

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY  
COURT OF APPEAL**

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| <b>Case Title:</b>        | <b>Calvary Hospital Auxiliary Inc v D'Amico</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Citation:</b>          | <b>[2016] ACTCA 39</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>Hearing Date:</b>      | 13 February 2015                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Decision Date:</b>     | 15 August 2016                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>Before:</b>            | Refshauge, Penfold and Katzmann JJ                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>Decision:</b>          | <ol style="list-style-type: none"><li>1. The verdict and judgment of the Master be varied by substituting "\$590,050" for "\$593,700".</li><li>2. Otherwise the appeal be dismissed.</li><li>3. The appellant pay the respondent's costs.</li></ol>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Catchwords:</b>        | <p><b>APPEAL</b> – JURISDICTION, PRACTICE AND PROCEDURE – Nature of appeal – re-hearing</p> <p><b>CIVIL LAW</b> – NEGLIGENCE – Personal injury – employer's duty of care – employee reported injury – inadequate response by employer – employers unaware of occupational health and safety obligations – failure to conduct risk assessment – failure to take preventative measures – failure to provide safe place and system of work – breach of duty</p> <p><b>DAMAGES</b> – explanations for calculations not explicit in judgment – assessment of interest on past economic loss – future economic loss – adjustments for future employment prospects – partial incapacitation for work – failure to establish availability of suitable work</p> |
| <b>Legislation Cited:</b> | <p><i>Civil Law (Wrongs) Act 2002</i> (ACT), ss 42, 43, 43(2)<br/><i>Occupational Health and Safety Act 1989</i> (ACT), ss 37, 87(1)<br/><i>Supreme Court Act 1933</i> (ACT), ss 37E, 37N, 37O<br/><i>Workers Compensation Act 1951</i> (ACT), s 184(4)</p> <p><i>Court Procedures Rules 2006</i> (ACT), r 6906</p>                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Cases Cited:</b>       | <p><i>Arthur Robinson (Grafton) Pty Ltd v Carter</i> (1968) 122 CLR 649<br/><i>Bankstown Foundry Pty Ltd v Braistina</i> (1986) 160 CLR 301<br/><i>CSR Ltd v Della Maddalena</i> (2006) 224 ALR 1<br/><i>Gaundar v Hogan</i> [2014] ACTCA 4<br/><i>Omari v Omari</i> [2016] ACTCA 16<br/><i>Wynn v NSW Insurance Ministerial Corporation</i> (1995) 184 CLR 485</p>                                                                                                                                                                                                                                                                                                                                                                                    |

**Texts Cited:** *National Code of Practice for the Prevention and Management of Occupational Overuse Syndrome* (AGPS: Canberra, 1990)

*National Code of Practice for the Prevention and Management of Occupational Overuse Syndrome* (AGPS: Canberra, 1994)

The National Occupational Health and Safety Commission, *National Standard for Manual Handling*, National Code of Practice (1990)

**Parties:** Calvary Hospital Auxiliary Inc (Appellant)  
Christine Joy D'Amico (Respondent)

**Representation:** **Counsel**  
Mr A Muller (Appellant)  
Mr R Crowe SC with him Mr W Sharwood (Respondent)

**Solicitors**  
Moray & Agnew (Appellant)  
Maurice Blackburn (Respondent)

**File Number:** ACTCA 3 of 2014

**Decision under appeal:** Court: Supreme Court of the ACT  
Before: Master Harper  
Date of Decision: 19 December 2013  
Case Title: D'Amico v Calvary Hospital Auxiliary Inc  
Citation: [2013] ACTSC259

## **REFSHAUGE AND PENFOLD JJ:**

### **Introduction**

1. Calvary Hospital Auxiliary Inc, the appellant to this appeal, to which we will refer as the Auxiliary, is a voluntary association, linked to Calvary Hospital in Bruce, ACT. It conducted a kiosk and a cafe at the Hospital until 30 June 2007. Thereafter, the business was conducted by a commercial firm, Zouki.
2. The respondent, Christine Joy D'Amico, was employed by the Auxiliary from February 2004 until 30 June 2007. She was employed in the cafe and her duties included customer service, particularly, making coffee.
3. In April 2006, Ms D'Amico consulted her general practitioner, Dr Silvio Demilio about pain in her elbow and down to the wrist of her right arm. She continued to have problems which ultimately led to her having surgery and, finally, she resigned her position on 10 November 2008, ceasing working on 21 November 2008.
4. On 2 June 2008, she commenced proceedings in the Supreme Court claiming damages for the injuries she said she suffered as a result of the work she carried out for the Auxiliary. That claim was heard in February 2012.

5. On 19 December 2013, the Master entered judgment for Ms D'Amico and ordered that the Auxiliary pay her \$593,700 damages and costs.
6. The Auxiliary has now appealed against the judgment, seeking that the orders of the Master be set aside and that judgment be entered for the Auxiliary.

### **The nature of the appeal**

7. Appeals from final orders of the Master are taken to this Court under s 37E of the *Supreme Court Act 1933* (ACT).
8. Such appeals are by way of re-hearing. Under s 37N of the *Supreme Court Act*, the Court of Appeal must have regard to the evidence before the Master and may receive further evidence. No further evidence was received or sought to be tendered in these proceedings.
9. By s 37O of the *Supreme Court Act*, the Court has power to confirm, reverse or amend the order from which the appeal is taken, to give any order it considers appropriate, refuse to give an order that a party seeks, set aside, completely or in part, any order made in the trial court or remit the proceedings to the trial court subject to directions.
10. Kirby J described the principles applicable to such a re-hearing in *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 at 7; [16]-[17], as follows:

...The relevant 'requirements' are that the appellate court is obliged to conduct a thorough examination of the record and a real rehearing. It is not confined to reconsideration of the record in order to correct errors of law, although that will certainly be encompassed in such an appeal. It is required to consider suggested errors of fact-finding. Experience teaches that many errors of this kind arise at first instance, more perhaps than errors of law. Having conducted a rehearing as so described, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance. This involves, where, as here, there is no jury, conducting a thorough review of the primary judge's reasons and engaging in the tasks of 'weighing conflicting evidence and drawing ... inferences and conclusions.'

The 'limitations' introduced into the rehearing based on the record of the trial are those necessarily involved in that form of appellate procedure. Such limitations include those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole.

(footnotes omitted)

11. Most recently, this Court addressed the issue of the nature of the appeal in *Omari v Omari* [2016] ACTCA 16 at [11], where the Court said:

**[11]** The nature of the appeal should be explained. As stated in *Moon v Whitehead* [2015] ACTCA 17; (2015) 10 ACTLR 309:

23. Neither party addressed the Court at any length with respect to the nature of this appeal, but it is desirable to briefly set out the applicable principles. The nature of this appeal was set out by Dowsett J in *Gaundar v Hogan* [2014] ACTCA 4 at [5] – [6]:

It seems to be common ground that the appeal is by way of rehearing. The appellant submits that on such an appeal, 'the Court is obliged to conduct 'a real review of the trial' and the judge's reasons and give 'the judgment which in its opinion ought to have been given in the first instance''. The quoted passage

comes from the decision of this Court in *Australian Capital Territory v Crowley & Ors* [2012] ACTCA 52 at [5]. Whilst it may be correct as far as it goes, it does not go as far as the appellant's submissions might imply. There are at least two limitations upon it. The first limitation appears from the decision of the Full Court of the Federal Court in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [21] – [30]. The case demonstrates that error must be shown before an appellate court is called upon to consider the appropriate judgment to be given. As Allsop J observed at [25], on some occasions the appellate court may not be convinced that it is in as good a position as the primary judge to assess a particular aspect, and so may be reluctant to find error. Further, a demonstrated error does not necessarily lead to a review of all aspects of the trial, but only to review of any part of the judgment which may be infected by the error.

