DISTRICT COURT OF QUEENSLAND

CITATION:	*Schafer v Glendale RV Syndication* [2022] QDC 263
PARTIES:	**DEBORA SCHAFER** (Plaintiff) **v** **GLENDALE RV SYNDICATION PTY LTD** **ACN 088 169 493** (Defendant)
FILE NO:	258/18
DIVISION:	District Court
PROCEEDING:	Civil
ORIGINATING COURT:	District Court
DELIVERED ON:	2 December 2022
DELIVERED AT:	Townsville
HEARING DATE:	15 – 17 February 2021
JUDGE:	Coker DCJ
ORDER:	**1. Judgment for the Plaintiff in the sum of $397,952.93.** **2. The Defendant is to pay the Plaintiff's costs upon the standard basis from 31 August 2018.**
CATCHWORDS:	TORTS – NEGLIGENCE – CAUSATION – DAMAGES – where the plaintiff was employed as a chef by the defendant – where the plaintiff's employment required food trays to be stacked in ovens and distribution trolleys – where the plaintiff had a pre-existing degenerative condition in her shoulder – whether unsafe system of work caused injury – whether any pre-existing injuries are relevant to the causing of injury – where expert opinion supported the contention that the work practices were a risk – where expert medical opinion was that the work practices caused the onset of the injury – where a significant portion of the population have the same degenerative condition – whether the defendant had breached its duty of care – whether the risk of injury was foreseeable – whether the breach of duty caused the plaintiffs injury.
LEGISLATION:	*Workers Compensation & Rehabilitation Act 2003* (Qld), S 305B, 305C, 305D. *Civil Liability Act 2003*
CASES:	*Berhane v Woolworths* [2017] QCA 166.

Erickson v Bagley [2015] VSCA 200.
Reed v Warburton [2011] NSWCA 98.
Benic v State of New South Wales [2010] NSWSC 1039.
Calvert v Mayne Nicklass Ltd (No 1) [2006] 1 Qd R 106.
Hopkins v WorkCover Queensland [2004] QCA 155.
Toth v ACI Australia (t/a Laminex Industries) 18/08/1995, unreported decision of Dowsett J.
Eaton v Putman [1991] 55 SASR 386.
Malec v JC Hutton Pty Ltd [1990] 169 CLR 638.

COUNSEL: Mylne. P for the Plaintiff
Perkiss. O for the Defendant

SOLICITORS: O'Shea & Dyer Solicitors for the Plaintiff
BTLawyers for the Defendant

Introduction

[1] On the 16th August 2016, Debora Schafer (hereinafter referred to as 'the Plaintiff'), commenced employment as a chef at Glendale Aged Care, an aged care facility operated by Glendale Syndication Pty Ltd ACN 088 169 493 (hereinafter referred to as 'the Defendant'). The Defendant's business was conducted from the premises situated at 435 Dalrymple Road, Mt Louisa, Townsville.

[2] The Plaintiff was employed as a chef by the Defendant from 16th August 2016 until the 10th February 2017, though it is more correct to suggest that that employment was until the 5th January 2017. On that day at approximately 4:00pm, the Plaintiff was working as a chef and in that capacity was preparing a stainless-steel tray to be inserted into a shelf of a steamer oven, which shelf was at approximately shoulder/head height.

[3] The tray, though it cannot be exactly gauged, held several pans containing food; weighing, the Plaintiff estimates, 5.5kg. The Plaintiff says that while performing this procedure, she commenced to experience severe pain in her left shoulder, such that she could not carry on with her work. She says that the pain was so severe that she had to leave work and attend upon her general practitioner.

[4] She attended with Dr Stephen Dick at the Fairfield Central Medical Practice later that afternoon of the 5th January 2017 and underwent an examination. She was prescribed pain medication, Meloxicam and referred to a physiotherapist at Performance Physio Group. The Plaintiff's evidence was to the effect that she took

a weeks leave after the 5th January 2017 and then returned to work until the 10th February 2017 when she resigned as she could not continue to work as she was required.

The Evidence

[5] The Plaintiff's evidence as to her personal circumstances and to the nature of the work seem uncontentious. The Plaintiff was born the 27th March 1962 and was fifty-four (54) years of age at the time of her employment by the Defendant. She is 157 centimetres tall, her shoulder height being 129 centimetres and of slight build. In the course of her employment her work involved assisting in the preparation of lunch, afternoon tea and dinner for the residents of the aged care facility.

[6] In the course of assisting in food preparation, she was required to load the stainless steel food trays into the steamer ovens. The dimensions of the stainless steel food trays was approximately 530mm in length, 325mm in width and approximately 100mm deep. Cooking pans of various dimensions could be accommodated in the stainless steel trays in varying configurations. Mr Martin James Gill, the head chef at Glendale aged care provided generally unchallenged evidence in respect of the weights and dimensions of the stainless steel trays with inserts included. They were as follows:

(a) the weight of a tray containing three insert pans holding potatoes was approximately 6.3 kg;

(b) the weight of a tray containing three insert pans of peas was approximately 4.2 kg;

(c) the weight of a tray containing minced chicken was approximately 3.2 kg;

(d) the weight of a tray containing sponge cake was approximately 2.8 kg.

(a) a 1/3 insert pan of potatoes weighed 2.1 kg;

(b) a 1/3 insert pan of peas weighed 1.4 kg;

(c) a tray with no insert pans containing roast pork weighed 2.8 kg;

(d) a tray with no insert pans containing sponge cake weighed 2.8 kg;

(e) a 1/6 insert pan of gravy weighed 1.4 kg;

(f) a 1/6 insert pan of mashed potato weight 980 gm;

(g) a 1/6 insert pan of minced chicken weighed 539 gm;

(h) a 1/6 insert pan of mashed beans weighed 435 gm;

(i) a 1/6 insert pan of pureed vegetables weighed 559 gm;

(j) a 1/6 insert pan of pureed meat weighed 489 gm;

(k) a 1/2 insert pan of soup weighed 6.4 kg.

[7] When the stainless steel trays were loaded they were placed into two steamer ovens so as to facilitate the cooking of food. There was some issue in respect of the brand or manufacturer of one of the steamer ovens at the time of the Plaintiff's employment but for the purpose of this determination such a matter is of no consequence. It was acknowledged that at least one of the steamer ovens was a 'Rational' brand oven and the specifications were as follows:

(a) was mounted on a stand which was approximately 660 mm in height;

(b) taking into account the stand referred to in (a), was approximately 1702 mm in overall height;

(c) was designed for lengthwise loading, that is, the narrower end of the tray would be inserted first;

(d) provided for 10 shelf heights;

(e) had a top-shelf height of approximately 1550mm.

[8] Dependant upon the menu for the day, the steamer ovens were loaded with various trays requiring the insertion of between 12 & 15 trays per meal. This involved the insertion of the trays into the steamer oven and of course their removal following the cooking and then insertion into similar shelves on distribution containers for movement to dining areas within the aged care facility.

