaintiff injured herself. At approximately 7:55 pm on 28 June 2019, in aisle 6 of the Aldi Brassall store, the plaintiff was required to undertake the unloading and stacking of stock from an ambient pallet. She lifted three cardboard trays from the pallet. Each cardboard tray had 12 tins of canned tomatoes which weighed approximately five kilograms, such that the plaintiff was lifting approximately 15 kilograms in total. As she performed the lift, she was bent over at the waist and her trunk was at an approximate 30-degree angle from vertical. She then turned to her left and took two steps towards the shelving whilst carrying the load. The carry was performed with the load held with outstretched arms below her waist. She then began to take a third step towards the shelving when she lost control of the lift. The cans of tomato then fell onto the floor.[1] As a result of being involved in the lift and carry, the plaintiff suffered a musculo-ligamentous injury to her lumbar spine.

[4] The plaintiff alleges that the defendant breached its duty of care by failing to adequately train her in manual handling techniques, an activity which she says carried with it a clear risk of injury. It is asserted on her behalf that there was never any limit imposed on what weight or number of items the plaintiff could safely lift at one time. It is also asserted that safe manual handling practices were not enforced by the management at Aldi Brassall. Rather, the emphasis within the store was on speed and completion of the task, as opposed to safety. The case advanced on behalf of the plaintiff was that she felt compelled to increase her speed of completion and so she lifted more product to become more efficient.

[5] The defendant admits that the plaintiff was required to undertake the unloading and stacking of stock from an ambient pallet as part of her work duties, but denies the

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1 See pleadings and CCTV footage of the incident.

assertion that the plaintiff was expected or required to complete the task in no more than 20 minutes, which was much the focus of the plaintiff's claim. The defendant says that there was no directive or instruction given to the plaintiff that this task was to be completed within that timeframe. The defendant denies that lifting three cardboard trays of canned tomatoes was part of the plaintiff's usual or accepted work duties. Its case is that:

(a) the plaintiff was not instructed, required, committed or directed to lift three cartons of canned tomatoes at a time;

(b) the plaintiff had been trained in safe manual handling, which included an instruction that items of more than 10 kilograms should be lifted by way of a team lift;

(c) the plaintiff elected to lift three cartons of canned tomatoes at a time and in circumstances where there was no requirement for her to do so, she had not been trained to do so and there was no instruction or directive upon her to do so; and,

(d) the plaintiff lifted three cartons of canned tomatoes in direct contravention of the theoretical and practical training that was provided to her by the defendant.

[6] The evidence led at trial established that the plaintiff commenced at Aldi Brassall on 21 May 2018. From her first day, the plaintiff underwent the defendant's induction program that consisted of five training modules which was designed to be done in the first five days. The plaintiff completed the modules in two and a half days. The store manager, Mr Hutchinson, showed the plaintiff around the store, the warehouse, the office and the break room. He had an iPad with him to sign off and confirm that the plaintiff had been shown and completed these things.

Manual Handling Training

[7] A major focus of the evidence led at trial revolved around the extent to which employees were trained in manual handling techniques. A number of witnesses gave evidence about this issue being the plaintiff, Mr Ashleigh Hutchinson, Mr Joel Gannon, Ms Ellen Barton, Ms Karen Mills, Ms Lucinda Dixon and Ms Taylah Watson.[2]

[8] The plaintiff recalled watching a video during her induction, and at one point, Mr Hutchinson asked her if she knew how to lift. She responded, "Yes". The plaintiff gave evidence that Mr Hutchinson did not perform a demonstration of lifting and did not require the plaintiff to perform one either. The plaintiff did not recall receiving any further training with respect to manual handling during her first week at work.

[9] The evidence of Mr Hutchinson's practical manual handling training provided to the plaintiff is, to some extent, in conflict with that given by the plaintiff. My impression of Mr Hutchinson's evidence was that Mr Hutchinson spoke more in general terms about what he would have done rather than what he actually did at the

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[2] Ms Watson was called on behalf of the plaintiff. The other remaining witnesses were called by the defendant.

relevant time. He is hardly to blame for that because he only had to recall the training he provided to the plaintiff for the first time, in the week prior to trial.

[10] Relevantly Mr Hutchinson said that he gave examples of "manual handling, tills and preboarding" in respect of the five modules which formed part of the theoretical component conducted on the iPad. There were videos in the module that new staff members, including the plaintiff, were required to watch. The videos were followed by a quiz. Once the new staff member completed viewing the video, Mr Hutchinson said that he would then explain to them that he was going to show them how to carry out the manual handling, including bending properly and lifting using the knees. He would then have the new staff member demonstrate the lifting technique to him. He said he would then "sign them off on that module" if their demonstration was sufficient. In respect to signing them off, it was Mr Hutchinson's evidence that after carrying out the demonstration himself, and having the new staff member perform the task, he would then explain to the person what they had done, the reason they have done it, following which he would put a password into the iPad in order to confirm they had been shown the manual handling technique.

[11] At the commencement of the plaintiff's first shift, Mr Hutchinson recalled showing the plaintiff stretching posters which were located in the staff room, as well as in the office where there were more stretching posters (including a stretching sign-off sheet). It is unclear to me whether the plaintiff was required to provide her signature for the sign-off sheet. Mr Hutchinson said that he provided the plaintiff with training in relation to the stretching (as identified in the stretching posters), and during the training on the iPad showed the plaintiff the stretches again before she commenced the manual handling training.

[12] In terms of the manual handling training, it was Mr Hutchinson's evidence that the plaintiff located him in the store and advised him that she had finished the manual handling module on the iPad, at which point he would check to see where she was up to in respect of the quiz and he would view the iPad to see what process had to be followed. He said that he demonstrated picking up a box using the correct technique. That involved what he described as sizing up the load, positioning his feet correctly, bending down using his knees by squatting, picking up the box in a nice comfortable fashion, holding the box close to his body, standing and turning using his feet, not twisting with his waist, and walking to another part of the warehouse and placing it down gently bending his knees, following which he would pick it back up and then walk it back to where it was originally found and place it down by bending his knees and lowering the product back onto the pallet. After this demonstration, Mr Hutchinson required the plaintiff to carry out the same actions. He observed her during this process. He relevantly observed the plaintiff to look at the box, size it up, position her feet close to the box, bend down with her knees by squatting, picking up the box comfortably, holding it on to her body, standing up and turning using her feet, walking across the warehouse and placing it down on another pallet whilst bending her knees. This process he estimated took about 10 to 15 minutes.

[13] It was his evidence that he ran a number of loads with the plaintiff when she commenced at the store. Relevantly, the plaintiff and Mr Hutchinson would be working off the same pallet and if he observed anything incorrect with the

plaintiff's lifting technique, he said he "would pull her up immediately and explain to her how she had moved or picked up a box and that it was incorrect", following which he would show her the correct technique, reiterate the reason why they did not do it that way, get her to do it again and once he was satisfied with what she had done, they would continue working.

[14] Mr Hutchinson said that after the plaintiff had completed her training and became a member of the team, he observed the plaintiff to perform an incorrect lift, at which point he immediately went over to her, explained that she was lifting incorrectly and demonstrated to her the correct way to lift. After that, he had her explain back to him what he had just shown her and then had her demonstrate the process again. Once he was satisfied, he would continue working on his own pallet. Mr Hutchinson could not initially recall the period of the plaintiff's employment when this occurred but recalled there were a "few other times further down the track", following which he approached her in the same manner. In cross-examination, he recalled this may have been a few weeks prior to the incident.

[15] Mr Gannon, who is a store manager for another one of the defendant's stores, gave evidence with respect to the training that was afforded to him by Mr Hutchinson when he first started at Aldi in 2017 which included the modules on the iPad, and manual handling training, the buddy system, the timeframe to unload an ambient pallet and the expectation on staff in terms of that timeframe. I will briefly refer to the issue of manual handling training and refer to the remaining matters later in these reasons. Mr Gannon said that he was required to demonstrate to Mr Hutchinson that he understood the training module after having completed the iPad training in four days. He was required to demonstrate to Mr Hutchinson that he could display the manual handling technique to him. Mr Gannon also gave evidence that after completing the iPad training, he worked on regular shifts and for the first two or three weeks, he was paired with someone (known as the 'buddy' system). Mr Gannon said that following the completion of the iPad training module in the first week and completing working with a buddy, there was ongoing training being quarterly refresher courses required to be carried out by staff. When asked whether the training specified a maximum weight an employee could lift or whether there were rules or expectations regarding how many trays a person should lift at one time, Mr Gannon's evidence was "not that I can remember".[3]

[16] Ms Barton worked for Aldi between 2016 and 2021, including at the Brassall store between June 2018 and January 2019. She worked with the plaintiff from time to time. She became aware of the training that was being done for new staff as it was part of her training to be exposed to how the training was done. She gave evidence in respect to the training required for new staff members when she commenced in June 2018 at the Brassall store, being a five-day program on the iPad called "new starter introduction". This involved the new staff member watching the videos and completing modules with questions and after going through the questions they would have to go and see the manager on duty and go through a bunch of steps that would show them how to do things. She recalled that one of these aspects was manual handling which she believed was carried out on day one of the program. She had some knowledge of the manual handling module in terms of the training and knew that it had included how to use a manual pallet jack and an electronic

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[3] T3-35, ll 1-7.

pallet jack, as well as lifting techniques. She recalled new staff members from June 2018 undergoing manual handling training with the manager but could not specifically recall who or which staff members they were. She recalled watching the new staff with Mr Hutchinson and hearing things said to them like "this is how, like, we would lift it".

[17] Ms Mills, an Aldi sales assistant, gave evidence that when she commenced working with Aldi in 2016 she underwent training, albeit at a different store which included having to undergo a medical assessment to get the job, and completing training via modules that they had to pass with the manager signing off. The modules were done on an iPad in the staff room and included having to carry out the theory by herself in the staff room, watching the video and answering numerous questions. Following the iPad training, she went onto more basic training including registers and customer service and it went on from there until she said, "it felt comfortable". She also gave evidence that when she commenced the Brassall store in 2018, she observed new staff members undergoing training. She recalled that they usually had a buddy with them or that there was a deputy that went alongside them to see that they were doing the job correctly.