As to the second limitation some aspects of a case may allow for more than one 'correct' answer, although the 'correct' answer may fall within a range. Again, an appellate court will not intervene to substitute its views for that of the primary Judge, unless error is first shown.

24. In *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, the majority (Gleeson CJ, Gummow and Kirby JJ) said at [22] – [23] concerning an appeal by way of rehearing:

The 'rehearing' does not involve a completely fresh hearing by the appellate court of all of the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.

The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of the case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

(Citations omitted)

## The appeal

12. The Auxiliary appealed from the whole of the Master's order. The grounds of the appeal were set out in the Notice of Appeal as follows:
- (a) His Honour erred in finding that the plaintiff complained to the defendant's employee, Ms Riddle, of symptoms in her right arm and hand in or about April 2006 or soon afterwards.
  - (b) His Honour erred in his summary and application of the legal duty of care owed by the defendant.
  - (c) His Honour erred by failing to take into account the criteria in s 43(2) of the *Civil Law (Wrongs) Act 2002* (ACT) when determining negligence.
  - (d) His Honour erred by failing to provide any or any adequate explanation of the amount of the discount applied to the assessment of damages to account for any permanent damage sustained by the plaintiff before she notified the defendant of her symptoms.

- (e) His Honour erred by failing to provide any or any adequate explanation for his assessment of the value of the plaintiff's present earning capacity.
- (f) His Honour erred by failing to specify the percentage applied for vicissitudes.
- (g) His Honour erred in failing to specify the discount factor applied when discounting economic loss.
- (h) His Honour erred in assessing interest on past economic loss in that he made an incorrect presumption that the workers compensation redemption figure was inclusive of legal costs.
- (i) His Honour erred by failing to provide any or any adequate explanation for his assessment of gratuitous assistance.

13. The final ground, however, was not pressed in the appeal.

### **The evidence**

- 14. Both parties described this case as "about making coffee". Ms D'Amico said that this was the cause of her injuries and the reason she was entitled to the damages awarded to her by the Master.
- 15. Ms D'Amico was employed by the Auxiliary as a cafe attendant from February 2004. The cafe and kiosk conducted by the Auxiliary were on separate floors in the hospital, the cafe upstairs and the kiosk on the ground floor. They were managed by a paid manager, Ms Vicki Riddle, who worked mostly in the kiosk and not in the cafe.
- 16. Ms D'Amico's duties included customer service, making sandwiches, replenishing stock, clearing tables and making coffee. She worked from 8.00 am to 3.30 pm on weekdays and opened the cafe for business at 8.30 am. Before that time, Ms D'Amico would go down to the kiosk to pick up stock and return to the cafe to open up, get the coffee machine and pie maker ready and generally set up the shop for the day. She initially worked alone until another staff member came in at about 10.00 am.
- 17. About 250 cups of coffee were made each day but demand was not uniformly spread throughout the day. The busy periods were from 8.30 am to 11.00 am and from about 11.30 am until 2.00 pm. It appears as though Ms D'Amico did most of the coffee-making and, if she was already making the coffee when the other staff member arrived, would continue to do so, but otherwise they shared the coffee-making. That staff member left the job at some stage and was replaced by another who did not make coffees during the busy period.
- 18. Most coffee orders were for coffee made with hot milk, though there were other orders for hot drinks. The task of making coffee with hot milk involved heating the milk in a stainless steel jug. The jug was filled with milk to just over the bottom of the spout and then held under a steam nozzle attached to the coffee machine. The operator pressed a button which released the steam into the milk, to heat it and also to froth it.
- 19. The jug, when full, was said to be about 1.86kg in weight and, for Ms D'Amico, had to be held at about chest height, with her upper arm vertical against her body and the forearm a little higher than horizontal, with her hand higher than her elbow. She had to hold the jug in that position for about a minute at a time. On a busy day, Ms D'Amico estimated that she would make up to 200 individual cups of coffee of varying types and hot chocolate, the great majority of which required the milk to be heated and frothed.

20. From time to time orders would be phoned through to the cafe for ten to twenty coffees to be made with some urgency, putting Ms D'Amico under some pressure.
21. At some stage, Ms D'Amico sought further help from Ms Riddle, who arranged for another member of staff to work from 11.00 am to 2.00 pm packing the dishwasher and attending to table service and customer service.
22. As time went by, Ms D'Amico found she was experiencing pain in her elbow, down to the wrist of her right arm. She had trouble holding the milk jug. In April 2006, she consulted her general practitioner, Dr Demilio, who prescribed anti-inflammatory medication and gave her exercises to do. Ms D'Amico did not find the exercises helpful.
23. By mid 2006, the cafe was becoming busier and Ms D'Amico was required to prepare more coffees each day. Her arm got worse and she developed pain from her shoulder to her wrist.
24. During 2006, on occasions the timing of which became an important issue in the proceedings, she complained to Ms Riddle, who said she could arrange for someone to assist with coffee-making. Staff were employed, but they attended mainly to customer service and making sandwiches while Ms D'Amico was left to make the coffee, especially as customers complained when other staff made the coffee; the customers said that the other staff either made the coffee too cold or burnt the milk.
25. Ms D'Amico's arm got worse and she consulted Dr Demilio again in November 2006, when she complained of severe pain down her arm, which she described as like a toothache; her arm was blue and the fingers were swollen. Her left arm was unaffected.
26. She was sent for tests and later admitted to hospital. She underwent a venogram, which revealed that she had a tight stenosis (narrowing) of the clavian vein overlying the first rib with complete occlusion of the vessel when the arm was raised above the head. She was placed on a heparin drip for about a week and spent four days in hospital. She was, by then, on annual leave and did not return to work immediately.
27. She had further tests and after about a week, returned to work on light duties. In particular, she did not make coffee in the cafe.
28. After further consultations, she was advised that she had thoracic outlet syndrome and was admitted again to hospital for surgery. After surgery, she awoke with a lot of pain.
29. She remained in hospital for about four or five nights and then stayed with her mother, with some limitation on the housework she could do.
30. After about four weeks, she returned to work but again on light duties. She also reduced her hours to three days a week, but was still making coffee.
31. On 1 July 2007, the Auxiliary ceased to operate the cafe and the business was taken over by a Sydney-based company, Zouki. Ms D'Amico was employed by that business and was, by then, working full-time.
32. Zouki, however, made some changes. They introduced a steamer and much smaller jugs, about half the size of the jugs that Ms D'Amico had formerly used. The new steam nozzle was longer so that the person holding the jug did not have to hold the jug to it as it was balanced on a cup placed upside down.