[9] The Plaintiff's evidence in relation to the process followed for preparation, cooking and distribution of the food was detailed in her evidence. It was unchallenged. Her evidence was as follows:

> *Now, can we turn, please, to the placement of the trays into the ovens. Did this occur before both lunch and dinner?---Yes.*
>
> *So after lunch was finished, did you commence preparing food for dinner just as you had previously prepared for lunch that morning?---Yes.*
>
> *Now, dealing with lunch: was there a usual pattern of the types of food and amount of food which you prepared?---Yes.*
>
> *And which you placed in trays?---Yes.*
>
> *And insert pans?---Yes.*
>
> *All right. Now, just dealing with trays: how many trays, all-up, do you recall generally were placed in the steamer oven for lunch?---Possibly 15.*
>
> *And did you do that?---Yes.*
>
> *And did you have any assistance in performing that task - - -?---No.*
>
> *- - - at all? Now, you've mentioned that there were two steamer ovens; right?---Yes.*
>
> *Do you recall the type or brand of each of those ovens?---The Rationals – was the brand.*
>
> *And do you remember another – what the other one was?---Yeah, sorry. It began with C. Co – com – something.*
>
> *Yeah, Convotherm?---Conver - - -*
>
> *All right. That's what our recollection is?---Yes, that's my recollection.*
>
> *Now, just dealing with the Rational brand oven: do you – that provided for 10 shelf heights - - -?---Yes.*
>
> *- - - into which trays could be placed; that's correct?---Correct.*
>
> *Were there any significant differences between the two ovens – the Rational brand one and the Convotherm one – in terms of the way they were set up or their heights or anything?---One was higher than the other.*
>
> *Anything significant, though?---No, they were the same.*

Now, you've described moving – for lunch – moving those 15 trays into the steamer oven. Can you tell the court, please, some more detail regarding their content – excuse me – their contents? In particular, were there any trays which contained six insert pans?---Yes.

And what was contained in those pans? Do you recall?---Those contained the – the smaller diets for the minces and the purees.

The – sorry, the first word I just missed. The smaller what?---Sorry. The mince – the six inserts - - -

Yeah. Okay?---Yeah. So for those six, there would've been a – a meat - - -

Yeah?--- - - - and vegetables. Then there would have been the puree mince, a puree vegetable, and a puree potato.

Right. Okay. And how many trays containing – there six insert pans of those, correct? And how many trays containing those six insert pans were there?---Three. For each dining room.

Right. And now, were there any trays containing three insert pans?---Yes.

And what did those insert pans contain?---They contained the vegetables, normally potatoes or rice, peas, carrot, which would be in those.

And how many trays with those three insert pans were there all up?---Six.

And, now, were there any trays which were for main course, which contained no insert pans?---Yes.

And how many trays of those were there?---Three.

And typically, what would those trays contain?---The lasagnes, casseroles, chicken legs, roast meat.

Now, were there any trays which contained dessert food?---Yes.

And did they contain insert pans?---No.

And how many trays were they?---Three.

Just excuse me. My instructing solicitor just reminds me, in respect of main course, how many trays were there which typically you would load in the steamer oven without any insert pans? That's the main course trays?---The main course trays, there would be three.

Okay. And, all right. And I think we've established there were three dessert trays; correct?---True.

And how long were the trays in the steamer oven for on the base that they were being steam cooked?---From 30 to 40 minutes, normally.

Okay. Now, did you then take, when they were cooked, the trays out of the steamer oven?---Yes.

And what did you do with them?---They would go into the hot boxes, which went to the dining rooms.

Okay?---So we loaded that out of the steamer into the hot box.

And those are referred to as distribution containers; is that right?---Yes.

All right. Now, can we return, for a moment, to the means by which you placed each of these trays into a steamer oven. Can we go back to that point. Now, can you – sorry, withdraw that. The tray was situated sitting on the bench; is that right?---Yes, it was.

And the tray is rectangular in shape; correct?---Correct.

And can you please describe how you first picked the tray up to move it into the oven. What did you do with your hands?---Okay, so I would turn it with both hands, support it, lift - - -

Just pause there, for a moment. You say you pick it up with both hands. At what end of the tray would you pick it up at?---Well, I would pick it up with the length – each, and then prop it into – if it was the heavy ones from the start, walk over to the steamer - - -

Okay. just pause there for a minute. When you say, "pick it up at the end", you mean at the narrower ends?---Yes.

Of the tray, all right. And then you'd walk over to the steamer, yes?---Yes.

And what would you do then?---Then I would lift it to the edge of the shelf. And then I'd support it with one hand and push it in with the other.

And just pausing there, you say you would lift it to the end of the shelf and you'd support it with one hand. Now, can you describe how you supported the tray with one hand, please, in more detail?---I had my hand underneath. The weight of the tin - - -

Yes, one hand?---One hand and guide it with the other.

Okay. Now, so the tray is sitting on one hand. Was the hand open such that the palm was facing upwards?---Yes.

And did you – well, describe what you did with the tray when you had it on that one open palm?---Yes. Well, when I've got the nose of the tray balanced onto the shelf - - -

Did you lift the tray?---Yes, yes, yes. Lifted the tray to the shelf. And then, so some of the front of the weight of the tray was on the shelf. Then I lift – carry on lifting it to support it, and then push it in.

All right. Now, you've described how you picked the tray up first with both hands?---Yes.

And you picked them up – picked the tray up at the narrow end of each tray - - -?---Yes.

Now, did you twist the tray in order to place the tray into the steamer oven? How was the tray loaded into steamer oven?---Yes. Well, I had to twist it, because where I pick it up I've got to do a full turn and then negotiate it into the steamer.

Was the tray loaded lengthwise into the steamer oven?---Yes.

With the narrow end going in first?---Yes.

Now, can you please describe the height of the shelves in the steamer ovens. Do you remember what they – how high were they compared to your own height, for instance?---The highest shelves was above eye height, so I had to look up.

And when you were lifting – you described lifting a tray with an open palm - - -?---Yes.

- - - with the weight bearing on that one hand. Correct?---Yes.

And did you lift – how high did you lift that tray, at the highest point, when you had to insert the trays into the ovens?---Well, it would have been above shoulder height.

All right. And do you know about how many racks there were by which you would have had to have conducted that manoeuvre, that is, lifting with the open palm upwards with the tray on it and lifting above shoulder height and inserting the tray?---Yes, normally ten shelves.

Yes. Ten shelves in the steamer, but how many above shoulder height? At or above shoulder height?---Ah, sorry. That – at least two.

Okay?---If not three.

Now, you've described this manner of lifting and inserting of the trays. Did you always use the one hand when performing that manoeuvre?---No.

And why was that?---When I got – my arm started to get very, very sore I swopped over with the right arm.

And when you say, "Your arm started to get very sore", you point – just a moment – you pointed to your – just in the witness box – you pointed to your left shoulder – the transcript should reveal; is that right?---Yes.

So, upon that pain being suffered by you, you also used your other arm. Is that right?---Yes.

When did you start to feel pain in your left shoulder after commencing working there?---It would have been at least a few weeks – around Christmas, I think – I started getting a real bad pain in my shoulder.

All right. Now, you described the manner of preparing food and loading the food into the insert pans and then loading the trays, containing the insert pans, into the ovens for lunch. Did the same happen at dinner?---Yes.

That is, the same volume of trays, or number of trays; correct?---Yes.

And about the same mix which you've described - - -?---That's right.

- - - for lunch; correct?---Yeah.

What time was lunch usually served at the facility, Ms Schafer?---Twelve o'clock.

Now, after the food has been steam-cooked, I think you said about 30-40 minutes, did you take the trays out?---Yes.

And how did you take the tray out? What sort of – can you describe the mechanism, what did you do with your hands?---You reach up and support the outside to pull it and lift it down.

And when you say, "Lift if down", you've got your open faced palm then held out in front of you - - -?---Yes.

- - - and so, was it placed then on one hand?---Yes, but you've got mitts on as well, because it's boiling hot.