[18] Shift manager Lucinda Dickson gave evidence that she has worked with Aldi Brassall from about 2017 and was first employed with the defendant in around 2016 at a different store as a store assistant. When she underwent training, she trained on the iPad including doing "a whole bunch of modules" in terms of how to do the job including running load, working tills, cleaning and "all that stuff like that". In terms of a practical element to the training, it was Ms Dickson's evidence that they had to do the iPad training and then "you'd go physically and do what the iPad basically entailed".[4]

[19] The remaining evidence about the defendant's manual handling training came from Ms Watson who was called by the plaintiff. Ms Watson commenced as a store assistant with the defendant in August 2018. Ms Watson gave evidence that during her time she completed some iPad training, including in respect of manual handling. She completed a series of modules which "weren't all that memorable" to her. Following the module training she was given some kind of "shadowing/mentoring training, [where] we were meant to be viewed and signed off as competent".[5] She gave evidence that Mr Hutchinson did not demonstrate any lifting techniques to her, but simply asked her, "Do you know how to correctly lift a box?"[6] Ms Watson also gave evidence of seeing another worker lifting multiple cartons of produce in the presence of a manager and being applauded for it. I treat Ms Watson's evidence with some caution given she was and is a very good friend of the plaintiff.

[20] I note the first training module the plaintiff completed was the manual handling module. The completed module record shows a start time of 2.44 pm on 21 May 2018 and a completion time of 2.48 pm on 21 May 2018, being a time taken of four minutes and two seconds. It is accepted that the four minutes and two seconds is not a reflection of the entire time taken to conduct the manual handling training, however as the plaintiff submitted, the more important aspects of the manual handling induction module were that:

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4 T3-58.
5 T1-45, ll 15-40.
6 T2-46, l 14.

(a) at no point in the video on manual handling technique was there any instruction about the maximum weight an employee could safely lift or the maximum number of boxes or items an employee should carry;

(b) the lifting demonstration in the video was of an employee lifting a box in the warehouse in what was clearly a staged scenario. The demonstration bears limited resemblance to the types of product that the plaintiff was required to lift when running an ambient load as part of her job;

(c) the iPad module contained a quiz with three simple questions. The quiz could not be considered a true "test" of an inductee's knowledge of manual training. There were only two possible answers to each question. The correct answer to each question was a photograph of the instructor who had demonstrated the correct lifting technique in the video shown only moments earlier, which clearly gave the correct answer.

[21] I consider that the more crucial evidence about the manual handling training the plaintiff received came from the plaintiff herself and Mr Hutchinson because, ultimately, they were the two individuals who were directly involved in such training, whereas the other witnesses spoke of the training they received or were involved with.

[22] To the extent of the inconsistencies with respect to the practical manual handling training provided to the plaintiff on the first day, I fall on the side of preferring the plaintiff's evidence. That is because much of Mr Hutchinson's evidence about the training provided was often prefaced in terms of what he would have done, not specifically what he provided to the plaintiff in particular. That is of course no criticism to Mr Hutchinson who in his evidence, as I have stated, indicated that he only first recalled the training he provided to the plaintiff the week prior to the commencement of this trial. Further one module the plaintiff was required to complete involved knife safety. Mr Hutchinson's evidence was that it would take approximately 20 minutes to conduct the required practical training. He also agreed that it was an important module. However, the plaintiff's training records demonstrated that Mr Hutchinson conducted that training within a maximum of eight minutes.[7] Mr Hutchinson was unable to provide an explanation for that. The plaintiff's knife safety module contained, as the 'trainer sign-off', the plaintiff's name, rather than that of the trainer's name. It could be inferred that the training, certainly to that extent, lacked sufficient attention to detail. It was my impression that based on the evidence of Mr Hutchinson, there were aspects of Aldi's manual handling procedures that, as a store manager, he did not enforce. Specifically, it was put to him that he did not slavishly enforce the stretching policy, his response was simply "no comment". Again, no criticism can be placed upon Mr Hutchinson particularly given he was only required to first recall the training he provided to the plaintiff in the week prior to the commencement of the trial. However, I am not sufficiently confident upon acting on his evidence where it conflicts with that of the plaintiff. Concerningly too, despite what was pleaded on behalf of the defendant,

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7 The plaintiff's manual handling induction module record (Exhibit 3) shows a completed time of 2.48 pm on 21 May 2018 and her safety knife induction module record (Exhibit 33) shows a start time of 2.56 pm on 21 May 2018 (i.e. eight minutes after the manual handling induction module was completed). Mr Hutchinson's evidence was that he conducted the practical training for each module before he logged on to the iPad, so the clear inference is that he conducted the practical training for the safety knife module within a maximum of eight minutes.

Mr Hutchinson did not give evidence that he provided any instruction that the plaintiff was not to lift more than 10 kilograms.

[23] I am also prepared to act upon the evidence given by the plaintiff with respect to the practical manual handling training that was provided to her, irrespective of the evidence given by any of the other defendant witnesses because those witnesses spoke largely about the training which was afforded to them and not the plaintiff as such.

[24] A number of witnesses, including the plaintiff, gave evidence about employee retraining. For instance, in January 2019, more than six months after the plaintiff commenced her employment, the plaintiff did some form of manual handling retraining (as opposed to the quarterly refresher course Mr Gannon and Ms Dixon gave evidence about, which consisted of an online module).[8] That module for present purposes however contained no instruction about the maximum weight an employee should safely lift or how many items an employee could carry safely. I am left with the view that there seemed to have been no practical element to the retraining.

Buddy System

[25] After the plaintiff completed the remaining training modules in the first few days of her commencement (including the module on knife safety), Mr Hutchinson said that the plaintiff participated in a buddy training system whereby each new staff member was placed with a buddy so that "the buddy could run load with them" and help them learn where all the products were in the store, including having the buddy assist the new staff member when they were performing cash register duties, until they were comfortable to perform the tasks themselves. Similar evidence was given from all of the other witnesses, as well as Ms Arama Taurau.

[26] In terms of the persons who buddied up with the plaintiff, Mr Hutchinson recalled that those included him, as well as other people in the store. He said he liked to rotate the role of the buddy with the new staff.

[27] The plaintiff's evidence about the buddy system was that sometime towards the end of her first week or the beginning of her second week, she followed Ms Taurau around when she "ran load". On another occasion, she followed a Deputy Manager, Robbie, around once before she started work. The plaintiff otherwise denied that she was assigned a buddy. Whilst perhaps there was an informal arrangement in place for a short period of time where new staff members were observed with how they manually handled stock, I am not sufficiently confident a formal system was allocated, particularly in circumstances where there is no written record of that occurring and it is inconsistent with the evidence of the plaintiff, which I accept in this respect, that she would be in the best position to recall what allocation was given to her in her initial employment period with respect to this issue.

Time to Unpack Ambient Load

[28] At the time of the incident, the plaintiff was running an ambient load. The plaintiff gave evidence that there was an expectation on the part of the defendant that the

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8 Exhibit 10.

task would be completed in no more than 20 minutes. Her evidence was that she had a time limit of 20 minutes per full running load to distribute around the store. She was told about the time expectation in her job interview, as part of her training, and that it was mentioned by "pretty much everyone in the store". Therefore another aspect of the plaintiff's complaint against her former employer is that there was apparently an expectation on the part of the defendant that the task of unloading and stacking of stock from a pallet would be completed in no more than 20 minutes. This complaint is rejected by the defendant. The rejection is difficult to reconcile in light of not only Mr Hutchinson's evidence, but also other evidence, which I shall now consider.

[29] Mr Hutchinson gave evidence that with respect to a timeframe to unpack an ambient pallet, the average was approximately 19 minutes. He indicated that the average time would have been made known to the plaintiff during her initial training and would have been repeated throughout her employment. In respect of a staff member (including the plaintiff) not being able to meet the average time of 19 minutes, he said the load would simply be postponed until the next available opportunity the staff member had to actually complete the unloading of the stock from the pallet. If staff were known to take longer, Mr Hutchinson said that he would explain to them that their performance was not up to "standard" and they would need to work on how to get their performance up. In terms of the plaintiff specifically running load and meeting the 19 minute average, Mr Hutchinson's evidence was that the plaintiff was inconsistent with "running load" and he had spoken to her about this. It was his evidence that he raised this with the plaintiff in the context of her managing to "get three double (ambient pallets) done, which was really good, but, the next time she should try to get four (ambient pallets) completed".

[30] This is consistent with the plaintiff's evidence that she had several conversations with Mr Hutchinson during which Mr Hutchinson told her that she needed to work on her speed. One of those occasions occurred a few months before the injury when she was approached by Mr Hutchinson about a deputy manager position that was becoming available. He responded that if she was to get her speed up then she would be considered for that role. He said he would mentor her but, according to the plaintiff, that never eventuated.[9] Mr Hutchinson recalled that in the months leading up to the incident there was the prospect of the plaintiff being considered for a promotion to a duty manager role.

[31] As was highlighted on behalf of the plaintiff, which I accept, the plaintiff's evidence that such an expectation existed at the defendant's premises is consistent with the following:

(a) Mr Hutchinson's evidence was that between May 2018 and June 2019 there was a timeframe in place for an average of 19 minutes for every double-D pallet. He confirmed that this expectation was communicated to the plaintiff as part of her initial training and that the expectation was repeated throughout her employment.[10] His evidence was also that if a staff member did not meet the 19 minute timeframe then he would explain to them that their

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9 T1-22.