33. There was also a change in personnel and a barista was employed who made most of the coffee in the morning, though Ms D'Amico did make coffee from time to time. He, however, left in late November 2007 and she resumed making coffee with another employee, who was happy to share a significant part of that work, so Ms D'Amico did not have to make all the coffee.
34. Her arm did not improve, however, and in October 2008 she commenced seeing a psychologist.
35. In November 2008, she suffered an injury when a bookshelf fell on her shin because the weakness in her right arm meant she was unable to hold up the falling shelf. She decided to resign from the job and ceased work that month.
36. In 2009, she underwent further tests and later tried, unsuccessfully, to return to work in the cafe but could not cope because of her arm. She was later referred to a neurosurgeon and vascular surgeon for treatment, but, when the latter advised that the proposed surgery had only 50 percent chance of providing a benefit and that she would never return to 100 percent of her original condition, she decided not to proceed.
37. Her arm became weaker and in 2011, she developed cramping in the fingers of her right hand with sharp pain. This affected her capacity to undertake domestic tasks.

### **Expert evidence**

38. Ms D'Amico's medical evidence, indeed the preponderance of the medical evidence, supported the diagnosis of thoracic outlet syndrome. The consensus of the medical opinion was that she had a pre-existing tightness in her thoracic outlet, which was aggravated or exacerbated by the work in the cafe. The prevailing view was that the aggravation was likely to be permanent.
39. Dr Garth Eaton, an occupational physician, attributed the pre-existing tightness to a congenital condition: the presence of a cervical rib, which was removed during surgery. On the cause of her pain and disabilities, he wrote:

Certain static postures of the neck and right shoulder and the position of the right upper limb with repetitive duties facilitated the eventual pressure and occlusion of the subclavian vein. The repetitive use of the right arm when lifting a heavy milk jug as well as reaching and elevating the limb in the workplace, would have contributed to the development of her condition.
40. Ms D'Amico also adduced a report of a Vocational Assessment prepared by Glen Dwyer of Evidex, an experienced occupational therapist employed as a Rehabilitation Consultant.
41. Mr Dwyer considered Ms D'Amico's age, limited formal education and absence of vocational qualifications other than as a barista and florist, and concluded that provision of occupational rehabilitation services or retraining to facilitate a return to suitable employment was inappropriate and ultimately futile unless suitable work could be identified.
42. He concluded that her prospects for securing and sustaining employment in the future were "poor to negligible".
43. He also concluded that, but for the effects of the injury, Ms D'Amico would have been unrestricted in continuing to work full-time at the cafe as she planned to do until retirement age.

44. Mr Dwyer's conclusions were consistent with the report of Ms G Tayler, a psychologist who prepared a report for Ms D'Amico. Ms Tayler recorded that Ms D'Amico did not like being at home every day and had not anticipated that she would be unemployed and restricted from gainful employment.
45. Neither Mr Dwyer nor Ms Tayler was required for cross-examination and those reports were not challenged or contradicted by evidence adduced on behalf of the Auxiliary.
46. In his final report, Dr Eaton said that Ms D'Amico remained unfit for any employment requiring the repetitive use of the right arm or for activities above shoulder level and that repetitive use of the arm with computer and office tasks "would be limited and problematic". He said that this work incapacity was "directly related to the work related right upper limb injury sustained when making coffees in the cafe ..."
47. Apart from the reports from medical experts and a vocational assessment report, the only expert reports on the circumstances of Ms D'Amico's place of employment and work procedures and processes came from Mr Mark Dohrmann AM, a mechanical engineer and ergonomist, who has worked in occupational health and safety since 1976.
48. Mr Dohrmann had access to the Statement of Claim and reports from various medical practitioners. He also inspected a jug similar to the one originally used by Ms D'Amico and he visited the cafe, taking some relevant measurements.
49. He set out in his report the facts he assumed for the purpose of his reports. There were some excisions from those facts set out in the Report, which facts were not admitted. Mr Dohrmann said that these excisions did not affect the opinion he expressed in his first report and adopted in his second report.
50. Mr Dohrmann relied on the *National Code of Practice for the Prevention and Management of Occupational Overuse Syndrome* (AGPS: Canberra, 1990) (the **Code**) and the later 1994 version. On 28 June 1994, this latter version was approved in the ACT under s 87(1) of the *Occupational Health and Safety Act 1989* (ACT), so as to be applicable under s 37 of the Act. It remained in force until 2010.
51. In his first report he wrote:
  - 7.2. The work Ms D'Amico did in this coffee shop was characterised by frequent, repetitive and forceful use of her right hand and arm (and evidently to a lesser extent) her left hand and arm. The actions in holding and raising a 4 kg jug to the height described earlier, performing the frothing actions, and then pouring milk into cups and mugs, is characterised by a number of the movements which are identified as risky in commonly-available advice for the identification and prevention of overuse strain in the elbow, forearm, wrists and hand. Likewise, the forceful impact of tamping coffee baskets, tightening baskets and striking them into a disposal container would have placed repeated mechanical stress on the relevant hand, wrist, forearm and elbow.
  - 7.3 In my opinion, this was a task which – given its duration, frequency and nature – exposed Ms D'Amico to risks of the injuries with which she has been diagnosed. In particular, once there were symptoms of tingling, pain, tiredness or soreness in the relevant hand, a prudent employer would in my opinion have investigated what manual tasks were being performed, with a view to making adjustments to the system, to change things.
  - 7.4 I have little doubt that the requirement that she continue to support a jug which probably weighed up to 2 kg or more when part-loaded with milk put her at risk...



52. We interpolate that the reference in [7.2] of the report to a 4 kg jug was erroneous. It is plainly at odds with the opinion expressed in [7.4] and is likely to have been a typographical error. The agreed weight was 1.86 kg. In a later report, Mr Dohrmann said that this made no difference to his opinion (and see [58] below).
53. Mr Dohrmann also identified what he said were the measures that the Auxiliary should have taken to prevent Ms D'Amico from being exposed to injury. They were:
- (a) Encouraging employees to report symptoms of pain and discomfort and training their supervisors to elicit such information sympathetically, that is to say, without causing employees to feel anxious about the consequences of doing so. "Early reporting often enables risks to be avoided by prompting helpful changes to work arrangements".
  - (b) Carrying out the type of review or audit of manual handling work called for under the *National Standard for Manual Handling 1990*, which, if conducted competently, "would doubtless have identified the task concerned as comprising a risk of strain injury, and may have prompted earlier intervention".
  - (c) Applying the helpful advice given in the *National Code of Practice for Manual handling* – "an excellent guide first published in 1990, and which gives an abundance of information on the identification, assessment and control of risks of strain (a companion Code dealing with *Occupational Overuse Syndrome* is equally authoritative and helpful)".
  - (d) Allowing Ms D'Amico to rest the milk frothing jug on a support to obtain relief from the effort of supporting it.
  - (e) Responding sympathetically to her request to arrange the job in that way.
  - (f) Placing an extension on the steamer pipe, so that the bench itself could be used to support the jug (a measure taken by Zouki shortly after it took over the operation of the coffee shop).
  - (g) Rotating her to other tasks which did not put such prolonged and constant stress on her right arm.
  - (h) Better and closer supervision.
  - (i) Providing training, not so much in lifting techniques but in *risk identification*.
  - (j) Providing more frequent and longer breaks.
54. Mr Dohrmann was cross-examined. It was put to him that there were a large number of coffee-making outlets in Australia and an even larger number of baristas and yet he had not previously been asked to investigate a barista being exposed to repetitive strain injury. He rejected the suggestion that this was remarkable, stating that he did not think that followed at all.
55. Mr Dohrmann agreed that the risk to Ms D'Amico was in what was called "static muscle loading". He also agreed that Ms D'Amico did a number of tasks other than making coffee and that even the making of the coffee involved a wide variety of different movements and, to some extent, use of a variety of muscle groups of both upper limbs, with some relief from the task of holding the jug up to the steam wand. He said that this would, in general terms, have reduced the risk of injury and was one possible explanation for why he had not seen another case of overuse syndrome in a barista.