Yes. Yes?---Yeah.

All right. And when you did that, did you alternative hands sometimes, or alternate - - -?---Sometimes, yes. If it was awkward.

Now, in terms of – I'm just going back to the loading of the trays for a moment – when you were loading a tray, did that also involve moving the tray a certain distance in front of the centre of your body?---Yes.

Okay. About how far would that have been from the centre of your sternum, say?---Probably about that far.

So, a meter and maybe 30 or 40 centimetres. Would that be right?---Yeah.

Sorry. I think you're agreeing with my suggestion, 30 to 40?---Yes, sorry. Yes.

That's all right. It just has to be transcribed, that's all, Ms Schafer. Now, and did you do that – the tasks you've described – did you do that every day during the course of your employment?---Yes, every day.

And about how much time, or proportion of your employment, was taken up preparing food – chopping the food up, preparing it, placing it into the insert pans, putting it into the ovens and then into the distribution containers. About how much time, as a proportion of your day, was that taken up with?---That would have been, say, three-quarters of the time.

Okay. Now, can we go to the distribution containers. Can you describe the height of the distribution containers compared to your height?---I think they were eye level.

Okay. And they were – just excuse me a minute – the distribution containers were stacked two high on top of trolleys; is that right?---Yes.

And each of them had about 12 rack positions for the insertion trays; is that right?---Yes.

[10] The Plaintiff describes in this evidence some changes in her procedure when she experienced some pain when performing the tasks required, prior to the 5th January 2017. Her evidence relating to that afternoon again is generally unchallenged. She said:

Yes. Now, do you recall an event which occurred on the 5th of January 2017 at your workplace?---Yes, I do.

All right. Now, what time did that happen?---It was between quarter past and half past 4 in the afternoon.

And can you describe – sorry, I withdraw that. Were you lifting a tray at the time?---Yes.

And can you describe, please, first, what were you lifting?---I was lifting a tray with six inserts, and it was going to the top shelf.

All right. Of the steamer oven. Is that right?---The steam oven, yes.

So this is lifting into the oven?---Yes.

And – all right. So can you describe, then, please, how you lifted the tray into the oven?---I had the tray on the bench table. I turned, and because my arm had been still sore – very sore - - -

Which arm is that?---My left arm. I had most of the weight on my right. But as I was lifting - - -

Well, just pause there. When you said you had most of the weight on your right - - -?---Yes.

- - - you've described earlier how you lifted a tray with an open-faced palm. Is that how you were holding this tray?---Yes.

All right. Sorry. Go on?---Yes. So I would – the tray would get onto the top shelf, and as I had my arm up, trying to negotiate the top of the shelf, I got a screaming pain straight down my left arm and shoulder.

All right. So the tray is being supported by the right arm?---Yes.

The right hand; correct?---Yes.

Moving into the top shelf, or one of the top shelves?---Yes.

All right. And were you moving the tray into the shelf - - -?---Yes.

- - - with your left arm?---Yes. Steering it.

And when did the pain happen?---The – as I pushed it in - - -

With your left arm?--- - - - with my left arm, that is when I got a screaming pain.

[11] The Plaintiff indicated after this evidence that she then went straight to her doctor having told the head chef, I presume Mr Gill, that she had hurt herself badly and asked to be excused.

[12] The head chef, Martin James Gill, gave evidence about process and procedure in the kitchen. He explained his role as head chef as,

To be responsible for catering for the residents meals for the whole day, looking after staff, managing staff, managing food costs, rosters.

Mr Gill was also able to give evidence relating specifically to the cooking of food including the placement in the ovens.

So when you're talking about it's got the 10 trays? Yes.

That's the oven you're talking about? Yes.

Okay. Being the head chef can you explain to his Honour what products or food products go into that oven, and how do they go in? It ranges to what you're cooking. If, you know, if I'm cooking a roast it would go into the lower part. You have it uncovered. You might have it on combi-steam. Each roast might weigh three kilos a pop, so you're putting six kilo into the oven, and the tray itself weighs about a kilo, so seven kilos into the bottom of the oven. Then you might put some potatoes, a shallower gastro tray. That weighs about 900 grams. The potatoes might weigh one and a-half kilos, and depending on what configuration, and depending on whether you're doing cooking or whether you're heating food up for lunch.

And if, for example, if you were preparing or getting ready for dinner - - -?---Yes.

- - - I take it from looking at the diagram, there's a section there where you will be at the bench – that you're working at the bench?---Yes.

Preparing the food?---Yeah.

And then you take the food from there and then you put it into the oven?---Yes.

And can you just explain to his Honour, like, what's the process involved in doing that, to get the trays into the oven?---Well, you'd have three steps doing the trays. Each steam tray represented a section of the facility. That section you would put in the required mashed potato, gravy, the minced and pureed products, anything that would go into a single gastro tray. The weight of that would be approximately four to six kilos, and that would be put at the top of the steamer. Then you'd put the next section under it, which would be two shelves down. You'd put the next tray, which would be another two shelves down, so that's two-thirds of your oven space used up in one go for your – what they call texture modified meals.

Okay. So while there's 10 shelves, not all 10 shelves get used, is that what you're trying to say?---Not always, no.

[13] Mr Gills evidence accorded substantially with that of the Plaintiff's, though there were some areas of difference. For example, the Plaintiff indicated that she commenced work at about 8.30am whilst Mr Gill suggested that she came in at 9.30am, at Prep. He did however, in Cross-Examination acknowledge that the times the Plaintiff referred to were 'plausible'. There was also evidence by Mr Gill regarding assistance being available within the kitchen which seemed different to the Plaintiff's recollection but generally his evidence as to procedure was in accord with that of the Plaintiff's.

[14] Mr Gill was adamant that the Plaintiff was not responsible for loading and unloading the ovens for lunch. However in Re-Examination he indicated that the use of the oven was fluid, in other words, use depended on menu needs. He said:

> *And so if you agree that Ms Schafer did the dinner – so you agree that she did the preparation and the dinner – how many times, on average, would you say she'd have to use the steamer oven during that process? How can you put a figure on something? Depending on what's going on in a given day. It's – you might have to boil eggs for the salad section. You might have to make potato salad, which would require a steamer. I don't know. I don't know how you put a number on how many times you use an oven a day.*

[15] I thought that Mr Gill, like the Plaintiff was an honest and reliable witness, however I am more inclined to the evidence of the Plaintiff where there might be differences. The Plaintiff was clear as to her tasks and what she was required to do. Mr Gill had less specific recollection of the day of the incident or in fact what was occurring in the days and weeks previous. As was submitted, '*the Plaintiff was in the best position to recall the role she played and the duties she performed'*.

[16] Having found that the Plaintiff's evidence is the most reliable insofar as considering what was required of her in the performance of her duties is only the first step in determining the position of liability. I say that in the sense that there are other considerations to take into account in this matter.

[17] The Plaintiff acknowledged that she had pre-incident injuries and issues which need to be considered. In her quantum statement she said the following:

> *Around 15 years ago, I suffered a minor injury when I pulled a muscle in my left shoulder. I recall having symptoms for approximately two weeks and had no ongoing symptoms.*
>
> *In early 2016, I was having issues regarding Carpal Tunnel symptoms in my right hand. I was prescribed analgesics and eventually underwent an injection of the Carpal Tunnel in March 2016 and an endoscopic carpal tunnel release in 2017 performed by Dr Wilkinson at the same time as he performed my left shoulder arthroscopy and AC joint extension. I had a history of Carpal Tunnel in my left hand around 12 years before the issues with my right hand.*

Prior to September 2017, I had experienced some intermittent neck and lower back pain which stemmed from an incident while I was working at Barnfield Residential Home and fell down the last 4 stairs and landed on my coccyx. I was approximately 23 years of age at this time. These symptoms did not however prevent me from working. Over the years I have received regular chiropractic treatment to manage both the symptoms in my neck and my lower back.