10 T2-97, l 45 – T2-98, l 5.

performance was not up to standard and that they needed to work on how to get their performance up.[11]

(b) As to timing more generally, Mr Hutchinson's evidence was that on occasions Aldi head office would ask him to time staff and that there were occasions when the plaintiff would have been the subject of timing when she was running loads.[12]

(c) Mr Gannon's evidence was that the 19 minute guideline was communicated to him by Mr Hutchinson when he first started at Aldi Brassall in 2017.[13] He said that if staff were not meeting the timeframe there would be a discussion with them that they were not meeting the expectation and then a plan would be devised to help and assist to reach that.[14] He said that he would keep track of the time that elapsed when other staff members were running load.[15] He also agreed that the entire emphasis at the Aldi Brassall was on speed of completing the task of running the ambient load.[16]

(d) The Aldi Expectation Document "Running Ambient Mixes" effective 1 November 2020 states that a key expectation was a timeframe of "Average 19 minutes per standard DD". Although that document postdates the incident, the evidence of Mr Gannon was that the same position applied in June 2019.[17]

(e) Ms Barton's evidence was that the 19 minute timeframe was an "Aldi standard of execution" which meant that an employee should be able to unload one ambient pallet in 19 minutes.[18] However, she said that she personally did not enforce the standard.

(f) Ms Taurau's evidence was that she recalled there being a timeframe in place between May 2018 and June 2019 of 19 minutes per ambient load, but she could not recall how she first became aware of that timeframe.[19] She said that if an employee did not complete the 19 minute timeframe then Mr Hutchinson would give them a bit of a warning after the shift was done and that Mr Gannon "would time us on his phone".[20]

(g) Ms Mills' evidence was the time expectation had previously been 20 minutes but in 2019 it was 19 minutes.[21] She recalled working the same shifts as the plaintiff and them saying to each other something to the effect of "Geez, it's busy tonight. We need to get this done quite quickly."[22]

(h) Ms Dickson's evidence was that there was a 19 minute timeframe that Aldi had set for employees to try and achieve.[23]

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11 T2-98, ll 4 – 29.
12 T3-14, ll 30 – 40.
13 T3-19, ll 20 – 35.
14 T3-20, ll 4-10.
15 T3-25, ll 30 – 38.
16 T3-26, ll 28 – 30.
17 T3-24, ll 2.0 – 40.
18 T3-49, ll 1 – 15.
19 T3-31, ll 25 – 33.
20 T3-32, ll 10 – 15.
21 T3-43, ll 13 – 19.
22 T3-40.
23 T3-60, ll 37 – 43.

[32] Additionally, the plaintiff had been counselled about being too slow in unloading pallets. Her evidence was that she often fell short of meeting the time target and that "conversations about my speed started almost immediately upon being employed and continued all the way up to my injury".[24] The defendant's "30/60/90 DAY PROBATIONARY REVIEW – STORE ASSISTANT" document about the plaintiff is consistent with the plaintiff's evidence that she was counselled about being slow in unloading pallets because she was graded as "needs improving" for the 30 and 60 day reviews and as "meeting the standard" for the 90 day review under the defendant's criteria of "speed and efficiency".[25]

[33] The plaintiff referred to an occasion when she was called into the office by Ms Ryan and Ms Barton. The two assistant managers told her that her speed was unacceptable. Ms Barton's recollection of that occasion, on New Year's Day 2019, was consistent with the plaintiff's evidence. Ms Barton, who in 2019 was a trainee store manager, recalled having to speak to the plaintiff about her performance on that occasion. She said she had to talk to the plaintiff about the fact that it was unacceptable that the plaintiff and another co-worker took so long for a load to be run. She recalled telling the plaintiff that it was unacceptable how slow the unpacking took, and she needed to try to keep up her speed for a bit longer and a little bit more. The plaintiff's response was simply that she said "okay".[26]

[34] Ms Mills, a sales assistant who worked at the defendant's premises between 2016 and 2018, recalled relevantly her observations of the plaintiff when they were both store assistants. She worked alongside the plaintiff from time to time and initially observed that the plaintiff was "quite efficient with her job".[27] Ms Mills observed a noticeable difference from the time the plaintiff first commenced employment, to the end of June 2019 (being the period before the incident) and in respect of the period around June 2019, it was her opinion that the plaintiff's "performance was not as well as when she first commenced". In other words, meaning that the plaintiff was "not as quick, not as enthusiastic, quite slow".[28]

[35] The defendant sought to highlight that due to the evidence of Mr Hutchinson, Mr Gannon, Ms Mills, Ms Barton, Ms Dickson and Ms Taurau, the 19-minute timeframe was not strictly enforced, and the time expected for someone to unpack an ambient load varied depending on the load being unpacked. For instance, it could take 10 minutes for a load with chips, or longer than the 19 minutes with a load with heavier items. Be that as it may, my view is that it was still an average time over which ambient pallets should be unloaded during a shift, and, in any event, it seems to me that on several occasions prior to the incident, management at the defendant's premises told the plaintiff that her speed of unloading ambient stock was too slow and she needed to improve. Further, in the months before the incident, the plaintiff approached Mr Hutchinson about a deputy manager role becoming available. Mr Hutchinson told her that if she got up to speed, then she would be considered for the role. In order for her to become more efficient, the plaintiff decided that she would have to increase the volume of stock she lifted at one time.

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24 T1-22, ll 23 – 24.
25 Exhibit 9.
26 T1-51.
27 T3-39, ll 23-37.
28 T3-41.

Her attempts to increase her speed were supported by Ms Barton who would at times encourage her to pick up her speed.

[36] The plaintiff also gave evidence that nobody said anything to her about the way she was lifting. It is not overly controversial that the plaintiff was never reprimanded, counselled or further instructed in respect of her manual handling technique by anyone in management at the defendant's store.[29]

Employer's Liability

[37] At common law, an employer owes a non-delegable duty of care to its employees to avoid exposing them to unnecessary risk of foreseeable injury.[30] The duty does not oblige the employer to safeguard employees completely from all perils.[31] Among other things, the duty obliges an employer to take reasonable steps to provide a safe place of work and a safe system of work.[32] Further, "the employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system."[33] What that requires was explained by Boddice J (McMurdo P and Gotterson JA agreeing) in *S J Sanders Pty Ltd v Schmidt* [2012] QCA 358 that:

> "An employer's duty of care requires that it establish, maintain and enforce a safe system of work. That obligation requires the undertaking of appropriate risk assessments, the devising of a proper method, training in its use, instruction to use that method, and the taking of reasonable steps to ensure its implementation. It includes the giving of such instructions, and the supervision of their enforcement, to experienced workers, having regard to the fact that an experienced worker may inadvertently or negligently injure themselves".[34]

[38] By reason of s 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA), the duty the defendant owed to the plaintiff is not breached unless the risk was foreseeable, not insignificant and, in the circumstances a reasonable person in the position of the defendant would have taken the precautions. Regarding the determination of whether there has been a breach of duty, ss 305B and 305C of the WCRA are as follows:

> "**305B General principles**

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29 Further Amended Statement of Claim, [13] and Further Amended Defence, [9].

30 *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839, [12] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ).

31 *Knott v The Withcott Hotel* [2015] QDC 15, [89] citing *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316, 318.

32 *Kondis v State Transport Authority* (1984) 154 CLR 672, 680, 687-688 (Mason J)

33 *McLean v Tedman* (1984) 155 CLR 306, 313 (Mason, Wilson, Brennan and Dawson JJ).

34 [29], citing *McLean v Tedman* (1984) 155 CLR 306, 313; *Reck v Queensland Rail* [2005] QCA 228, [16] and *Bus v Sydney County Council* (1989) 167 CLR 78, 90.

(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—

(a) the probability that the injury would occur if care were not taken;

(b) the likely seriousness of the injury;

(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[39] The enquiry as to whether a duty of care has been breached is prospective and not confined to the circumstances of the plaintiff's accident.[35] The analysis must be undertaken from the viewpoint of the defendant, in the circumstances that were

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35 See *Lusk v Sapwell* [2012] 1 Qd R 507 per Muir JA (Margaret Wilson AJA and A Lyons J agreeing), [18] and [22].

known, or ought to have been known, to the defendant at the time of the alleged injury.[36]

[40] The risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. However, it is not confined to the precise set of circumstances in which the plaintiff was injured. Rather, what must be reasonably foreseeable is "the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred".[37] An employer is not required to guard against all risks of injury.[38]

[41] The first step, as has been identified to me on the plaintiff's behalf, in assessing whether a breach of duty has occurred under s 305B of the WCRA is to identify the risk of injury.[39] I find in the present instance the relevant risk of harm is the risk of injury to an employee when manually handling products over 10 kilograms.

[42] On the plaintiff's behalf, it was submitted that the risk was both foreseeable and not insignificant in terms of s 305B(1)(a) and (b) of the WCRA, in circumstances where:

(a) The defendant operates a supermarket business that relies on its employees to manually re-stock items of product on the shelves.

(b) The evidence established that running load was a significant part of an Aldi store assistant's job. The plaintiff's evidence was that every shift she would generally do some form of load running.[40]

(c) The "Running Load – Ambient" task in "ALDI Stores Job Dictionaries – Store Assistants & Managers" confirmed that the task of running ambient load involved:[41]

(i) Frequent (being 34-66%) waist lifting of less than (or equal to) 10kg;

(ii) Occasional (being 10-33%) waist lifting of 10 to 15 kg;

(iii) Occasional (being 10-33%) push/pull of less than (or equal to) 10 kg;

(iv) Occasional (being 10-33%) overhead lifting of less than (or equal to) 5 kg; and,

(v) Occasional (being 10-33%) ground lifting of less than (or equal to) 15 kg.

(d) The "Running Load – Ambient" task is described as "medium". "Medium" is described as "*exerting 10-25kg of force occasionally, or 5-10kg of force frequently, or up to 5kg of force constantly to move objects…".*[42] One of the intentions of the ALDI Stores Job Dictionary is to provide:

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36 Ibid.
37 See *Rudd v Starbucks Coffee Company (Australia) Pty Ltd* [2015] QDC 232, [150].
38 See *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29, 41 per Williams J.
39 *Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329, [77].
40 T1-20, ll 19 – 39.
41 Exhibit 35.
42 Exhibit 35, page 1.