56. He also agreed, in cross-examination, that some people would be more susceptible to such an injury, which might be presaged by early complaints of soreness or tiredness and a predisposing factor would be any anatomical variation from normal. The latter information, he accepted, would not be known to a small business operator, unless there had been some complaint to which an operator should be responsive. One response, he accepted, would be to employ more people to relieve the repetitive tasks carried out by one person, to take the load off them.
57. Mr Dohrmann accepted that the natural business cycle during the working day would probably provide some relief. He accepted that adopting a fixed posture of performing overhead activities may be provocative of symptoms in a pre-existing thoracic outlet syndrome, though he rejected the suggestion put to him in cross-examination that it would instigate it rather than inflame or aggravate it. Nevertheless, he accepted that the posture was one seen in everyday life from time to time.
58. Mr Dohrmann also accepted that he had to adjust his report because the weight of the full jug he had originally mentioned in his Report was greater than the weight of that actually used by Ms D'Amico, but he said that this did not alter his opinion as it was not so much the weight that was relevant as the grip required.
59. The Code, Mr Dohrmann said, provided employers with useful insights into the identification of injury risks and strategies for prevention. It was widely and freely available. It specifically referred to the difficulty associated with maintenance of constrained or awkward postures in the workplace and the importance of employers considering an employee's posture in attempting to reduce the risk of injury. It also focused on the responsibility of employees to carry out risk assessments in relation to these matters.
60. None of the matters raised in cross-examination caused Mr Dohrmann to resile from or modify his conclusions.
61. Mr Dohrmann was not cross-examined about any of the measures he said that the Auxiliary could have taken to prevent Ms D'Amico being exposed to injury.
62. It is also relevant to note that at least two measures, namely providing a means of resting the jug on a support to avoid the staff member having to hold it up and extending the steamer pipe, were measures taken by the company, Zouki, which took over the cafe business.
63. No non-medical expert evidence was adduced by the Auxiliary and, to that extent, Mr Dohrmann's evidence was unchallenged, subject to the matters raised in cross-examination.

### **The reasons of the Master**

64. The Master noted (at [129]) that an employer owes a non-delegable duty to take reasonable care for the safety of all employees, by providing them with a safe place and system of work, so as to eliminate unnecessary risk of injury. He found (at [130]) that Ms D'Amico had "an anatomical vulnerability to thoracic outlet syndrome" but noted that the law requires that an employer must take each employee as it finds her.
65. The Master accepted Ms D'Amico's evidence as truthful and honest. That said, having regard to the passage of time since the events in question had taken place, he was cautious about her account of the timing of events, while finding that her memory was

“generally reliable as to the sequence ... and ... most of the detail of the events” (at [124]). He also accepted the evidence of the other lay witnesses called on her behalf and he considered that there was no “real inconsistency” with the evidence given by Ms Graham on behalf of the Auxiliary. While there were inconsistencies between Ms D’Amico’s evidence and some parts of Ms Riddle’s statement, to the extent of those inconsistencies, the Master preferred Ms D’Amico’s evidence because Ms Riddle did not present herself for cross-examination.

66. On the contentious question of when Ms D’Amico first complained to Ms Riddle of symptoms in her right arm and hand, the Master found that, as Ms D’Amico saw her GP about the symptoms in April 2006, it was more likely than not that she complained to Ms Riddle at about that time or soon afterwards. He found that Ms Riddle tried to “do something practical about the problems”, such as by engaging Ms Seo (now Moon) and sending her to the cafe to help Ms D’Amico, but did not take any steps to reduce the amount of time Ms D’Amico spent making coffees or bring Ms D’Amico’s complaints to the attention of members of the executive of the Auxiliary.
67. The Master held (at [132]) that the Auxiliary should have been aware of the National Code of Practice for the Prevention of Occupational Overuse Syndrome. Earlier in the judgment, in the context of discussing Mr Dohrmann’s evidence, the Master referred to the relevant parts of the Code which, he said (at [80], adopting Mr Dohrmann’s opinion), “provides a well-illustrated and down-to-earth recitation of the steps needed to identify and assess the risk of overuse injury in a task, and deals with what measures should be taken to control or minimise these risks”. In particular, his Honour said at [81]–[82]:
  81. The code specifically refers to the difficulty associated with maintenance of constrained or awkward postures in the workplace. It is noted in the code that muscles when used repeatedly or required to hold a position for any length of time will fatigue, increasing the risk of injury. It is also stated that the application of force when used to hold a posture requires muscular effort, and that an employee should not be required to exert forces which feel uncomfortable.
  82. The code specifically states that it is important to consider the employee’s posture in attempting to reduce the risk of injury. The risk of injury is increased where the work height varies significantly from the optimum level, where the employee is required to maintain a single posture for a lengthy period, and where the employee is required to hold a fixed body posture unsupported. For most work the optimum working height, the code states, is at elbow level.
68. It is implicit, if not explicit, that the Master accepted Mr Dohrmann’s evidence. Mr Dohrmann identified the risk to which Ms D’Amico was exposed, classed the magnitude of the risk as “medium”, and detailed the precautions which were available to eliminate or reduce it.
69. Finally, the Master held (at [131]) that it was “clear on all of the medical evidence ... that the work was a cause of [Ms D’Amico]’s injury, symptoms and continuing disability”. Read in context, “the work” is a reference to the manner in which Ms D’Amico made the coffees, by holding a full milk jug in her right hand under the steam nozzle without being allowed to rest the jug on a surface below the nozzle: see [130]. His Honour found (also at [130]) that the Auxiliary “should have done something about this” and, had it done so, the injury “might have been arrested before her disability became permanent”.

70. Consequently, the Master held (at [134]) that the Auxiliary failed to provide Ms D'Amico with a safe system and place of work, and that the failure was a breach of its duty of care to her and a major cause of her injuries and disabilities. He did not accept that the nature of the Auxiliary or its non-profit status affected its duty.
71. The Master's award of damages was made up as follows:
- (a) general damages of \$100,000, attributing half that sum to the past upon which he awarded interest of \$8,000;
  - (b) past treatment expenses of \$26,000;
  - (c) \$10,000 for future treatment expenses;
  - (d) \$140,000 for past economic loss plus interest of \$9,500;
  - (e) \$240,000 for future loss of earning capacity;
  - (f) \$34,200 for loss of superannuation benefits;
  - (g) \$12,000 for past gratuitous care plus interest of \$4,000; and
  - (h) \$10,000 for future gratuitous care.
72. Given the scope of the appeal, it is unnecessary to refer to the Master's reasons with respect to all heads of damage. It is sufficient to note that the Master held (at [140]) that he was satisfied, on the evidence, that Ms D'Amico had "no measurable retained capacity to earn income" and will not have one in the future. He calculated her probable future earnings but for the injury at \$300,000 (based on a net weekly figure of \$650) but considered (at [141]) that a greater discount for vicissitudes than the conventional 15 percent should be applied and so reduced the \$300,000 figure to \$240,000.
73. Regrettably, the reasons of his Honour left much to be desired: they did not set out, in a systematic and helpful way, findings he made on the credibility and reliability of witnesses nor a clear exposition of the principles of law to be applied and their application to the facts of this case.
74. It was, however, possible to glean the findings and basis of the decision from inferences following a careful reading of the Master's reasons. It is regrettable that this was necessary.