[18] Counsel for the Defendant however explored at considerable length, issues in respect of the Plaintiff's injuries and circumstances prior to the incident. The Plaintiff was questioned at length about her prior work history and about the range of employment she previously engaged in. She provided answers which were comprehensive and showed her as a person with a multitude of skills and aptitudes and one who was able to turn her hand to many types of work.

[19] With that background information, the Plaintiff was asked about her application for work with the Defendant. In Cross-Examination the following exchange occurred:

Okay. And when you commenced working as Glendale you were asked to complete an application for employment?---Yes.

And part of that application for employment, one of the questions that was asked of you was whether or not you had any pre-existing injury or diseases that you were aware of that would affect your employment?---That's correct

Yeah. And you told them no, didn't you?---Yes

Okay. And it was also noted on that application that if you failed to disclose this information it may cause you an exacerbation of a pre-existing injury or may result in the worker not being able to [indistinct] for compensation under the Act. Do you remember reading that in the application form?---Yes, I do

[20] The Plaintiff was then asked about her injury when about 23 years of age, which I note was more than 30 years prior to the incident and, of course, the Plaintiff had already given evidence as to her employment that followed the accident when she 23 years old. The Plaintiff acknowledged more recent attendances with a chiropractor but did not agree with many of the matters noted in the chiropractic

records. She also acknowledged more recent still attendances with the Fairfield Central Medical Practice, though in respect of Carpal Tunnel syndrome and treatment previously provided in relation to that.

[21] Thereafter there was a lengthy exchange regarding the Plaintiff's statements to chiropractors and doctors regarding pain experienced by her over time and she acknowledged the entries made. She explained also however that many attendances were for 'an alignment' and were not associated with pain being experienced. Ultimately, she agreed that in the application for employment with the Defendant she had answered that there were no pre-existing injuries or disease which may affect her employment as outlined in the position description.

[22] In that regard, I would simply note that the Plaintiff struck me as quite stoic and though she may have at different times and to different degrees suffered pain, she continued in employment and in the carrying out of her employment requirements. There is no dissembling or attempts to mislead the employer in the answers given.

[23] As Cross-Examination continued the Plaintiff was asked about her other skills and other work appointments that might have been open to her. She confirmed that she had sought other types of employment but was generally unsuccessful. She detailed attempts at various forms of employment but was unsuccessful. As she said, she tried for three years to get another job in catering and had '*no luck at all*'. She indicated that on many occasions she was considered '*too old*'.

[24] On the second day of the trial, the Plaintiff gave detailed evidence about developing symptoms in the days or perhaps weeks leading up to 5th January 2017. She said that she reported to the supervisor Troy, that she had problems with her left shoulder and that she was having problems with lifting. She also spoke to a woman, Maryanne, about the same issues. However, she continued to work as she had previously.

[25] The Plaintiff was an impressive witness, she did not seek to exaggerate her circumstances and as I commented previously, she struck me as stoic. I accept her evidence in this matter, especially so in respect of the lack of real assistance with trays in the kitchen area and of the need for there to be lifting and manipulation of those trays.

[26] The Plaintiff's husband gave evidence in the matter, though obviously not related to the actual incident. However, his evidence was helpful in one respect in that it reflected him being told almost exactly what the Plaintiff has said occurred on the 5th January 2017. He said in Evidence In-Chief:

> *And do you recall your wife telling you that she had injured her shoulder at work - - -?---Yes.*
>
> *- - - in January 2017?---Yes, I do.*
>
> *Do you remember what she told you?---She had been reaching up into an oven or something of that nature and she'd put her shoulder out. Was in extreme pain.*
>
> *Did she tell you about the pain?---Yes.*
>
> *And what sort of pain did she describe?---Excruciating. She just could not lift.*
>
> *And what shoulder was that?---Her left shoulder.*
>
> *All right. Now, did she complain about any reason or cause which she attributed to that?---That she had caused it? No.*
>
> *Well, no. Did she say to you anything about what she thought had caused it?---Yes. Definitely. It was lifting up repetitively, too high for her.*

[27] Mr Schafer's evidence also related to household activities conducted by the Plaintiff and again corroborated her evidence. I was assisted in my understanding of this matter, as I was by the evidence of the Plaintiff and Mr Gill.

The Law

[28] I turn at this time to the law. The Plaintiff's claim arises as a result of the fact that the Plaintiff says that the Defendant has breached its duty of care to protect the Plaintiff from a risk of injury that the Defendant know or ought reasonably to have known existed. As required by statute, the Plaintiff also says that the risk was not insignificant and that the Defendant failed to take any or any adequate precautions to alleviate the risk of injury to the Plaintiff.

[29] The Plaintiff's claim is founded in negligence, in that the Defendant, owing a non-delegable duty to take reasonable care to avoid exposing the Plaintiff to unnecessary risk of injury, failed to provide, maintain and enforce a safe work system.

[30] Liability is to be considered by reference to ss 305B & 305C of *Workers Compensation & Rehabilitation Act 2003* (Qld) ('*WCRA*'). Sections 305B & 305C are in these terms:

> ***305B General Principles***
>
> *(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.*

[31] What follows from the wording of the Act is that the employer is not required to guard against all risks of injury or to provide safeguards from all perils. Most

relevant to this case however, is the fact that the employer is not required to take care to avoid exposing an employee to risks resulting from a special vulnerability, absent to some special knowledge of that susceptibility to injury.

[32] Hence, in this matter, the concentration by the Defendant on the answers given in the application for employment and any, pre-accident illnesses or injury. The legislative provision directs the court's attention therefore to the level of risk that needs to be guarded against.

[33] The pleadings provide some clarity as to the nature of the Plaintiff's case and to the defence. The defendant's submissions on this matter summarise those two positions conveniently in paragraphs 26, 28-34 and 38-44:

> *26. The Plaintiff alleges that the terms implied by law into the contract of employment and the content of the duty of care owed by the Defendant to the Plaintiff required the Defendant:*
>
> *(a) to take all reasonable precautions for the safety of the Plaintiff whilst she was engaged in her said the Plaintiff's employment;*
>
> *(b) not to unreasonably expose the Plaintiff to a risk of damage or injury of which the Defendant knew or ought to have known;*
>
> *(c) to provide for the Plaintiff safe plant and equipment'*
>
> *(d) to provide for the Plaintiff a proper and safe place of work;*
>
> *(e) to provide for the Plaintiff a proper and safe system of working;*
>
> *(f) to instruct the Plaintiff in correct and safe methods of carrying out her work;*
>
> *(g) to provide to the Plaintiff sufficient assistance to enable her to carry out her employment safely;*
>
> *(h) to supervise the Plaintiff to ensure she carried out her work safely;*
>
> *(i) to warn the Plaintiff of the possibility of injury to her in carrying out of her work and instruct her in methods of work to avoid the possibility of such injury;*

(j) to not require the Plaintiff to perform work where the Defendant knew or ought to have known that the carrying out of that work may cause injury to the Plaintiff.

...