> *"An analysis of the inherent physical requirements for each individual task; and identifying areas of risk within the business*."[43]

(e) The defendant, therefore in its own document, identified this task as a "medium risk". The document is also completely contrary to the defendant's pleaded case of the plaintiff being instructed to never lift on her own, more than 10 kilograms.

(f) One of the first slides shown in the Manual Handling Training Module is a slide which states that "36% of injuries that occur in the workplace are defined as manual handling injuries."[44] In the video, the instructor states, inter alia, "*poor manual handling can lead to workplace injuries and that is something we definitely want to avoid."*

[43] At trial, it seemed to me that much of the focus of the defendant's defence related to the measures the defendant took to avoid a foreseeable risk of injury, although I do note that it was specifically pleaded by the defendant that the task of unloading a pallet with 5 kilograms trays of tomatoes did not create a foreseeable risk of injury and the work did not expose the plaintiff to a risk of injury.[45] However, the case advanced by the plaintiff at trial was that the relevant risk of harm is the risk of injury to an employee when manually handling products over 10 kilograms. In any event, when viewed objectively, I am satisfied that such a risk was foreseeable and not insignificant in light of the features identified to me in the preceding paragraph (and where the employer has acknowledged in its own risk documentation that a worker will occasionally lift 10 to 15 kilograms).

[44] The plaintiff has agitated that she did not receive appropriate manual handling training as part of her induction. It was also emphasised on her behalf that the lack of appropriate manual handling training occurred in the context of a store culture where a significant emphasis was placed on speed of completing the task of running an ambient load. In circumstances where it was effectively left up to individual staff members to determine how much weight they were comfortable lifting at any one time, this, it was said, invariably led to unsafe manual handling practices evolving. There was no, or no effective, follow-up manual handling training and the plaintiff was not supervised.

[45] Arguments have been advanced on the plaintiff's behalf that there were a number of precautions a reasonable person in the defendant's position would have taken against the risk of injury.

[46] The first was to ensure that the plaintiff was provided appropriate initial training in manual handling. That first would have involved complying with the Manual Handling Module that was in existence at the time of the plaintiff's induction. That, it was suggested, did not occur. Additionally, appropriate training would involve more thorough testing to ensure a proper understanding of what was being taught. There also ought to have been instructions given about the maximum weight the plaintiff should lift safely by herself and the maximum number of cardboard trays she should lift at any one time. On the defendant's pleaded case, this ought to have been 10 kilograms and two cartons.

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43 Exhibit 35, page 1.
44 Exhibit 20.
45 Further Amended Defence, [11](j) and (l)].

[47] The defendant sought to rely upon a number of matters. In terms of the plaintiff's manual handling training, it was highlighted that the plaintiff's evidence-in-chief was that Mr Hutchinson showed her around the warehouse, the store, the office and the break room. The plaintiff was required to watch a video and was asked by Mr Hutchinson if she knew how to lift, to which she replied "yes", in circumstances where she had not previously (prior to commencing with the defendant) received any training about lifting.[46] The effect of the plaintiff's evidence in this regard, it was submitted, was that she lied to Mr Hutchinson about previous training. In cross-examination, the plaintiff accepted that by the end of watching the video on the iPad for manual handling training, she had been told of the following features of the manual handling training:

(a) to carry out stretches before each shift;[47]

(b) that there were stretching posters located in the store that contained pictures of stretches to carry out;[48]

(c) the lifting technique to follow to safely lift and move items,[49] which technique comprised the need to plan how the item was to be lifted, to look where the item was and the path of its final destination, to examine the item and make a judgment on the weight of it, to look for the weight of the item listed on the box, to consider using a manual handling aid;[50]

(d) if gloves were required, they were always available in store;

(e) that she was shown a demonstration in the video of a lift which included the following detail:

(i) to place the feet as close as possible to the item that is being picked up;

(ii) to bend at the knees if bending down to pick up an item;

(iii) that she had to get a good grip on the item using the palms of her hands and then pull the item close to the body;

(iv) to then lift by straightening the legs and slightly straightening the back;

(v) once the item was in her hands, to be careful moving;

(vi) to continue to hold the item close to the body, at waist height and to pay attention to where she was walking; and,

(vii) once reaching the final destination, to lower the item carefully by bending the knees, and to put the item down and slide it into place;[51]

(f) that she would then be observing a demonstration to practice her manual handling.[52]

[48] On the basis of the plaintiff's evidence, it was submitted by the defendant, that a factual finding should be made that by the end of the iPad training on manual

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46 T1-17.
47 T1-59.
48 T1-59.
49 T1-60.
50 T1-60.
51 T1-60 to T1-61.
52 T1-62.

handling, the above features of manual handling had been appropriately explained to the plaintiff, and demonstrated to her in a video on the iPad. In my view that is not an ambitious submission to make, however, it is not a submission I am willing, on balance, to accept when balanced against the fact that the training was short in duration and occurred within the first day or two of the plaintiff's employment. Whilst I am not of the view that the initial training was entirely unsatisfactory, there were some features which cause me concern. Relevantly, based on the evidence which I have preferred, it is my view that more thorough testing of the initial training in manual handling should have occurred to ensure a proper understanding of what was being taught, together with clear, explicit instructions given about the maximum weight the new staff member should lift safely by themselves at any one time, including the number of cardboard trays. I maintain this view despite Mr Hutchinson's evidence that the plaintiff located him in the store, said that she had finished the module, and after grabbing the iPad and checking to see where things were up to, Mr Hutchinson demonstrated the picking up of a box to her, and had her repeat the process, where he had her "physically do it".[53] It was his evidence in terms of the demonstration to her that he picked up the box, held it close to his body, stood and turned using his feet, not twisting his waist, walked to another part of the warehouse, placed down gently bending his knees (or whatever), picked it back up again and walked it back to where it was found, bending his knees and lowering the product back into place.[54] Perhaps the plaintiff should have demonstrated to Mr Hutchinson how she lifted a number of boxes or cardboard trays, of various weights, sizes and dimensions (as opposed to a fleeting assessment).

[49] I also maintain the view that there were some features of the training which were reasonably lacking even though it was Mr Hutchinson's evidence that he then had the plaintiff do the same demonstration that he had done, where she "… looked at the box, she sized it up, she positioned her feet close to the knee-box, then she bent with her knees like squatting down. She picked the box up comfortably, held it to her body, then stood up and then turned using her feet, walked across the warehouse and placed it down on another D pallet with bending her knees, and then stood up and I got her - then she repeated the process…".[55] That evidence is in conflict with the plaintiff's evidence, which I have accepted, regarding the practical manual handling which she received on the first day. I am unable to reach the view, on the defendant's case, that the plaintiff was, by the manual handling training conducted on 24 May 2018, adequately trained and instructed to safely perform the task of unpacking an ambient pallet, including the lifting and carrying of trays of tinned tomatoes.

[50] Additionally, it was submitted by the defendant that it is not open to make any factual finding that the plaintiff's manual handling training lasted only four minutes and two seconds. I accept this. I also note too that this submission was accepted on the plaintiff's behalf that the four minutes and two seconds is not an accurate reflection of the entire time taken to conduct the manual handling training. Moreover however, the more significant aspects of the Manual Handling Induction module were that:

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53 T1-91.
54 T1-92.
55 T1-92.

(a) at no point in the video on manual handling technique was there any instruction about the maximum weight an employee could lift safely or the maximum number of boxes or items an employee should carry;

(b) the lifting demonstration in the video was of an employee lifting a box in the warehouse in what was clearly a staged scenario. The demonstration bears limited resemblance to the types of product the plaintiff was required to lift when running ambient load as part of her job;

(c) the iPad module contained a quiz with three simple questions. The quiz could not be considered a true "test" of an inductee's knowledge of manual handling. There were only two possible answers to each question. The correct answer to each question was a photograph of the instructor who had demonstrated the correct lifting technique in the video shown only moments early, which clearly revealed the correct answer.

[51] I also accept as was contended on the plaintiff's behalf that another precaution a reasonable person in the defendant's position would take is to maintain and enforce a system of work where:

(a) appropriate manual handling techniques, including the need to keep the load close to the body were enforced by members of the management team;

(b) the speed of completion of the task was not emphasised by management, particularly for newer, inexperienced members; and,

(c) a proper system of supervision occurred so that unsafe manual handling practices can be observed and corrected. Only one to two trays of canned tomatoes were to be carried at one time.

[52] It was submitted these are all measures which were discussed in Mr O'Sullivan's report.[56] Mr O'Sullivan is an Ergonomist. It was emphasised by the plaintiff that Mr O'Sullivan's opinions were not contradicted at trial. Be that as it may, I do not have to act upon his opinions to find in favour of the plaintiff because ultimately it is the trial judge's assessment about matters of law and fact which is relevant. So much so was acknowledged by Mr Lynch of counsel for the plaintiff during his closing address.

[53] Even without considering Mr O'Sullivan's opinions of which I am, on this occasion, not inclined to necessarily consider, it is my assessment of the evidence that another precaution a reasonable person in the defendant's position would have taken to maintain and enforce a system of work would be to implement a proper system of supervision to reduce and/or avoid unsafe manual handling practices to ensure, for instance, that product was lifted and carried close to the body, or that only one to two trays of product be permitted to be carried at one time, especially where speed of the completion of the task was not emphasised to inexperienced or newer staff members.