### **Duty and breach (appeal grounds (b) and (c))**

75. The standard of care owed by an employer to his, her or its employees is set out in s 42 of the *Civil Law (Wrongs) Act 2002* (ACT), which provides:

#### **42 Standard of care**

For deciding whether a person (the *defendant*) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

76. Section 43 of that Act sets out the general principles about the care required to be taken by such a reasonable person. It is in the following terms:

**43 Precautions against risk—general principles**

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
    - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
    - (b) the risk was not insignificant; and
    - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
  - (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
    - (a) the probability that the harm would happen if precautions were not taken;
    - (b) the likely seriousness of the harm;
    - (c) the burden of taking precautions to avoid the risk of harm;
    - (d) the social utility of the activity creating the risk of harm.
77. The appellants complain that the Master did not take account of the nature of the employer, namely the Auxiliary, its size and resources.
78. That complaint is untenable. His Honour expressly addressed this matter at [129]:
- I understand that the cafe was run by the Auxiliary, a non-profit body with a board of unpaid members who, I have no doubt, should be applauded for the time they gave voluntarily to activities associated with the hospital which might otherwise have cost a great deal more money. Having said that, it does not seem to me that the nature of the body or its non-profit status, or the fact that board members were unpaid, alters the duty the defendant owed as an employer to the plaintiff as an employee. This may be seen as harsh when a small non-profit employer is held to account to the same standard as a large corporation or government instrumentality, but the law focuses on the rights of the employee rather than the size or financial position of the employer. An employer owes a non-delegable duty to take reasonable care for the safety of every employee. What is reasonable must be influenced by current community standards, and seen in the light of legislative requirements as to workplace safety. It is the obligation of an employer to provide each employee with a safe place and a safe system of work, eliminating unnecessary risk of injury.
79. His Honour cites no authority for that, but it is trite law. As the High Court made plain in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307-9, the general content of the duty of care owed by an employer to an employee is universal: to take reasonable care to avoid exposing employees to unnecessary risks of injury.
80. While the question of reasonableness may require a consideration of the resources of the employer, the fact is that the Code was part of the law which applied and his Honour found that the employer had actual knowledge of the difficulties being experienced by Ms D'Amico.
81. Further, nothing was put on the appeal to suggest, for example, that there was any evidence on which the Master should have relied to find that any of the measures suggested by Mr Dohrmann would have been beyond the financial or staffing resources of the Auxiliary to supply.

82. It may be accepted that his Honour did not address each of the particulars of negligence pleaded by Ms D'Amico. Nor did his Honour refer to the relevant sections of the *Civil Law (Wrongs) Act*. His Honour, however, did make an entirely conventional finding from the evidence (at [134]):

I am satisfied that the defendant, as employer of the plaintiff, failed to provide her with a safe system and place of work, and that that failure was a major cause of her injury and disabilities. I am satisfied that the failure was a breach of the duty of care owed by the defendant to the plaintiff.

83. This was the effect of Mr Dohrmann's evidence, which his Honour summarised with specific reference to the *Code*, and which was clearly a sufficient basis for the finding.
84. To this, however, must be added the fact that there was no risk assessment as required by the *Code*. It was expressly conceded in the hearing of the appeal by counsel for the Auxiliary that no risk assessment had been carried out. The *Code* described such an assessment as a key stage in the process of reducing injuries arising from tasks undertaken in the workplace. See [5.5] of the 1994 *Code*.
85. While the Master found that neither the manager, Ms Riddle, nor the members of the Board of the Auxiliary were aware of the *Code*, they should, as an employer, have been aware of it, given the *Code's* status under the *Occupational Health and Safety Act*.
86. The evidence was clear that members of the Board of the Auxiliary had a close involvement in the conduct of the business, including at an operational level. Members of the Board of the Auxiliary, including the President, were regularly in attendance at the cafe; Patricia Graham, one of the Presidents, was there "most days", though not all day, and for "some hours". Another President spoke to Ms D'Amico following a complaint she had made of the problem with her arm, and told her not to make all the coffees.
87. Tellingly, however, when asked what action she would have taken if she had known of the problem earlier than when she had been told that Ms D'Amico was having difficulties with the coffee-making duties, Ms Graham did not suggest any review of the procedures, physical arrangements or staff duties. All she would have done was to invite Ms D'Amico to see her medical practitioner.
88. There was no evidence to suggest that any of the measures recommended by Mr Dohrmann would have been beyond the resources of the Auxiliary; most would have required little or no expenditure at all.
89. While the Master did not make express reference to the *Civil Law (Wrongs) Act*, there can be no doubt that his Honour applied the correct test of negligence. Furthermore, his findings were supported by the evidence. While senior counsel for Ms D'Amico referred to s 43 of the *Civil Law (Wrongs) Act*, senior counsel for the Auxiliary made no submissions directed to the questions raised by the section.
90. A fair reading of the reasons his Honour gave shows that his Honour had proper regard to the general principles set out in the section and no submissions on the appeal showed otherwise.
91. His Honour referred, with apparent approval, to Mr Dohrmann's evidence when he identified the risk to Ms D'Amico of the system of work, the precautions he proposed

and the remedial steps that could have been taken and which were taken by the new owner.

92. His Honour referred to the use of the jug and the possibility of a support for it when under the steam nozzle, the inevitable inference being that his Honour considered such a precaution as imposing no great burden on the Auxiliary.
93. Although the magnitude of the risk was not expressly addressed by the Master, the only expert evidence was that of Mr Dohrmann. He expressed the view that the work practices in the cafe exposed Ms D'Amico to a known risk, specifically epicondylitis. He considered the risk to be a medium risk but that it increased to a high risk once the person exhibited symptoms as Ms D'Amico did. In other words the risk was "not insignificant".
94. As we mentioned earlier, it was put to Mr Dohrmann that coffee-making was extremely common in Australia and, despite that, he had not been called upon to investigate a complaint of repetitive strain injury before. This implicitly challenged Mr Dohrmann's assessment of the risk.
95. Mr Dohrmann rejected the criticism and was right to do so, as the generality of the challenge did not undermine the opinion he had expressed. Apart from anything else, there was no evidence to suggest that baristas were required commonly (or at all) to hold large jugs of milk in a way that Ms D'Amico had to do. Further, apart from Mr Dohrmann's lack of other relevant experience, there was no evidence to suggest that there were no such injuries in the industry.
96. His Honour's conclusion as to liability inevitably meant that his Honour accepted Mr Dohrmann's assessment of the risk, and there was no reason not to do so. Not only did the Auxiliary call no expert evidence to contradict that risk assessment, but Ms D'Amico's evidence was supported by the unchallenged evidence of Ms Moon that she also felt soreness in her arm after using the jug and of Ms Foster that she found the jug "heavy". It is also clear that the Master was satisfied that a reasonable person in the Auxiliary's position would have taken the precautions Mr Dohrmann identified and that, in reaching that state of satisfaction, he took into account the matters referred to in s 43(2) of the *Civil Law (Wrongs) Act*.
97. It is not without significance that the Auxiliary did not address the Master on the terms of s 43.
98. As Dowsett J, with whom Burns J agreed, said in *Gaundar v Hogan* [2014] ACTCA 4 at [13]:

...a judge's reasons will be tailored to meet the circumstances of the case, including the evidence and the way in which it has been conducted, in particular, the approaches taken by the parties in their submissions. In some cases, the reasons may be more readily understood by reference to these matters. A Judge's reasons will not necessarily be insufficient merely because they cannot be discerned from one, discrete document. When read in the context of the trial as a whole, apparent gaps in findings and/or reasoning may disappear.
99. In all the circumstances, the criticism of the Master's reasoning by reference to the *Civil Law (Wrongs) Act* should be rejected.
100. Grounds (b) and (c) of the Notice of Appeal are not made out.