28. The Plaintiff alleges that her work required her to repetitively:

(a) load trays containing food without insert pans into a steamer oven;

(b) load trays, which held insert pans containing food, into a steamer oven in circumstances in which there were between two and six insert pans in number within each tray;

(c) load insert pans containing food into a steamer oven;

(d) unload the trays and insert pans from a steamer oven;

(e) load the trays into distribution containers so as to permit the distribution of food to residents of the facility;

(f) load the trays into the steamer ovens with the long dimension of the tray away from the body;

(g) unload the trays from the steamer ovens with the long dimension of the tray away from the body;

*(h) load the trays into the distribution containers with the long dimension of the tray away from the body ("**the repetitive work**").*

29. Between August 2016 and 5 January 2017, in the course of food preparation before each meal of lunch and dinner, the Plaintiff says that she would usually load into a steamer oven:

(a) three trays each containing six mixed insert pans;

(b) six trays each containing three insert pans where;

(i) two trays held potatoes;

(ii) two trays held carrots;

(iii) two trays held peas;

(c) three trays each containing a main course such as chicken or lasagne where no insert pans were used or required;

(d) three trays each containing desserts such as pudding or sponge cake where no insert pans were used or required.
*("**the steamer oven loading**")*

30. During the course of the steamer oven loading:

(a) the weight of the tray containing three inserts pans holding potatoes was approximately 6.3kg;

(b) the weight of a tray containing three insert pans of carrots was approximately 5.4kg;

(c) the weight of a tray containing three insert pans of peas was approximately 4.2kg;

(d) the weight of a tray containing minced chicken was approximately 3.2kg;

(e) the weight of a tray containing lasagne was approximately 6.8kg;

(f) the weight of a tray containing sponge cake was approximately 2.8kg;

31. Upon completion of the cooking of the food in the steamer ovens, it was then necessary to move unload the trays from the steamer oven and load the trays into the distribution containers to take to the dining areas.

32. The Plaintiff alleges that during the course of the food preparation, each day the Plaintiff:

(a) usually loaded approximately 30 of the trays into the steamer ovens;

(b) usually unloaded approximately 30 of the trays from the steamers ovens;

(c) usually loaded approximately 30 of the trays into the distribution containers.

33. *The Plaintiff alleges that the system of work in respect of the steam oven loading and unloading required the Plaintiff to perform manual tasks which were:*

    (a) difficult to do;

    (b) tiring;

    (c) awkward;

    (d) characterised by:

        (i) repetitive movement; and

        (ii) repetitive force.

34. *The Plaintiff further alleges that the system of work in respect of the distribution container loading and unloading required the Plaintiff to perform manual tasks that were difficult to do, tiring, awkward and characterised by 'repetitive movement' and 'repetitive force'.*

...

38. *The Defendant says that the Plaintiff's duties were varied and the task described constitutes only a part of her overall duties as a qualified and experienced chef. As for the height of the steamer oven and distribution containers, the Defendant says that the rack positions were at a reasonable height.*

39. *The Defendant denies that the Plaintiff was required to continuously and repetitively lift heavy trays at or above shoulder height. For most trays handled, the Plaintiff's left hand was not raised or held in a position above shoulder height, nor was the shoulder was not placed under load, or in the alternatively, not placed under a significant load.*

40. *So far as manually handling was concerned, the Defendant says, that the Plaintiff was provided with manual handling training and that her work involved little work at or above shoulder height and duties that were shared amongst three people and performed at a reasonable pace.*

41. *The Defendant denies that it was negligent and says further that any injury to the Plaintiff's left shoulder was not caused or contributed to by*

work, but rather the degenerative, pre-existing nature of the Plaintiff's left shoulder or alternatively, a temporary exacerbation of established pre-existing acromioclavicular joint degeneration and arthritis in the left shoulder.

42. The Plaintiff alleges that the risk of injury to the Plaintiff was a risk that the Defendant knew or ought to have known existed by reason of:

(a) failing to conduct a risk assessment;

(b) the complaints made by the Defendant's employees about unsafe manual handling procedures at the workplace;

(c) the nature of the repetitive work;

(d) the obviousness of the risk of injury arising out of the repetitive work. In those circumstances, the Plaintiff's claim is that the Defendant failed to take any or any adequate precautions so as to alleviate the risk of injury to the Plaintiff.

43. The Defendant has denied that reasonable care required it to undertake a further risk assessment, or change the work practices or system in respect of the trays, provide additional manual assistance, reduce production, lower the height of the steam ovens, provide a safety step, alter the configuration or mix of insert pans or instruct workers to lift insert pans separately, which would only have served to increase manual handling, nor reduce tray weights.

44. The Plaintiff claims that had the Defendant taken the precautions alleged, the Plaintiff would have followed instructions and warnings given about the risk of harm to her and system of work such that she would not have suffered injury.

[34] The Defendant's position is to say that for those reasons the risk of the Plaintiff suffering injury to her shoulder was not foreseeable and further that the Plaintiff had not taken steps to take precautions herself. In particular, the Defendant suggests that the Plaintiff had not reported the difficulties or onset of shoulder pain, however that does not accord with the uncontradicted evidence of the Plaintiff. Her evidence that

she had reported concerns to two persons in apparent authority, Tony and Maryanne.

[35] Ultimately, the Defendant submits that the Plaintiff's claim should be dismissed on the basis that the risk of injury which the Plaintiff suffered was not foreseeable and that therefore the Plaintiff's left shoulder injuries were not caused by any negligence or breach of duty on the part of the Defendant. The Defendant relies here upon the lack of disclosure by the Plaintiff in the employment application, to neck and lower back pain which was being treated by regular chiropractic attendances as well as carpal tunnel syndrome.

[36] The position of the Defendant needs then to be considered in the circumstance of the actual injury complained of and the foreseeability of such an injury on the part of the Defendant. As recognised in *Erickson v Bagley*[1], what must be reasonably foreseeable is not necessarily the precise set of circumstances whereby the Plaintiff was injured but, *"the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which the harm was incurred"*.

[37] Similar statements arise in *Toth v ACI Australia (t/a Laminex Industries)*[2], and in *Eaton v Putman.*[3]

[38] The Plaintiff argues that the initial question to be answered is, does the Defendant owe a nondelegable duty of care to the Plaintiff – to take reasonable care to avoid exposing the Plaintiff to unnecessary risks of injury in the course of her employment? Such a question in my view must be answered in the affirmative and the arguments put by the Defendant, that a failure to disclose pre-existing conditions absolves them of this duty is incorrect.

[39] The question is therefore, did the Defendant breach its duty of care? In considering S.305B there is a need to look at the duty imposed to take precautions against risk of injury and the basis upon which such a duty arises. Comment upon such matters arose in *Reed v Warburton*[4], where Basten JA said of relevantly identical language in the New South Wales equivalent of the *Civil Liability Act 2003* (Qld):

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[1] (2015) VSCA 220 at 33.
[2] 18/08/1995, an unreported decision of Dowsett J.
[3] (1991) 55 SASR 386.
[4] [2011] NSWCA 98.