[54] As to the factors in s 305B(2) of the WCRA, namely, the probability of the injury occurring and the likely seriousness of the injury, these are matters which, as already demonstrated, were recognised by the defendant in its induction training material. It was documented in the defendant's records that a person running an

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56 Exhibit 2, Tab 4, particularly at page 24.

ambient load would be required to waist lift 10-15 kilograms, up to 33 per cent of the time.[57] Given that level of frequency and weight, there is a demonstrated high likelihood of serious physical injury if a person were to adopt unsafe manual handling techniques. It was submitted on behalf of the plaintiff that the burden of taking the precautions was low, in circumstances where the defendant had already in place a training program and employed management staff who had been capable of enforcing the appropriate system of work. I accept this submission. The plaintiff had not received any training in respect of the maximum weight she was able to safely lift, or how many trays of product she was able to safely carry at one time. The training she did on manual handling was a cursory and as part of a much larger volume of training information. The testing of the manual handling understanding was superficial and inadequate. I am left with the impression that it was effectively left up to individual staff members to determine how much weight they were comfortably lifting at any one time which invariably led to unsafe manual handling practices evolving. There was no or no effective follow up manual handling training and the plaintiff was not supervised. At a minimum there ought to have been instructions given about the maximum weight the plaintiff should lift safely by herself and the maximum number of cardboard trays she should lift at any one time. Even on the defendant's pleaded case, this ought to have been 10 kilograms and two cartons. There was no proper system of supervision to prevent unsafe manual handling practices because management did not observe or correct the plaintiff. Therefore, I find that the defendant breached its duty of care it owed to the plaintiff.

[55] Having been satisfied that the defendant has breached its duty of care, I move to the issue of causation.

[56] Pursuant to s 305D (1) of the WCRA, the plaintiff must establish that the breach of duty was a necessary condition of the harm and that it is appropriate for the scope of liability of the defendant to extend to the injury. The first requirement, that the breach was a necessary condition of the harm, requires the plaintiff to prove that "but for" the defendant's breach of duty, her injuries would not have occurred. [58]

[57] In my view, the provision of proper manual handling training or the enforcement of safe procedures for the performance of the task would have either prevented or significantly minimised the risk of injury to render it unlikely that the incident would have occurred because such measures would have, on balance, brought to the plaintiff's attention the inadvisability of lifting three trays of canned tomatoes at one time. Indeed it may have, as submitted by the plaintiff, reduced any emphasis placed on the importance of her speed, which in turn would have eliminated the plaintiff's perceived need to lift as many products as possible at the one time, such as she did when the incident occurred.

[58] Further, the evidence was that at the time of the incident the plaintiff was striving to secure a promotion. There was no evidence that she disobeyed any staff instructions. Therefore it is plausible that she was striving to comply with management expectations. Accordingly, the clear inference is that if she received proper training or instructions from management then she would have complied with that and not lifted the three trays of tomatoes away from her body and therefore would not have suffered her injuries.

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57 Exhibit 35.

58 *Strong v Woolworths Limited* (2012) 246 CLR 182, [18].

[59] The medical evidence also supports a finding that the plaintiff in fact suffered an injury during the incident. There is no issue around the scope of liability given that the incident plainly occurred in the course of the plaintiff's employment duties.

[60] Accordingly, I am satisfied that it has been established, that but for the defendant's negligence, the plaintiff would not have suffered the injury to her back.

Contributory Negligence

[61] The defendant pleaded that if liability was established, the plaintiff's damages should be reduced by 100 percent for contributory negligence (or to such a lesser extent as the court deems fit) because the plaintiff:

(a) failed to act with due care and attention;

(b) failed to take responsible care for her own safety;

(c) failed to take account of the obvious risk in lifting three cartons of tomatoes in circumstances where:

(i) it was obvious that three cartons would be unstable;

(ii) she had not been trained and instructed to adopt the technique;

(iii) she had been trained in safe manual handling practices (both theoretically and practically);

(iv) her training (both theoretical and practical) did not instruct her to adopt the technique;

(v) a reasonable person in the position of the plaintiff (who underwent the theoretical and practical training that the plaintiff had undertaken) would not have adopted the technique;

(d) failed to comply with training and instruction provided by the defendant (both theoretical and practical);

(e) failed to comply with the defendant's safe system of work.

[62] Pursuant to s 305F of the WCRA, the same principles that apply in determining breach of duty by defendant are engaged in determining contributory negligence by the plaintiff. The standard of care required of the plaintiff is that of a reasonable person in her position, and the matter is to be decided on the basis of what the plaintiff knew or ought reasonably to have known at the time.[59] Section 305H provides the circumstances where a court may make a finding of contributory negligence.

[63] Given my earlier findings regarding the training and instruction which the plaintiff received, on balance, I am not satisfied a finding of contribution can be made, despite at least the employer requiring the plaintiff to watch the instructional video, complete a quiz and confirm with Mr Hutchinson, when it was not completely accurate, that she knew how to lift. A principal criticism I have of the employer is the enforcement of safe procedures in the system of work. I am therefore unable to find that the plaintiff failed to comply with instructions regarding her permissibility

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59 Section 305F(2) of the WCRA.

or otherwise to carry more than two cartons of canned tomatoes. I am not satisfied that she disobeyed any instruction given to her by the defendant or undertook an activity involving an obvious risk or failed to account of an obvious risk. I am also not satisfied that she knew that she was taking a risk for her own safety. The plaintiff's evidence, which I am prepared to act upon, was that she was not instructed to lift any maximum weight and was not instructed to lift any maximum number of trays.

[64] Further, evidence was led from other witnesses that they would engage in the same or similar lifts.

[65] All in all, it seems to me that it was essentially up to the individual employee to determine what was reasonable. Accordingly, I am not satisfied that a reasonable person in the plaintiff's position would not have lifted three trays of canned tomatoes when such an activity was not prohibited or discouraged. I therefore make no order for contribution.

Quantum

[66] The incident took place on 28 June 2019 at a time when the plaintiff was 33 years of age. She is now 37.

[67] On the day of the incident, the plaintiff completed her shift and worked the next two days before raising the incident with Mr Hutchinson on 1 July 2019. A formal report was made the following day.[60]

[68] On 2 July 2019, the plaintiff presented to her General Practitioner complaining of a "twinge". The doctor's impression was of a "likely disc irritation". She was advised of "heat packs, stretches and analgesia" and to return two days later for further advice and a medical certificate was issued. The plaintiff then returned two days later where it was reported of ongoing pain in her lumbar region. She was referred for physiotherapy. On 8 July 2019, she commenced physiotherapy.

[69] By 11 July 2019, the plaintiff's General Practitioner reduced her hours to a maximum of six hours per day. The plaintiff was prescribed a short cause of Prednisone. By 18 July 2019, the plaintiff's General Practitioner reported "definite improvement" in the plaintiff's symptoms.

[70] The plaintiff continued to receive physiotherapy treatment. A letter from her physiotherapist dated 10 September 2019 noted that she had attended 11 times and that, at the most recent appointment, the plaintiff reported only slight right sided hip pain "with minimal low back pain".

[71] Yet on 12 September 2019, the plaintiff returned to her General Practitioner with increased pain. She reported she "had been doing really well regarding her lower back until overnight. Pain had essentially settled completely. [She] had attended a couple of sessions at gym with noted stiffness after and increasing pain

60 Exhibit 34.

overnight/this morning." Consequently, the plaintiff attempted to reopen her statutory Workcover claim because she felt that her current pain was an aggravation of the injury sustained in the incident. Her attempt to reopen the claim was unsuccessful.

[72] On 22 October 2019, the plaintiff underwent an MRI of the lumbosacral spine which reported mild lower lumbar spondylosis and disc degeneration slightly more marked at L4/5 level where a posterior annular tear and mild generalised disc bulge was noted.

[73] On 18 November 2019, the plaintiff was referred by her General Practitioner to the physiotherapy department of the Ipswich Hospital. She again presented on 27 November 2019 to her General Practitioner after she aggravated her lower back pain whilst on light duties at the defendant's premises.[61] She sought physiotherapy from the Ipswich Hospital on 16, 22 and 29 June 2020.

[74] On 31 August 2020, the plaintiff commenced attending upon massage therapist Troy Randall at Pain 2 Performance. Mr Randall then began to regularly treat the plaintiff. His most recent treatment was on 31 December 2021. The treatment consisted of joint manipulation, both dry and electro-dry needling, massaging and a rehabilitation exercise protocol.

[75] The plaintiff has been seen by two independent medico-legal experts. Neurologist, Dr Don Todman, saw the plaintiff on 23 February 2021. Orthopaedic Surgeon, Dr John Tuffley, saw the plaintiff the following day.

[76] On the occasion Dr Todman assessed the plaintiff, she reported to him that she was still suffering from symptoms related to the incident, namely persistent pain across her low back. Dr Todman was of the view that, on examination, the plaintiff showed some tenderness in the lumbar paravertebral muscles. He noted there was reduced forward flexion in the lumbar spine by 40 degrees, a left lateral flexion by 40 degrees and a right lateral flexion by 30 degrees. He also noted that strength, reflexes and sensation were normal in the lower extremities. The rotation of her hip was also normal. Dr Todman's view was that on 28 June 2019, the plaintiff developed acute lower back pain, the symptoms of which continue. In his view, the ongoing symptoms are directly attributable to the incident. The incident was consistent with causing trauma to the lumbar spine. He assessed the plaintiff's injury as DRE Category II injury using AMA 5 guidelines which represents a seven percent whole person impairment. He was also of the view that the increase in pain after attending gym on 11 September 2019 was an aggravation of the plaintiff's pre-existing injury, rather than a new incident.