## **Complaints by Ms D'Amico (appeal ground (a))**

101. The trial was conducted on two bases:

- (a) that the Auxiliary had failed to provide and maintain a safe system of work in that it failed to assess the risk of injury required under the Code and to take appropriate precautions to eliminate or reduce it to a reasonable level also required under the Code; and
- (b) that, when Ms D'Amico complained to Ms Riddle, the Auxiliary failed to provide an adequate response.

102. Nevertheless, a central issue that emerged in the proceedings before the Master was the question of when Ms D'Amico first complained to anyone in authority about the difficulty with her arm.

103. While that issue occupied a lot of time in the trial, it would not have been critical unless the problems with the system of work were not reasonably foreseeable.

104. Given our conclusion on the first issue, namely that the evidence showed there was no safe system of work, any error by the Master as alleged in this ground would not justify upholding the appeal.

105. Nevertheless, it is necessary that the appeal ground be addressed.

106. The learned Master found, on the balance of probabilities, that Ms D'Amico did tell Ms Riddle of the difficulties that she was having with her arm as a result of the system of making hot milk for the coffees in about April 2006 or "soon afterwards".

107. Unsurprisingly, for a trial conducted in May 2012 on events occurring in 2006, memories of dates was not always clear, witnesses were uncertain and oral evidence was not always consistent or reconcilable. That needs to be borne in mind, but does not mean that a finding cannot be made on the evidence where an inference is reasonably available.

108. A brief summary of the evidence on these matters from the various witnesses is as follows.

### *Ms D'Amico*

109. Her evidence was that she first noticed pain in her right arm in April 2006 and went to see her general practitioner, Dr Demilio. She did seem to concede that she may not have offered to Dr Demilio a cause of her pain but she said she spoke to Ms Riddle "on numerous occasions" about having trouble making coffee. The pain in her arm got worse, as she told Ms Riddle and co-workers, Ms Lau and Ms Foster. Her evidence then was that she told Ms Riddle in September 2006. She said that Ms Riddle's response was to "sen[d] young uni students up [from the kiosk downstairs]" though Ms D'Amico was still making the coffee, as customers did not like the coffees made by the others. This timing is odd, for Ms Moon was employed in the cafe in April 2006 for this very purpose, and there was no evidence of other such employees. It is also notable that there was no evidence of any attempt to ensure that these efforts were adequate to address the complaint. Further, Ms D'Amico had requested a reduction in her hours in July 2006 because of her arm problems, although she did not mention that cause to Ms Graham.



110. There is no doubt that, by the time of the trial, Ms D'Amico thought that the first time she complained to Ms Riddle of the pain in her arm was in September 2006.

*Dr Demilio*

111. His clinical notes confirmed that Ms D'Amico came to see him on 5 April 2006 complaining of pain in her "right elbow/wrist". He did not note any cause ascribed by her, despite his attempts to elicit a history from her. He prescribed medication and she returned in a week, on 12 April, when she had improved but was still complaining of continuing pain.
112. She then returned to see him relevantly on 25 November 2006, when he found "ongoing cyanosis, peripheral oedema, venous congestion" in her right arm and hand, with ongoing pain in the tendons of her elbow. It was after this that she had an operation.

*Helen Moon*

113. Ms Moon finished school in 2005 and was first employed at the kiosk in her final year. In early 2006 she moved up to the cafe when Ms Riddle approached her and told her that Ms D'Amico was having trouble and Ms Riddle was creating a position to help Ms D'Amico. The records show that she started working in the cafe on 27 April 2006. After she commenced working there, she noticed that Ms D'Amico was having problems with her right arm, which was sore. She said that, in the mornings, the employees would meet together and talk and afterwards would go to their tasks, some to the cafe upstairs. She said that she also felt discomfort from her work. She said that Ms D'Amico would sometimes speak about the pain in her arm and that it was "most likely due to those darn coffees". She said that Ms Riddle was present during those conversations "on numerous occasions". She also said that Ms Riddle had told her that Ms D'Amico was struggling to make coffees in the morning. She also spoke to Ms Riddle on a few occasions about Ms D'Amico's arm. She said Ms Riddle told her that Ms D'Amico said her arm was sore, most likely from the coffees, and asked Ms Moon to help out more. She said that the conversations started "pretty early on, early 2006".
114. Ms Moon was first contacted about these proceedings in about 2010 and asked to make a statement about them in April 2012. When challenged about her recollection, she said that she had "a pretty good recollection of the sequence [of events]". She also said that the soreness of Ms D'Amico's arm because of her coffee making was "brought up quite often" in the conversations with Ms D'Amico in the presence of Ms Riddle. She also said that the problems with Ms D'Amico's arm were "pretty common knowledge in the beginning". It was not suggested to her that Ms D'Amico did not complain about her arm until much later.

*Noelene Carr*

115. Ms Carr worked at the Calvary Hospital kiosk from August 2003. She had regular contact with Ms D'Amico and, from time to time, would go up to the cafe to help her out. She noticed a problem with Ms D'Amico's arm and shoulder she said in her evidence-in-chief, at the end of 2005. She was also present when Ms D'Amico, on a couple of occasions, told Ms Riddle that her arm was sore. Ms D'Amico showed her arm to Ms Riddle and it was blue.

116. Ms Carr made a statement in 2009 in which she said that she noticed, from about November 2006, that Ms D'Amico's arm had turned visibly blue and become swollen. When shown the statement she agreed that this was what she had said, but added "but I thought it was earlier than that".

*Helen Foster*

117. Ms Foster also worked in the cafe. She recalled that another employee, Helen Moon, (then Helen Seo) commenced work "some months" before Ms D'Amico had surgery in November 2006. Ms D'Amico told Ms Foster that she was having surgery on her rib because of her right arm pain. Ms Foster said that she "knew quite early that year that [Ms D'Amico] was ... battling pain in her arm". Her memory was that Ms Moon commenced after she, Ms Foster, had observed Ms D'Amico having pain with her arm and taking pain killers. She said that she noticed that the pain to Ms D'Amico's arm caused her difficulty in making the coffees. While she conceded it was hard to recollect details, she was not challenged in cross-examination about the timing of her observations.

*Robert D'Amico*

118. Mr D'Amico was Ms D'Amico's husband. He recalled his wife having problems with her right arm when he noticed her moving her shoulder and rubbing her hands some time before she turned 45, which was in early October 2006. She told him that her arm was sore. He said that he had some arguments with her about the problem and "[i]t went on for a while". He told her to tell members of the Board of the Auxiliary but Ms D'Amico did not want to do that. She told him, however, that she had told Ms Riddle about the problem. He said this was "eight to ten weeks later". He said that she had seen a member of the Auxiliary Committee about five or six weeks before she turned 45.