> *Section 5B appears to be directed to a case where a person has, or should have, identified a risk of harm, must then take 'precautions' against it, as opposed to simply exercising reasonable care in going about his or her activities. For example, in the present case, it makes sense to speak of the use of a heat shield or ensuring the availability of buckets of water as 'precautions': the need to take care not to allow the flame too close to inflammable material is less helpfully described as taking a precaution. The latter simply involves taking reasonable care. The infelicity of the expression of s.5B need not be problematic, but it may be necessary to avoid an unconscious tendency to look for identifiable 'precautions' instead of considering whether the responsible party has simply failed to exercise reasonable care.*

[40] In such a case as this, the question is whether there is a duty to take reasonable care not to expose the Plaintiff to the risk of musculoskeletal injury to her shoulders from the system of loading and unloading the trays into and out of the steamer ovens and into the distribution containers? In considering the foreseeability of the risk of injury, consideration should properly be given to the guidance provided in *Berhane v Woolworths*[5] and *Calvert v Mayne Nicklass Ltd (No 1)*.[6]

[41] In both of those cases consideration was given to whether the injured worker was described as being, 'within the normal range of health and strength'. Such a situation arises here as the injuries complained of include specifically, the aggravation and/or acceleration of pre-existing asymptomatic degeneration in the left acromioclavicular joint. Morrison JA in *Berhane v Woolworths* noted at paragraphs 88 and 89 as follows:

> *[88] Thus, as Calvert shows, if the pre-existing degenerative condition is quite common in persons of the employee's age that can be a basis for concluding that the employee is nonetheless within the class of people within the normal range of health and strength.*
>
> *[89] In my view, Mr Berhane's pre-existing condition should be assessed the same way. The condition is sufficiently common that it should be found*

[5] [2017] QCA 166.
[6] [2006] 1 Qd R 106.

that a significant segment of the population has it, and it becomes more prevalent as one gets older. The risk of injury to such a segment of the population is foreseeable. Accordingly the duty that should have been found was not a special or higher duty, but rather the normal duty to take reasonable care not to expose Mr Berhane to a risk of injury. The risk here was the risk of musculoskeletal injury to the shoulders from the required system of lifting and transfers.

[42] Foreseeability is therefore to the fore and the evidence of Mr McDougall is of particular assistance. As noted in paragraph 55 of the Plaintiff's outline, the instances of the foreseeability of the risk include:

A. *in his report of 6 August 2018, Mr McDougall refers to and relies upon the United Kingdom's Health and Safety Executive guides which apply to occasional lifting from a standing posture with two hands directly in front of the body when the object has good handgrips;*

B. *the loading of pans weighing about 3 kg into the higher racks of the steamer by a person of Ms Schafer's stature exceeds the United Kingdom guidelines. Such tasks are known to involve an increased risk of musculoskeletal injury;*

C. *the United Kingdom guidelines assume load is being evenly distributed between both hands. The Plaintiff describes lifting with one hand under the pan and gripping the front edge of the pan with her other hand. Almost all the weight will be supported by the hand under the tray and this will be the greatest reach distance away from the body. The unequal load distribution will predictably create an increased risk of musculoskeletal injury and particularly to the shoulder.*

D. *"The loading of pans weighing above 3 kg ... into the higher racks of the steamer by a person of her stature (working above shoulder height) exceeds internationally recognised safe work guidelines. Such tasks are known to involve an increased risk of musculoskeletal injury and particularly to the shoulder. These tasks have the potential to produce shoulder damage as a consequence of the 'Gradual wear and tear caused*

> *by frequent or prolonged periods of muscular effort' as well as produce 'Sudden damage caused by intense or strenuous activity'... The tasks and the technique used by Ms Schafer were repetitive activities which could reasonably have been subject to audit and risk assessment."*

[43] These matters, coupled with the clear evidence of Dr Low and Walters, that degeneration of the AC joint is endemic in the community lead inexorably to the conclusion that the risk of injury to the shoulder was entirely foreseeable.

[44] What that then leads to is an assessment of whether the Defendant knew or should reasonably have known of the risk of musculoskeletal injury to the Plaintiff's shoulders brought about by the repetitive nature of the cooking requirements. The loading and unloading of the steamer ovens was a fundamental part of the tasks, required of the Plaintiff. It was in my assessment a situation similar to that commented upon by Garling J in *Benic v State of New South Wales*[7], where there was "…*obviousness or the likelihood of the event happening when using common sense*".

[45] It may be that a risk assessment would have identified such issues but it seems clear that no such assessment was performed. If that is in fact the case, then such considerations as to liability loom large but no matter what, the employer had the clear need to take precautions over and above any steps identified on the part of the Defendant. A failure to seek out knowledge of the risk, as is apparent here, constitutes a failure by the employer to take precautions in the exercise of reasonable care for the safety of its employees and specifically, the Plaintiff.

[46] Whether the Defendant had actual knowledge of the risk of injury to the Plaintiff's shoulder is not clear. It would seem that there is evidence placed solely on the fact that the Plaintiff did not, it is suggested, make full disclosure to the Defendant. However, that fails to at all appreciate the inherent risk in the task required and no risk assessment seems to have been undertaken. The risk was apparent from the work being performed by the Plaintiff and should have been obvious. As has been submitted on the part of the Plaintiff, '*risk assessment undertaken proactively is the modern hallmark of an employment duty of care'*.

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[7] [2010] NSWSC 1039.

[47] The Defendant clearly had actual or constructive knowledge of the risk of injury to the Plaintiff's shoulder, when performing her work related tasks and the risk was clearly "*not insignificant*". This consideration arising pursuant to S. 305B(1)(b) is clearly met when consideration is given to the unchallenged evidence of Mr McDougall.

[48] The next matter then to consider is that which arises pursuant to S. 305B(1)(c), whether a reasonable person in the position of the Defendant would have taken the necessary precautions. In other words, what would a reasonable person do in response to the risk of injury? What steps would properly be taken, or method of operation devised for the performance of the tasks but with the diminution of risk?

[49] In that regard, the Counsel for the Plaintiff has helpfully detailed the evidence of risk as drawn from the report and evidence of Mr McDougall and the content of the Manual Tasks Code of Practice 2011. At paragraph 71 of the written submissions the following is noted and I would respectfully adopt some:

A. *the Code is an approved code of practice under section 274 Work Health and Safety Act;*

B. *the Code is admissible in court proceedings and courts may have regard to a code of practice as evidence of what is known about a hazard, risk or control and may rely on the Code in determining what is reasonably practicable in the circumstances to which the Code relates;*

C. *some manual tasks are hazardous and may cause musculoskeletal disorders. A musculoskeletal disorder means an injury to the musculoskeletal system whether occurring suddenly or over time. Musculoskeletal disorders may include injuries to the shoulder. Musculoskeletal disorders occur in two ways – gradual wear and tear to joints, ligaments muscles and intervertebral discs caused by repeated or continuous use of the same body parts including static body positions; or sudden damage caused by strenuous activity or unexpected movements such as when loads being handled move or change position suddenly.*

D. *a hazardous manual task means a task that requires a person to lift, lower, push, pull, carry or otherwise move a thing involving repetitive or*

sustained force, high or sudden force, repetitive movement, sustained awkward posture;

E. *a risk assessment should be carried out for any manual tasks that have been identified as being hazardous, unless the risk is well-known and it is known how to control it. A risk assessment can help determine:*

- *which postures, movements and forces of the task pose a risk;*
- *where during the task they pose a risk;*
- *why they are occurring;*
- *what needs to be fixed.*

F. *examples of control measures that should be considered when handling loads include reducing the size or capacity of containers;*

G. *Mr McDougall refers to and relies upon the United Kingdom's Health and Safety Executive guides which apply to occasional lifting from a standing posture with two hands directly in front of the body when the object has good handgrips;*

H. *the loading of pans weighing about 3 kg into the higher racks of the steamer by a person of Ms Schafer's stature exceeds the United Kingdom guidelines. Such tasks are known to involve an increased risk of musculoskeletal injury;*

I. *the United Kingdom guidelines assume load is being evenly distributed between both hands. The Plaintiff describes lifting with one hand under the pan and gripping the front edge of the pan with her other hand. Almost all the weight will be supported by the hand under the tray and this will be the greatest reach distance away from the body. The unequal load distribution will predictably create an increased risk of musculoskeletal injury and particularly to the shoulder.*

J. *"The loading of pans weighing above 3 kg ... into the higher racks of the steamer by a person of her statute (working above shoulder height)*

exceeds internationally recognised safe work guidelines. Such tasks are known to involve an increased risk of musculoskeletal injury and particularly to the shoulder. These tasks have the potential to produce shoulder damage as a consequence of 'Gradual wear and tear caused by frequent or prolonged periods of muscular effort' as well as produce 'Sudden damage caused by intense or strenuous activity'... The tasks and the technique used by Ms Schafer were repetitive activities which could reasonably have been subject to audit and risk assessment".