[77] Orthopaedic Surgeon Dr Tuffley reported that the plaintiff indicated to him that she experiences most back pain in the lumbosacral region. His view was that the ranges of lumbar spine motion the plaintiff was able to demonstrate actively were forward flexion allowing her fingertips to reach the upper poles of her patellae, extension which was normal in range but associated with complaint of tingling in her buttocks and lateral flexion to 20 degrees bilaterally. All lumbar spine motions and simulated motions were associated with deep sighing. No guarding, spasm or dysrhythmic motion was observed during the demonstration of the lumbar spine

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61 Exhibit 2, volume 2, tab 5, page 27.

motion range. There was a full range of motion of both hips and both knees. There was no complaint of lateral hip pain during maximum adduction of the hips. It was Dr Tuffley's view that prior to the incident, the plaintiff had some minor age-related degenerative change in her lumbar spine. His view was that the incident may have caused the plaintiff a minor musculo-ligamentous strain in the region of her lumbar spine which would last for four to six weeks. It was noted that the posture of her back at the time the canned tomatoes fell to the floor was within normal physiological limits, and that following the incident, she was able to retrieve the canned tomatoes from the floor and from under the shelves without restriction. Unlike Dr Todman, Dr Tuffley was of the view that the complaint of increased back pain after attending gym on 11 September 2019 was consistent with a new episode of back pain and did not represent an aggravation of the injury suffered on 28 June 2019. His assessment was that the incident has not left the plaintiff with any permanent impairment and, as such, he assessed a zero percent whole person impairment under a DRE Category I injury using AMA 5. He was of the view that the back pain which followed her gym attendance was also likely to be a musculo-ligamentous strain, or at worst, a minor exacerbation of pre-existing degenerative change in the lumbar spine.

[78] Whilst Dr Todman and Dr Tuffley are of the view that the plaintiff suffered an injury to the spine, they obviously disagree about the extent of the injury, including the level of permanent impairment and disability that it has caused and whether the gym attendance on 11 September 2019 represented a new injury or simply an aggravation.

[79] The difficulty for the defendant in having Dr Tuffley's opinion preferred over Dr Todman is that some of the contemporaneous medical documentation does not bode well with Dr Tuffley's opinion that the injury would have resolved in four to six weeks, that is sometime between late July and mid-August 2019 because I note the plaintiff sought medical treatment and physiotherapy between mid-August and prior to attending gym on 11 September 2019.[62] I do note however that the plaintiff reported relatively mild symptoms during that period, and, on 29 August 2019, her General Practitioner was of the impression that she was fit to return to full duties.

[80] Nonetheless it has been submitted on the plaintiff's behalf that I should accept Dr Todman's opinion for four reasons. The first, as I have already identified, is expressed in the following way, namely that Dr Tuffley's opinion that the plaintiff would have made a full recovery between four to six weeks from the injury was inconsistent with the plaintiff having consistently reported lower back pain to her treating practitioners in the time leading up to it and following that period. To me, it seems common sense therefore that, consistent with Dr Todman's opinion, the plaintiff suffered an aggravation of her pre-existing injury rather than a new accident, after she attended gym on 11 September 2019. I make this assessment despite the defendant's submission that I should find that by 12 September 2019, the plaintiff's symptoms in respect of the injury suffered on 28 June 2019 had resolved.

[81] A second reason, submitted on the plaintiff's behalf to accept Dr Todman's opinion, is that Dr Tuffley confirmed in cross-examination his opinion that the plaintiff's back pain suffered after attending the gym in September 2019 was a new episode of

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62 Treatment sought on 16, 22, 27 and 29 August and 5 September 2019.

back pain which was based on his understanding that the plaintiff "went and did another physical task similar to the one she did when she was lifting tomatoes …".[63] However the evidence, it was submitted, does not support that assumption. There is no evidence that the plaintiff lifted up to 15 kilograms at the gym. The plaintiff's evidence was that she did body weight exercises and stretching. Therefore, it was submitted that the factual assumption which formed the basis of Dr Tuffley's opinion has not been established on the evidence. This is a sensible submission to make and one which I am prepared to accept.

[82] Thirdly, it was submitted that Dr Tuffley provides no cogent explanation for the presence of the annular tear identified on the 22 October 2019 MRI. His evidence in cross-examination was that it was possible that the tear occurred on the day of the incident, but that one cannot "categorically say it did".[64] I do not find this submission persuasive, on its own, to reject the entirety of Dr Tuffey's opinion.

[83] Finally, it was submitted that Dr Todman's opinion overall was more consistent with the plaintiff's evidence as to the symptoms she experienced and the difficulties that she has encountered returning to work after the incident. It may be so that Dr Todman's opinion was more consistent with the plaintiff's evidence as to the symptoms she experienced, but ultimately I am left with some scepticism about the plaintiff's efforts of returning to work given her employment history prior to Aldi. I intend to expand further when addressing economic loss.

[84] In the end I am left with the view that Dr Todman's opinion, on the whole, was slightly more compelling than that of Dr Tuffley in light of the overall evidence.

[85] I will now consider each relevant head of damage.

General Damages

[86] General damages for pain and suffering are to be assessed in accordance with s 306P of the WCRA and the general damages calculations provisions are set out in s 130 and Schedule 8 of the *Workers' Compensation Rehabilitation Regulation* 2014 ("the Regulation").

[87] It was highlighted to me on the plaintiff's behalf that the plaintiff is consciously aware of the toll that her injury has taken on her enjoyment of life. It was submitted that the dominant injury is likely to fall within either Item 91 (Moderate thoracic or lumbar spine injury – fracture, disc prolapse or nerve root compression or damage) or Item 92 (Moderate thoracic or lumbar spine injury – soft tissue injury) within Schedule 9 of the Regulation.

[88] On the other hand, the defendant has submitted that the plaintiff's injury should be assessed under Item 93 (Minor thoracic or lumbar spine injury) based upon an acceptance of the opinion of Dr Tuffley over that of Dr Todman, that is because the plaintiff's injury would have resolved within a short period of time. It was contended that her ongoing symptoms were not attributable to the injury suffered in the incident. Alternatively, it was submitted that if the opinion of Dr Todman was

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63 T3-5, II 38-45.
64 T3-6, II 32-45.

accepted, the appropriate item would be Item 92 (Moderate thoracic or lumbar spine injury – soft tissue injury).

[89] It is my view that the plaintiff's injury should be assessed under Item 92 (Moderate thoracic or lumbar spine injury – soft tissue injury). I attach an injury score value ("ISV") of 8 because Dr Todman's diagnosis is that of a chronic muscular ligamentous strain to the lumbar spine and an annular tear at the L4/5 level, resulting in a seven percent whole person impairment. I have come to the view that an ISV of 8 is appropriate as opposed to an ISV of 10, in light of the seven percent whole person impairment as opined by Dr Todman, balanced against some of the plaintiff's complaints. For example, as was identified to me on behalf of the defendant which I accept as persuasive, the plaintiff asserted that she was restricted, among other things, in her ability to drive, yet she was able to drive 186km on two occasions for the purposes of having a massage at City Cave Caloundra on 16 March 2022, and for the purpose of purchasing some treatment oil on 28 March 2022. There was no evidence of the plaintiff complaining to her General Practitioner about any issues with driving these distances on these occasions. In addition, the plaintiff's Facebook posts otherwise evidence her having travelled regularly to the Sunshine Coast and to northern New South Wales; not demonstrative of any significant ongoing issues with driving. There is also, in my view, an absence of sufficiently compelling evidence regarding treatment for ongoing back pain. I also remain circumspect with respect to the ongoing effects of the injury the plaintiff sustained as a consequence of attending a gym, irrespective of her view that it was for rehabilitation purposes. For me, a peculiar feature with the plaintiff's evidence was that she has recently completed a Certificate III in Fitness from TAFE, which will permit her to work as a fitness instructor, which will inevitably require her to utilise more effort on her lumbar spine. It is therefore somewhat contrary to the plaintiff's complaints of pain in her back.

[90] An ISV of 8 equates to an award for general damages of $12,530.

Past Economic Loss

[91] The plaintiff is 37 years of age. She completed grade 11 in 2001. Her first daughter arrived in 2006. Her second daughter arrived in May 2013.

[92] The plaintiff's employment history is sporadic. On my calculations, she worked approximately two and a half years over a period between 2001 and 2006, that is the period of time between when she finished school and the birth of her first child. For six months she was employed at McDonalds, she spent another six months working at a German bakery, and as a car detailer with a car dealership for possibly a year and a half. There was limited evidence given by the plaintiff about her reasons for not being able to work during the entire period before the arrival of her first child. She did not undertake any study during this period. I accept therefore the submission on behalf of the defendant that the evidence with respect to her work history prior to having her two daughters establishes that the plaintiff, for unexplained reasons, demonstrated a capacity to work intermittently on a part time basis. The evidence demonstrates that the plaintiff, for unexplained reasons, had breaks from any employment during 2001 and 2006. The defendant's submissions also focused upon what could be described as embellishments within the plaintiff's curriculum vitae. For me, whilst not ideal, it does not entirely impugn the plaintiff's

credibility. It is clear however that the role at Aldi was the plaintiff's first paid employment in a couple of years. Prior to her paid employment with Aldi, the plaintiff said that she volunteered some of her time with the RSPCA and Youngcare.

[93] After the incident, the plaintiff took six days off work following which she was placed on light duties as per her General Practitioner's recommendation. There were difficulties for the defendant in finding suitable duties for the plaintiff. By 25 June 2020, she became unemployed after she was told that there were no light duties to be performed at Aldi based on what she had been certified as fit to perform.

[94] In May 2021, the plaintiff obtained fulltime employment as a receptionist at Healthy Lifestyles. This role was short lived. The plaintiff gave evidence that she thought the reception work would be good for her because she could sit down and would not need to do any heavy lifting. However, she struggled with the hours due to the sitting and, as a consequence, experienced increased pain in her back. Accordingly, on the recommendation of her General Practitioner, the plaintiff reduced her hours to part time. In that respect a letter from her General Practitioner to the employer dated 18 June 2021 stated that the plaintiff had a long-term back injury from 2019 and that reducing to part time work was recommended as part of the management of her back condition.[65] In July 2021, the plaintiff's employment was terminated because her employer required a fulltime person to undertake the role. The plaintiff therefore worked for a period of seven weeks. She remains unemployed to this day.

[95] The plaintiff has applied for other jobs, but I am not convinced those efforts have been genuine. She gave no detailed evidence as to how many jobs she applied for, nor did she adduce evidence of any applications she had made. Further, when cross-examined about her job applications between August and September 2021, the plaintiff said that she "applied for quite a few jobs around the same time as Petbarn" as a casual sales assistant. When asked whether she provided any of these job applications to her solicitors, she said "I thought I did". Whilst I accept that she applied for a job with Petbarn in October 2021 as a casual sales assistant, she did not produce any evidence of her actual application. I am troubled about the plaintiff's sporadic employment history prior to her first pregnancy. All of these things cause me to consider that a discount should be made in the circumstances, despite contrary submissions made on her behalf.