*Ms Riddle*

119. Ms Riddle did not give oral evidence but a statement she made was tendered and admitted into evidence. She said that she did not work with Ms D'Amico but did visit the cafe two or three times a week and saw her making coffee. She recalled one occasion when Ms D'Amico came to work and one of her hands were blue, but she said Ms D'Amico had not noticed it. She said, when the operation was scheduled in November 2006, that Ms D'Amico laughed and said that she "would not have known of the medical problem if not for Ms Riddle". Ms Riddle stated that she told Ms D'Amico to let others make the coffee; though she understood that Ms D'Amico continued to make coffee. Because of the inability to cross-examine Ms Riddle, the learned Master put little weight on this evidence.

*Ms Graham*

120. Ms Graham was President of the Auxiliary in 2006.
121. She said that her first conversation about Ms D'Amico's medical matters was in September or October 2006 when a staff member told her of Ms D'Amico's discoloured hand and she went to see her and was told that Ms D'Amico had seen a doctor about it. Later she spoke to Ms D'Amico after her surgery when she visited her in hospital. She also spoke of earlier discussing with Ms D'Amico, in about June 2006, a request to

reduce her hours in order, she said, “to have more time with her family”, a proposition Ms D’Amico denied.

### *Consideration*

122. The Auxiliary submitted that, while the learned Master preferred the evidence of Ms Moon to that of Ms D’Amico on the timing of her complaint to Ms Riddle, the weight of the evidence was that Ms D’Amico did not make a work related complaint to Ms Riddle or a member of the Auxiliary until shortly before November 2006.
123. The sequence of events identified by Ms Moon, however, is relatively consistent with the other evidence and supported, for example, by the evidence of Ms Foster. It is also supported by other evidence about the circumstances of Ms Moon’s employment.
124. The Master, who had the opportunity to see and hear the witnesses, came to the view that Ms D’Amico and her husband were witnesses of truth, especially as Ms D’Amico’s evidence was generally supported by that of the other witnesses, except for Ms Riddle. It was also generally consistent with that of Ms Graham, President of the Auxiliary.
125. His Honour gave cogent reasons for not accepting Ms Riddle’s evidence.
126. As to Ms Moon, his Honour did not make specific comment on her evidence, but it was clear that he accepted it. While there was a general challenge in cross-examination to Ms Moon’s recollection, she was not specifically challenged on her evidence that Ms D’Amico complained to her about the soreness of her arm and that she did so in the presence of Ms Riddle, and Ms Moon did not resile from her evidence.
127. It is also clear from the evidence, as the Master held, that while Ms Riddle made some attempts to address Ms D’Amico’s complaints, in particular by engaging Ms Moon, she made no attempt to follow-up and ensure that this was effective and, in particular, to reduce the time that Ms D’Amico spent making coffee.
128. While the reasons for his Honour accepting that Ms D’Amico more likely than not complained about her sore arm in April 2006 are not expressed in any detail, there is no doubt, at the very least, that Ms D’Amico did bring the problems of the pressure of her work in making coffee to the attention of Ms Riddle before Ms Moon commenced work but that this did not adequately address the problem and no action was taken to see that it did.
129. The ground in the Notice of Appeal did not complain about the inadequacy of the reasons but the finding itself. In our view, the finding was open on the evidence. Indeed, during oral argument, counsel for the Auxiliary appeared to accept as much. He also accepted that the Auxiliary had a burden, which it failed to discharge, of pointing to some evidence to show that, had she complained earlier, it might have made a difference to her prognosis. The Master’s findings on this issue should not be disturbed.

### **Damages**

130. The Auxiliary made a number of complaints about the damages awarded to Ms D’Amico and the calculation of them (appeal grounds (d), (e), (f), (g) and (h)).

### **Discount for damage prior to the complaint (appeal ground (d))**

131. His Honour held that he should discount the general damages by an unspecified amount “to take account the possibility that by the time Ms Riddle became aware of the [respondent]’s problems with her right arm, some damage might already have been done”.
132. The Auxiliary complains that, if his Honour applied a discount, the amount and reasons for it are not stated. It correctly accepted that his Honour was not required to specify the discount in mathematical terms.
133. The problem for the Auxiliary, however, is that, while complaint was a large feature of the conduct of these proceedings, it was not the only, and perhaps not the major, feature of the case. Ms D’Amico relied on the need for a safe system of work and, on the evidence of Mr Dohrmann, that safe system had not been provided.
134. In these circumstances, any discount applied by the Master for pre-complaint injury was generous, perhaps overly generous, to the Auxiliary. The amount awarded was plainly within the appropriate range and does not suggest that further reasons are required. There is no substance in this ground of appeal.

### **Assessment of present earning capacity (appeal ground (e))**

135. For the current measure of Ms D’Amico’s pre-injury earning capacity, the Master determined the amount of \$650 net per week. His Honour had assessed that the earning capacity at the time of trial was \$640.
136. The amount of \$640 was based on the annual salary payable to Ms D’Amico when she was employed by Zouki until she gave up work. That was \$41,600 per annum which, after deduction of tax, left \$641 per week as her earnings.
137. Counsel for Ms D’Amico at trial and on appeal, Mr R Crowe SC and Mr W L Sharwood, submitted that, because of the passage of time from 2008 when Ms D’Amico finished working until the trial in 2012, it would be reasonable to increase the future weekly earnings from \$640 to \$650 (from the date of judgment). There were no contrary submissions at trial from the Auxiliary and so there can be no criticism of his Honour for accepting these submissions.
138. This was put to the Master by Ms D’Amico as the amount on which his Honour should base her earning capacity. No alternative submission was put by the Auxiliary. While his Honour did not express it in this way, that is clearly the context of the finding and, in the circumstances, there can be no complaint about that.
139. This ground of appeal must fail.

### **Discount for vicissitudes and economic loss (appeal grounds (f) and (g))**

140. The Master expressed his calculation of loss of earning capacity (future economic loss) at [140]-[141], as follows, namely that Ms D’Amico:

is now 52. The multipliers, using the 3% tables, for a woman of her age are now 367 to age 60 and 550 to age 65. It seems reasonable to adopt a figure of \$650.00 net per week as the current measure of the plaintiff’s pre-injury earning capacity. Before reduction for vicissitudes, the range would therefore appear to be \$238,500.00 to \$357,500.00.

... I adopt a midrange figure of \$300,000.00 as representing the full value of the plaintiff’s present earning capacity had it not been for the injury.

141. The Master held, that he was justified in “applying a greater percentage than the conventional 15 percent for vicissitudes, to take account of the other factors I have mentioned”. His Honour then discounted the amount of \$300,000 to \$240,000 for loss of future earning capacity. That is a discount of 20 percent.
142. Fifteen percent is a conventional discount for the vicissitudes of life. See *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497-8. This takes into account such contingencies as ill-health, unemployment, road or rail accidents, wars, change in industrial emphasis including changes in technology and the like: *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 659.
143. The argument in the Auxiliary’s written submissions was that the Master had “failed to state the vicissitudes discount that he applied”. The argument is curious because, while his Honour did not articulate the percentage, he did specify the two relevant amounts, namely the figures before and after the discount, from which the exact discount could be calculated without difficulty.
144. The Auxiliary also submitted that the starting point for the calculation of future economic loss was obscure. The Master calculated the present value of earnings to age sixty and then to age sixty-five, which were \$238,000 and \$357,500 respectively. His Honour then adopted a mid range figure of \$300,000 which he discounted by 20 percent. In oral submissions, Mr A Muller for the Auxiliary submitted:

the difficulty is his Honour starts with those two projected retirement ages. He’s earlier said that greater than the usual discount is appropriate. He appears to take an average of a retirement age of 60 and 65 and then to apply a discount rate of 20 percent to the mid-range figure. If it is the case that he was intending to say usually 15 percent would be an appropriate vicissitudes discount but in this case, for these reasons, I consider that an additional five percent is appropriate. Well, that is what it is but that hasn’t occurred here and the appellant is unable to understand again the process by which he has arrived at the conclusion he has arrived at in terms of his allowance for future economic loss damages.
145. The reality is, however, that despite 65 being the age at which Ms D’Amico would ordinarily be able to access the social security pension and, despite no express evidence that she was proposing to work to 65, the Master did calculate the future earning capacity as being somewhat less than to age 65 and then reduced the resulting amount by 20 percent for vicissitudes of life which was increased to account, amongst other things, for the fact that Ms D’Amico’s pre-existing anatomical abnormality may have caused future problems.
146. While the Master may not have expressed himself quite as directly as this, a careful reading of his Honour’s reasons show this to be the approach taken. If anything, it is generous to the Auxiliary and disadvantageous to Ms D’Amico.
147. There is nothing of which the Auxiliary can fairly complain. This ground of appeal is not substantiated.