[50] Having noted those risks as identified, the next question relates to what would have been a reasonable response. Again the report of Mr McDougall sets out the response as recommended and was unchallenged. Mr McDougall proposes:

A. *lowering the height of the steamers (for example reducing the height of the stand below the steamers by approximately 300 mm) or providing safety steps stools such that all loading and unloading of the steamers is performed below shelf height and above mid thigh height;*

B. *the use of safety step tools in order to complete the task of loading and unloading;*

C. *having workers (and particularly female workers) limit the weight being handled by loading 1/2 and 1/3 insert pans individually into the racks of the steamer rather than assembling them on to 1/1 insert pans.*

[51] Such a response as is suggested by Mr McDougall in my assessment was both reasonable and practical. In addition, such steps could not be considered, expensive, difficult or inconvenient to alleviate the risk that was apparent.

[52] Having considered such issues to this stage it is then necessary to look to the question of causation. Such matters then bring into play S. 305D of the *WCRA*. Relevantly sections 1(a) and (b) provide:

305D General principles

(1) A decision that a breach of duty caused particular injury comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the injury (factual causation);

*(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (**scope of liability**).*

[53] What is required in respect of causation is for the Plaintiff to prove, to the civil standard, that the Defendant's negligence was a necessary condition of her injury. It might otherwise be described as considering the probable course of events, had the omissions not occurred. In other words, did the injury occur because of the breach of duty of the employer?

[54] Dr Low in his evidence answers that question most directly in his report of 14th June 2019 when he states,

Acromioclavicular joint degeneration is in endemic in the community. Just because you see the generation of an AC joint on an x-ray, it has no correlation whatsoever with the symptoms. However, there is a possibility that repetitive overhead activity can make a shoulder symptomatic. In this case, it is the workplace activity that has been identified as being responsible for a degeneration of the AC joint.

[55] He further says in his report of 3rd September 2020, in a most emphatic assessment of the cause of the injury the following:

Ms Schafer was loading and unloading trays into and from a steamer oven and then into a distribution container. Some of the shelves onto which the trays were loaded and uploaded from were at or above shoulder height. This was heavy physical work performed on a repetitive basis. In my opinion it caused the aggravation of acromioclavicular (AC) joint arthritis. But for these work activities, the injury would not have occurred.

Dr Low's evidence in this regard was not challenged.

[56] For the Defendant, reliance was placed upon the reports and evidence of Dr Walters and Dr Halliday, orthopaedic surgeons and Dr O'Toole, an occupational and environmental physician. Both Dr Walters and Dr Halliday gave evidence of what

they referred to as an '*exacerbation*' of underlying conditions. Dr Walters spoke of '*underlying AC joint arthritis'* and Dr Halliday, after arranging an MRI on the left shoulder identified a moderately severe degenerative change of the AC joint. He spoke of the condition being '*temporarily exacerbated*' by overhead work activities.

[57] Both Dr Halliday and Dr Walters related the current difficulties experienced by the Plaintiff to the pre-existing condition within the AC joint. Dr Walters in particular commented upon the matters raised by Dr Low as significant. Dr Walters in his comments says,

> *I realise that my opinion is perhaps different from that in some recognised "guidelines" which would indicate that lifting a certain weight a certain number of times exceeds accepted practice. The inference is that there has been a musculoskeletal injury. I do not agree with the statement that gradual "wear and tear is a consequence of prolonged or frequent muscular effort. I do not concur with the view that strenuous activity causes joint damage.*
>
> *Wear and tear does occur in the shoulder tendons with age. This is a different and constitutional condition, and there are other anatomical factors of blood supply and friction.*
>
> *I would perhaps summarise my position by indicating that the frequency and loading of the left upper limb and AC joint in the course of the work activities described, would not, in a person with a normal AC joint, be responsible for causing a work injury. Mrs Schafer became symptomatic, because she had a quite abnormal and degenerate AC joint, as evident on imaging.*
>
> *The work events may have precipitated symptoms in a person with pre-exiting arthritis and hence a predisposition for symptoms to develop. This has been termed an exacerbation of the underlying condition. In normal circumstances, the loading and work activity described would not have in my opinion constituted an injury. The requirement for surgery, relates not to a work exacerbation, but to the underlying condition. Similarly, I would regard any ongoing symptoms relating to the left shoulder girdle as a consequence of that pre-existing condition. I find it difficult to concede that any perceived injury was preventable. Normally, common sense would dictate that if a worker*

reports symptoms relating to a particular activity, then the job can be modified accordingly.

[58] Relevant here is that evidence of Dr Low, and significantly, the unchallenged evidence of the Plaintiff of reporting difficulties to persons in apparent authority. Dr Walters also acknowledged that he had no expertise in risk management, as was held by Mr McDougall.

[59] Ultimately, I am satisfied that the evidence of Dr Low in conjunction with the expert evidence of Mr McDougall more comprehensively answers the questions in relation to the cause of the injury experienced by the Plaintiff, arising from a breach of the Defendant's duty of care owed to the Plaintiff.

Quantum

[60] Having dealt then with the question of liability, I turn to quantum. The medical experts all acknowledge an aggravation of pre-existing degeneration of the acromioclavicular joint of the left shoulder. However, the evidence diverges in respect of whether that degeneration was caused by the nature of the work required of the Plaintiff as well as whether it was temporary in nature. Dr Halliday indicated as early as June 2017 that the effects of any injury had ceased. However that flies in the face of the Plaintiff's evidence, which I accept.

[61] Additionally, the Plaintiff submits that Dr Halliday was not asked to and did not assess the Plaintiff for a permanent impairment, and accepted the limitations in his assessment that arose as a result of this. More directly on point here, is the evidence of Drs Walter and Low. Conveniently, Counsel for the Plaintiff sets out the Plaintiff's assessment of relevant evidence for both Drs, which I accept as a reasonable and fair summary. At paragraphs 90 and 91, Counsel says,

[90] Dr Walters is the only doctor called by the Defendant who has provided a report for the purposes of this court proceedings. Relevantly, he states:

(i) Mrs Schaffer had significant established pre-existing arthritis in the left AC joint;

(ii) The work activities preceding and on 5 January 2017 acted to aggravate the pre-existing condition;

(iii) The work activities appeared repetitive and involved lifting with the limb in various positions. This is consistent with causing an aggravation of pre-existing arthritis;

(iv) The lifting activities are consistent with causing an aggravation.