[96] I have earlier referred to the plaintiff's recent completion of a Certificate III in Fitness.

[97] On my calculations, the plaintiff's financial records demonstrate that in the time she worked at Aldi prior to the injury (being a period of about 57 weeks), she received on average $570.18 net per week.[66] This amount is slightly lower than the figures identified on behalf of the plaintiff for it has been highlighted that the plaintiff's financial records revealed that she earned $34,189 gross in the financial year ending 2019, a putative income of approximately $599.37 net per week and $604.28 net per week for the period from 1 July 2020 onwards.

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65 Exhibit 2, tab 5, p 163.

66 Over 57 weeks, the plaintiff received $32,500 net based on $2,104 for 5 weeks (from 21 May 2018 to 30 June 2018) and $30,395 for say 52 weeks (from 1 July 2018 to 30 June 2019).

[98] On the plaintiff's behalf, it was sought that there are three periods in which past economic loss is claimed, namely:

(a) The first is the period from the incident (28 June 2019) until 24 May 2021 when the plaintiff started at Healthy Lifestyles on 24 May 2021. Adopting her earnings as per above, she would have earned an income of $59,568.40 net. Instead during that period, she received an actual income of $17,923 net from Aldi, thus resulting in a loss of $41,645. No loss is claimed for the period from 24 May 2021 to 13 July 2021 whilst she was employed at Healthy Lifestyles.

(b) The second period is from 13 July 2021 until the time of trial. She has been unemployed for that whole period despite having made several job applications. It was submitted that she would have continued in her role as a store assistant at Aldi, but for her injuries, and earned an average net weekly income of $612.35, amounting to a loss of $30,617.50.

(c) Finally, for the two-week period from 1 July 2022 to trial, the plaintiff's weekly earnings had she remained at Aldi would have been $599.37 net per week (the difference in weekly amounts in the preceding year being due to the different income tax rated in 2021/2022 financial year). That amounts to a loss of $1,198.74.

[99] I am persuaded by the submission advanced on behalf of the defendant that the plaintiff in fact applied for very few jobs from the date of the incident until the present day, and that the reason the plaintiff had and has not yet found employment is not principally due to her injuries, but rather due to her lack of reasonable efforts to apply for and obtain employment. It is in that respect a discount should be appropriately applied in my view.

[100] Another reason for the discount should be that the plaintiff, in my assessment, was unable to work due to either unrelated medical issues, holidays or her own voluntary decision to not to work during the COVID pandemic. For example, she suffered from a serious migraine with associated side effects including neck pain from 26 December 2019 through to at least 12 January 2020. The plaintiff was certified unfit to work during this period by her General Practitioner.[67] She attended the Ipswich Hospital on two occasions during this time being on 27 December 2019 and 5 January 2020. She attended upon Dr Smith at the East Clinic on 8 January 2020 again complaining of ongoing migraine and headache symptoms. She travelled to Bali on 6 March 2020 for four days following which she was required to isolate for 15 days (as reported by the plaintiff to her General Practitioner on 25 March 2020). She reported to Dr Tuffley that she chose not work during the first four months of COVID pandemic in order to care for her children.

[101] The defendant has submitted that by reason of the evidence of the plaintiff's General Practitioner and Dr Tuffley's opinion, the plaintiff was certified fit to return to full duties by 12 September 2019, such that any loss beyond that date is unrelated to the incident, and instead, related to a fresh injury she suffered at the gym on 11 September 2019. It was highlighted that by 11 September 2019, the plaintiff was certified by General Practitioner Dr Hedley as fit to return to full duties as her symptoms had completely resolved by this time. It was also highlighted that Dr

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67 Exhibit 23.

Tuffley's opinion was that the plaintiff's injury would have resolved within four to six weeks of the incident such that she was capable to returning to pre-incident duties and hours by 12 September 2019. As such, it was submitted that the plaintiff's past economic loss should be limited to 12 September 2019. Noting that the plaintiff has otherwise been compensated for this time off work, as she received Workcover weekly benefits during this period of time, the appropriate award it was submitted should be $4,747.72.

[102] The defendant also highlighted that as a consequence of her completing her Certificate III in Fitness, the plaintiff's response was to work in "group fitness" as a fitness instructor. She was also required to complete 30 hours of practical training where she was required to "come up with circuits" such that she would be able to have a class. In that time, she was required to attend the gym, watch classes, do some work on a computer, carry out light cleaning, help with memberships and prepare coffees. It was said that this was counterproductive to the plaintiff's claim of an inability to work and ongoing pain and symptoms because she was able to successfully manage and complete the course within the designated time and required no additional time or extension during which to complete the course. It was contended that she was perfectly able to complete the course within the same time as other persons who were not injured.

[103] I do not accept the contention advanced by the defendant that in light of Dr Tuffley's opinion about the resolution of symptoms and the plaintiff's General Practitioner that by 11 September 2019, the plaintiff was fit to return to full duties, because the plaintiff continued to seek treatment beyond that period for her back symptoms. It is my assessment however that there should be an appropriate discount for the plaintiff's past economic loss. Adopting the calculations identified by the plaintiff, a significant discount of 30 percent will be applied to reflect certain considerations, those being: the plaintiff's limited and sporadic work history since leaving school and producing her first child; the plaintiff's limited qualifications and skills; that the plaintiff had a migraine condition for a period of approximately two weeks from 29 December 2019 for which she was unable to work; that the plaintiff had breaks in her part time employment between the date of the incident to the present day; and given her limited work history and age, it is my impression that there is a very real possibility that the plaintiff would have changed jobs from time to time before she settled into a permanent line of employment despite her evidence that she was content to be promoted through the ranks at Aldi. Therefore, past economic loss sits at $58,974.93 calculated as follows:

(a) The first is the period from the incident (28 June 2019) until 24 May 2021 when the plaintiff started at Healthy Lifestyles on 24 May 2021, the resulting loss of $41,645.

(b) The second period is from 13 July 2021 until the time of trial, being a loss of $30,617.50.

(c) Finally, from 1 July 2022 until judgment at $599.37 net per week (20 weeks).

(d) Reduced by 30 percent.

Interest on Past Economic Loss

[104] Interest on $58,974.93, after deducting the net weekly benefits of $609.12, at 1.96 percent (being one half of the 10-year government bond rate at the most recent quarter (October 2022)) over a period of 177 weeks (calculated since date of injury) equals $3,893.88.

Loss of Past Superannuation Entitlements

[105] For past loss of superannuation entitlements, I assess $5,251.52 based on:

(a) 9.5 percent for 104 weeks, in the amount of $2,769.42.

(b) 10 percent for 52 weeks from 1 July 2021 to 30 June 2022, in the amount of $2,143.23.

(c) 10.5 percent from 1 July 2022 to the present (20 weeks), in the amount of $338.87.

Future Economic Loss

[106] A figure of $250,000 is being sought on behalf of the plaintiff.

[107] The assessment of this head of damage involves a consideration of whether the plaintiff has demonstrated, on the balance of probabilities, that her earning capacity has been diminished by reason of the accident caused injuries and, if so, whether that diminution in earning capacity is or may be productive of financial loss.[68] It remains with the plaintiff to show that her earning capacity has been diminished by the accident caused injury and "that diminution is or may be productive of financial loss".[69]

[108] In *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, the High Court held that it was an error to conclude, on the balance of probabilities, whether the future event would have happened by the relevant date with a consequence that loss of earning capacity for a period after that date did not occur.[70] Rather, the future hypothetical event was to be approached according to the possibilities with the plaintiff entitled to the relevant proportionate amount of the prospect that loss of earning capacity would continue after the relevant date, in future, and until the end of the plaintiff's expected working life.

[109] It was highlighted on behalf of the plaintiff that in this case her loss is ongoing and demonstrated by the evidence, viz:

(a) At the time of the accident, the plaintiff had been employed by the defendant for over 13 months;

(b) The plaintiff had passed her probation period and her work performance was altogether satisfactory;

(c) At the time of the accident, the plaintiff was a permanent part time of the defendant's staff at their Brassall store;

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68 See generally *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312, [47] - [51] per White JA.

69 See *Nucifora & Anor v AAI Limited* [2013] QSC 338, [30], as applicable to the *Civil Liability Act* 2003, analogous to the WCRA.

70 As applied by Jackson J in *Rodger v Johnson* [2013] QSC 117, [14].

(d) The plaintiff was ambitious and was interested in promotion;

(e) Since June 2020, the defendant has been unable to offer the plaintiff any suitable duties and she has not worked in the period since that time;

(f) The plaintiff attempted alternate sedentary work as a medical receptionist, but found that the prolonged sitting aggravated her back pain;

(g) On medical advice, she transitioned to part time work, however, was terminated before the end of her probation period because she could not work full time;

(h) The plaintiff has limited transferable skills and experience;

(i) According to Dr Todman, the plaintiff's experience of lower back pain would clearly interfere with her capacity for employment;

(j) The plaintiff has qualified with a Certificate III in Fitness from TAFE, however, remains unemployed.

[110] I was invited by the plaintiff's representatives to be impressed with the plaintiff and be satisfied that she is desirous of obtaining work. I am not overly enthused with respect to the plaintiff's efforts to seek employment post incident. Nonetheless, it was submitted on her behalf that she is motivated to work in disability fitness, albeit the availability of such employment is unclear.

[111] It was submitted that allowing the plaintiff, say, two years to transition into employment at a weekly rate of $600 net per week (yielding a loss of $59,400) and thereafter reasonable to assume that because of her injury the plaintiff has lost approximately half her pre-accident earning capacity ($300 net per week) for the remainder of her working life, deferred for two years would yield approximately $215,000. Therefore, the putative loss over the balance of her working life, by reason of her lower back pain, is in the order of some $275,000. After discounting by 10 percent, a figure of about $250,000 is appropriate.