(v) Dr Walters assesses 2% whole person impairment as a result of this work aggravation;

(vi) Dr Walters agrees with Dr Lowe that: "AC joint degeneration is 'endemic in the community'". He states that Dr Low "correctly states 'Just because you see degeneration of an AC joint on a x-ray, it has no correlation whatsoever with the symptoms'. I completely agree. He further states that repetitive overhead activity in a person with underlying asymptomatic arthritis can initiate symptoms. I also agree".

(vii) Repetitive overhead activity could initiate symptoms or exacerbate the underlying condition of AC joint degeneration;

(viii) As Dr Low has suggested, it is very difficult to predict when and if a person with AC joint arthrosis develop symptoms;

(ix) It is quite possible that the shoulder may have become symptomatic by general household and common duties. It is simply impossible to predict when and if such an arthritic joint becomes symptomatic.

(x) The frequency and loading of the left upper limb and AC joint in the course of the work activities described, would not, in a person with a normal AC joint, be responsible for causing a work injury.

[91] Dr Low opines that:

(i) Mrs Schafer's injury is an aggravation of AC joint arthritis which was asymptomatic prior to her employment at the aged care facility;

(ii) if not for the work injury, her shoulder would have stayed asymptomatic, and she would have been able to work indefinitely to retirement age;

(iii) Ms. Schafer cannot do any work in general above shoulder height where there is any load on the left arm;

(iv) Ms Schafer has suffered 5% related whole person impairment as a result of her left shoulder injury or aggravation;

(v) Ms. Schafer's current job is fairly light based on her physical restrictions. These restrictions will continue indefinitely. In any future employment she will need to seek a similar role where she is not performing repetitive or heavy work with the left shoulder above shoulder height. As such, she is not suitable for work at the aged care facility.

[62] However, as the Plaintiff submits, the Defendant takes the Plaintiff as it finds her and as I have found, that includes her stoicism. That leads, of course to a consideration of what might have been in the future for the Plaintiff, were it not for the situation now faced by her.

[63] It is acknowledged that the Plaintiff suffered from a pre-existing degenerative acromioclavicular joint and had also had carpal tunnel release in or about 2008 and again in 2017. However there is no suggestion that this situation prior to January 2017 had affected her capacity to work.

[64] This is certainly a factor to consider but there is no certainty as to other future events. As was said by Deane, Gaudron and McHugh JJ in *Malec v J.C. Hutton Pty Ltd*[8]:

> *When proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which is a 49% probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.*

[8] (1990) 169 CLR 638 at 643

[65] Any such necessary assessment requires specific attention given to the evidence of the Plaintiff and the findings in respect of the Plaintiff. In a situation somewhat similar to the findings here, McKenzie J said in *Hopkins v WorkCover Queensland*[9]

> *It was accepted by the learned trial judge that it was probable that without the subject incidents, the Plaintiff's degenerative condition of his spine would have interfered at some point with his capacity to continue with his work as a tyre fitter and his capacity to undertake alternative forms of employment. She said that that probability had to be assessed against his work history that showed that he was a good and conscientious worker and that the degenerative spine was asymptomatic until the incident in February 1998.*

[66] The evidence in this case, suggested by Dr Low and accepted by Dr Walters was that '*AC joint degeneration is endemic in the community*'. Dr Low was I think fair and reasonable when he noted that it was difficult to predict when and if a person with AC joint degeneration might develop symptoms or at all.

[67] Dr Low opined that '*if it was not for the employment, Ms Schafer's shoulder would never have become symptomatic*', but such a statement, similar to some percentage indication of the likelihood of the shoulder becoming symptomatic requires speculation which is beyond the evidence available.

[68] The medical experts views differ here, as they do in respect of the degree of impairment and what adjustment, if any should be made again in accordance with the findings upon the evidence. The Plaintiff had an admirable and consistent work history until January 2017 and clearly I find, sought work that she was capable of performing subsequent to the injury. She would in my assessment have continued to work as a chef, as she said was her intention until 67 years of age, subject to the obvious need for some discount relating to the prospect of her shoulder degeneration becoming symptomatic.

[69] Finally, I turn then the calculation of damages. Both the Plaintiff and the Defendant agree that general damages would be assessed under Item 97 of the *WCRA*, though the Plaintiff argues that it would be based upon an ISV of 10 with an uplift and, the Defendant suggests it would be in the lower end of the ISV range and submits no

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[9] [2004] QCA 155.

more than one (1). I would find that the appropriate ISV would be 10 and assess the general damages at $15,530.00.

[70] Next is required an assessment of past economic loss and the Plaintiff's claim is based on her pre injury income of $1,091.00 nett per week. The Defendant relies upon the fact that the nett income earned by the Plaintiff at Glendale Aged Care was the highest that she had ever earned and that in previous employment in earlier years was less and that the Court should reduce the actual nett weekly wage as the Plaintiff was still on probation and therefore her role was not secure. However, there is no evidence so suggest that the Plaintiff was doing anything other than performing her duties appropriately. I intend to assess past economic loss upon the basis of income received in her last employment.

[71] For completeness, though probably unnecessary in light of these reasons, I am satisfied that the past economic loss as well as her future economic loss are directly related to the negligence on the part of the Defendant. For 210 weeks, the calculation being made from the date of her resignation, not the date of injury, I assess the loss of income at $229,110.00. Deductions however include $15,274.00 representing 14 weeks when absent from the country, and income received in various capacities totalling, $53,599.00.

[72] Accordingly, I fix past economic loss at $160,237.00.

[73] Future economic loss would then also be calculated on the nett weekly income of $1,090.00 and appropriately it is accepted that that would be for a period of 8 years, the Plaintiff having turned 59 on 23 March 2021 and based upon normal retirement at 67 years. That claims needs to be offset by the work she is now doing, 30 hours per week as a nursery attendant but she indicated that the work was causing an increase in symptoms such that she was seeking to negotiate a reduction to 22.5 hours per week.

[74] On that basis and a pay rate of $22.263 this would be a weekly income of $500.90 or nett $478.00. The difference between the two nett incomes in $612.00 per week and upon the appropriate 5% multiplier for 8 years equates to $211,752.00. Discounting for normal contingencies concerning the vicissitudes of life and the previously addressed prospect of future degenerative change in her shoulder,

impacting upon her working capacity, and fixing that at 25%, I fix future economic loss at $158,814.00.

[75] Past and future superannuation losses would be based on 9.5% for past superannuation losses and 10.5% for future superannuation losses. Those then equate to $15,222.51 and $16,675.47.

[76] Future medical and rehabilitation expenses are claimed in the sum of $20 per week upon a life expectancy of 32 years, and future pharmaceutical expenses are claimed at $7 per week. Upon the 5% tables the multiplier would be 845 resulting in amounts of $16,900.00 and $5915.00. However, whilst I accept both these claims as reasonable and arising directly from the injury, the Plaintiff proposes a discount of 50% on the future pharmaceutical expenses to reflect the use of analgesia to assist with neck and back pain. Accordingly, I fix future pharmaceutical expenses at $2,957.50.

[77] WorkCover special damages are not contested consisting of medical expenses and rehabilitation expenses totalling $2,866.80.

[78] Finally, past special damages are claimed by the Plaintiff totalling $11,616.45 reflecting medical, rehabilitation, pharmaceutical and travel expenses and I find this to be appropriate.

[79] Accordingly, the total here is $400,819.73. The deduction of the repayment to WorkCover is $2,866.80 and accordingly I give judgment for the Plaintiff in the sum of $397,952.93.