[112] It was also submitted that the discount for the contingency should not be as large because the base figures applied in respect of the calculation for the plaintiff's future economic loss were conservative and based on the first 12 months after she re-entered the workforce following the birth of her two children.

[113] As was highlighted on behalf of the defendant, which I accept, there is no evidence at all that the plaintiff will remain unemployed for a further two years. It was highlighted also that the plaintiff's claim is otherwise on the basis that she has lost half of her pre-accident earning capacity such that she will only have an earning capacity of 10 hours per week. It was highlighted that the plaintiff's sporadic history does not support the view that the plaintiff would have continued until retirement working 20 hours a week, or in any capacity, until retirement and neither Dr Tuffley nor Dr Todman provide any opinion that the plaintiff's capacity until the time of her retirement is now limited to 10 hours per week. I accept as has been submitted on the defendant's behalf that the evidence does demonstrate that there are uncertainties in what the future would have held for the plaintiff in terms of her working life, if not for the incident.

[114] I am also persuaded by the submission advanced that, significantly, the plaintiff gave evidence as to her future career path and study that she has pursued post-accident. The plaintiff has undertaken and completed study and during her evidence expressed a real and genuine interest in a future career path as a fitness and group fitness instructor. This is a physical role which is seemingly entirely inconsistent with the plaintiff's otherwise significant claim for ongoing pain, symptomatology, impairment and loss of capacity for work. Notably too, the interest that the plaintiff expressed during her evidence is a completely different career path to those with which she has experienced prior to the incident, and certainly completely different again to the three short roles that she carried out prior to having her two children.[71] As has also been highlighted on behalf of the defendant, the plaintiff gave no evidence as to how much money she could potentially earn in the role of disability fitness and the court is left to speculate about these matters.

[115] Regarding the plaintiff's capacity for employment, Dr Tufley was of the opinion that there was no evidence of any restriction and within four to six weeks from the date of the injury, she would have been capable of returning to her normal employment with no restriction. Dr Todman's view is slightly conservative in that he expresses the opinion that with some conservative treatment, it was possible for the plaintiff to achieve a gradual return to work which would be on light duties initially. He considered she would have difficulties doing her pre-accident duties. He provided no opinion as to her ability to carry out office work, although noted she may have some difficulty with sitting.

[116] The medical evidence otherwise demonstrates the plaintiff has other medical conditions including chronic fatigue syndrome and has, in the past, suffered depression and anxiety.

[117] As in all cases, an assessment of the loss of earning capacity involves an evaluation of the probabilities and possibilities that hypothetical events will occur.[72] This is not an exact science. She is 37 years of age. She has a not insignificant working life ahead of her prior to normal statutory retirement (30 years). According to Dr Todman, the plaintiff's lower back complaints interfere with her capacity for employment. He is of the view too that the plaintiff requires further treatment, but it is possible with response to treatment in three to six months that she may be able to achieve a gradual return to work. It is apparent that she has a residual work capacity which will improve so long as her condition improves. I am unable to come to a conclusive view about a defined weekly loss for the plaintiff, other than a nominal amount of say $50 - $75 net per week because in my view, despite the plaintiff's current unemployment status, she has recently completed her Certificate III in Fitness, and will, on balance, obtain employment in the future given her age. In light of these matters, and given the plaintiff's education and limited employment history, I will allow a global amount of $60,000 for future economic loss. One way for me to fortify this figure is to assume say six months' gradual return to work following further treatment, which seems consistent with the opinion expressed by Dr Todman (although I do recognise that opinion was expressed in April 2021 and the plaintiff has not returned back to work, however, I remain unconvinced about the genuineness of those efforts based on her sporadic previous employment

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71 T1-41.

72 *Malec v JC Hutton* (1990) 169 CLR 638, 642.

history), $75 net per week loss thereafter for the remainder of the plaintiff's working life, discounted by 15 percent for contingencies.[73]

Future Superannuation Loss

[118] The rate of 11.82 percent should be applied as the current rate of 10.5 percent will rise 12 percent by 2025. The average of those rates over the balance of the plaintiff's working life is therefore 11.82 percent. That equates to a loss of $7,092.

Fox v Wood Damages

[119] Workcover paid $60 to the Australian Tax Office in respect of the plaintiff's weekly compensation benefits.

Workcover Special Damages

[120] The plaintiff will require to recover to Workcover the amount of $3,954.14 on account of medical, rehabilitation and other treatment expenses.

Medicare Australia Refund

[121] The plaintiff will be required to pay Medicare in the amount of $2,967.90 as per the current notice of charge.

Out of Pocket Expenses

[122] The plaintiff tendered a schedule of out-of-pocket expenses claiming the sum of $8,807.41, comprising:

(a) pharmaceutical expenses of $206.50;

(b) travel expenses of $3,368.16; and,

(c) medical treatment expenses of $5,232.75.

[123] It was submitted that the expenses claimed are reasonable having regard to the medical evidence and the nature of the plaintiff's injury and her quest to relieve the symptoms.[74]

[124] Regarding the medical treatment expenses, a number of criticisms were made on behalf of the defendant. It is submitted on the defendant's behalf that an award of no more than $4,000 should be awarded (inclusive of the Medicare refund of $2,967). The remainder relates to the cost of Prednisone, travel to GP appointments and five myotherapy appointments. It was highlighted that in terms of the radiology attendances, the plaintiff has not produced receipts evidencing her payment of any of these items. The plaintiff also gave no evidence about these attendances. I agree. Regarding massage treatments, a cost of approximately $3,000 is sought which is said to relate to 43 massage appointments between 2 July 2019 and 22 June 2022. By the end of December 2019, the plaintiff claims to have attended some six massage appointments. However, no reference was made to her doctors of

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73 $600 p/w for 6 months ($14,400) together with $75 x 809.7 x .952 ($57,812), less 15 percent.

74 The plaintiff was happy to forego an amount of $82.50 on account of her claiming within the schedule the full amounts of a "couples floatation therapy" and an "infrared sauna treatment" when she went with a friend.

attendance at massage therapy appointments until 8 January 2020 in the context of the plaintiff suffering from a migraine. It is significant to note the reference in the plaintiff's attendance at her General Practitioner on 31 December 2019 was migraine complaints. The plaintiff made no reference to massage treatments with the medico-legal experts. The records beyond those assessments were also the subject of focus on behalf of the defendant. Those records, it was submitted, demonstrated matters other than those solely related to the plaintiff's work-related injury. I tend to agree but I will however make an allowance, despite the defendant's submission that such treatment should not be covered.

[125] Regarding the floatation therapy and infrared sauna treatment, it is my assessment that no allowance should be made despite the plaintiff being prepared to only claim half of the amount. I do so because as has been submitted by the defendant, the plaintiff was generally evasive in respect of the question in cross-examination about the benefits of float therapy and infrared sauna treatment nor is any medical evidence available to support the need for either of those treatments for her accident-related injury.

[126] Regarding the myotherapy treatments, similar arguments were advanced with respect to the massage attendances. I tend to agree with the defendant's submission that it relates to treatment not solely related to the work-related injury, such that a small allowance will be made, but not to the extent as sought by the plaintiff ($1,326). I will allow five myotherapy treatments.

[127] Like the floatation therapy and infrared sauna treatment, I am not satisfied that her claim for a chiropractic attendance on 1 November 2021 should be allowed given there is no evidence in respect of the need for this treatment, what it was for, or the cost.

[128] Therefore, I will allow $2,500, in addition to the Medicare refund.

Interest on Out of Pocket Expenses

[129] At 1.96 percent per annum over 3.4 years, this yields a figure of $166.60.

Future Expenses

[130] The plaintiff advances a claim for $25,000 for future expenses. The claim is comprised of two parts. The first is a global sum of $10,000 consistent with the treatment recommended by Dr Todman, namely the plaintiff would benefit from a series of weekly physiotherapy sessions for at least three months in addition to exercise physiology review and a supervised gym program for six months. Dr Todman considered that if the plaintiff's symptoms failed to settle, then treatment with lumbar facet joint blocks or radio-frequency neurotomy would be appropriate (which may cost up to $1,500 per treatment and be repeated three times in total). The second component is a global claim of $15,000 viewed in the context that in the three years since the accident, there has been a total of $15,646.95 in treatment expenses, and, such a claim of $15,000 for the balance of the plaintiff's life is quite reasonable.

[131] The defendant advances an argument that no amount should be awarded in light of Dr Tuffley's opinion, alternatively should the opinion of Dr Todman be preferred, then a small global amount of no more than $2,000 should be awarded due to the uncertainties of the cost of treatment and discounting for the fact that any lumbar facet joint treatment may not be necessary at all.

[132] The totality of the evidence sufficiently demonstrates to me that the plaintiff is still receiving treatment and requires treatment to ensure her return to normal daily life, including employment, to alleviate her symptoms and complaints of pain. Doing the best I can, I will allow $5,000.

Workcover Refund

[133] Any judgment amount must be expressed clear of the Workcover refund of $4,623.26.

Summary of Damages Assessment

[134] The plaintiff should therefore be awarded damages of $157,767.71, comprising the following:

Head of Damage	**Amount**
General Damages	$12,530.00
Past Economic Loss	$58,974.93
Interest	$3,893.88
Past Loss of Superannuation Entitlements	$5,251.52
Future Economic Loss	$60,000.00
Future Superannuation Entitlements	$7,092.00
Fox v Wood Damages	$60.00
WorkCover Special Damages	$3,954.14
Medicare Australia Refund	$2,967.90
Out of Pocket Expenses	$2,500.00
Interest	$166.60
Future Expenses	$5,000.00
Sub-Total	**$162,390.97**
Less WorkCover Refund	$4,623.26
TOTAL	**$157,767.71**

CONCLUSION

[135] There is judgment for the plaintiff in the amount of $157,767.71. I will hear from the parties as to costs.