### **The assessment of interest on past economic loss (appeal ground (h))**

148. When calculating the claim for past earnings, the Master noted at [139], that it attracted interest until payment at commercial rates but that the figure had to be offset by the redemption of Ms D’Amico’s workers compensation claim which his Honour noted at \$135,000. His Honour stated that this sum was “presumably inclusive of costs”.
149. It was common ground that the Master’s presumption was wrong. Ms D’Amico accepted as much as early as 29 January 2014 in a letter her lawyers wrote to the

lawyers for the Auxiliary. It was suggested in the letter that the error could be corrected under the slip rule (r 6906 of the *Court Procedures Rules 2006* (ACT)). It is not clear to us whether this error would have been amenable to correction under that rule, but it can be corrected on appeal and, as it is agreed, this should be done. The appeal should be upheld to that extent.

150. It was agreed that the correct figure for interest on the damages for past economic loss is \$5,850, not \$9,500. Thus, the final judgment should have been in the sum of \$590,050. We would make an order to that effect.

### **Disposition**

151. A small amendment must be made to the judgment sum to take account of the error relating to interest on the past economic loss. Apart from that, no ground of appeal has been upheld. Accordingly, the appeal must otherwise be dismissed. In the circumstances, the Auxiliary should pay Ms D'Amico's costs.

152. We propose the following orders:

- (1) The verdict and judgment of the Master be varied by substituting "\$590,050" for "\$593,700".
- (2) Otherwise the appeal be dismissed.
- (3) The appellant pay the respondent's costs.

I certify that the preceding one hundred and fifty-two [152] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justices Refshauge and Penfold.

Associate:

Date: 12 August 2016

### **KATZMANN J:**

153. I agree with the orders proposed by Refshauge and Penfold JJ and with their Honour's reasons. I merely wish to add some remarks of my own.
154. The Master's judgment reads very much as if it had been given *ex tempore*, though it was, in fact, delivered more than 18 months after the hearing. Some 34 of its 41 pages are devoted to summarising the evidence. While findings are made about the credibility and reliability of witnesses, there is no orderly analysis of the elements that needed to be proved before the Auxiliary could be held liable and of the manner and extent to which the evidence satisfied those elements. These deficiencies largely account for the appeal on liability. It is unlikely they would have arisen if the Master had referred to the terms of s 43 of the *Civil Law (Wrongs) Act 2002* (ACT). It would certainly have been prudent for him to have done so. Indeed, it is extraordinary that he did not when senior counsel for Ms D'Amico drew his attention to the section and submitted that he was required to make "appropriate findings" about the matters mentioned in it. Like Refshauge and Penfold JJ, however, I am satisfied, in all the circumstances, that the Master had regard to the general principles set out in the section and that his conclusion that the Auxiliary was negligent was made with those

principles in mind. I am also satisfied that the conclusion was well and truly open on the evidence. In particular, the evidence of Mr Dohrmann demonstrated that the risk was foreseeable and not insignificant, that there were a number of precautions that could have been, but were not taken, - against the risk of harm occurring to Ms D'Amico and that, in the circumstances, a reasonable person in the Auxiliary's position would have taken those precautions.

155. The Master did not make a finding either — at least in terms — as to the nature of Ms D'Amico's injury, its duration or its cause. Rather, one is left to infer from his discussion of the evidence what his opinions were. This is unsatisfactory. Causation is not an issue on the appeal, so that matter can be put to one side. But in its submissions, the Auxiliary did complain about the Master's failure to make findings concerning the nature and duration of the injury in so far as they affect the findings on economic loss. The written submissions included the following contention:

In assessing whether the respondent's diminished earning capacity was or may be productive of financial loss, his Honour failed to make any findings concerning the nature and duration of the compensable physical injuries suffered by the respondent and the extent, if any, to which they may reasonably be regarded as likely to be productive of financial loss.

156. The only ground of appeal to which this submission could conceivably relate is ground (e):

His Honour erred by failing to provide any or any adequate explanation for his assessment of the value of the plaintiff's present earning capacity.

157. On the face of things, this ground relates to the assessment of future economic loss. Despite the way in which the submission was couched, no application was made to amend the notice of grounds of appeal to broaden the appeal to include an attack on the assessment of past economic loss. Consequently, the submission should be taken to relate to the award for future economic loss.
158. The Master found that Ms D'Amico had no measurable retained capacity to earn income and will not acquire one in the future. He said that he was satisfied of that "on the evidence". True it is, he did not refer to what that evidence was. In this respect, his reasons are inadequate. But the respondent did not submit that the Master's conclusion was not open on the evidence.
159. At the trial, the Auxiliary submitted that the medical evidence was to the effect that Ms D'Amico could work in a clerical position, "albeit with some ongoing restrictions ... in respect of use of the right arm on a repetitive basis".
160. The medical evidence did admit of a residual work capacity. Dr Ron Brooder, for example, a consultant neurologist who examined Ms D'Amico at the request of her solicitors, said that when he last saw her (in August 2011) she had been unable to return to any further work and remained "unfit for any further work activities that involve prolonged heavy or repetitive use of her dominant right arm and hand". Under cross-examination, he said that she could undertake activities predominantly of a sedentary nature using her left arm but that she was "hard pushed" to find any activity that was not going to aggravate her symptoms. Dr Eaton told the Master that he suspected that any repetitive use of her arm in an occupational situation would be "problematic indefinitely". Mr Gregory Leslie, a vascular specialist, thought that prolonged use of a computer would "cause problems" unless she typed "left-handed" but that she was

suitable for “work not involving much use of the right upper limb”. Mr Gordon Stuart, a consultant neurosurgeon who assessed Ms D’Amico at the request of the Auxiliary’s solicitors in May 2010, considered that she was permanently unfit to resume her previous activities as a barista but that she was partially incapacitated for work.

161. It was another question, however, whether the residual capacity identified in the medical evidence could be exploited on the open labour market. The evidence on that subject tended to support the Master’s conclusion.
162. Glen Dwyer, a senior occupational therapist, conducted an assessment of Ms D’Amico’s capacity to work. For that purpose, he had regard to a number of documents, including a number of medical reports, all of which found their way into evidence, to Ms D’Amico’s age, education and work experience and her attraction as a potential employee in competition with able-bodied job seekers. He also interviewed Ms D’Amico. He considered Ms D’Amico’s capacity to work in a range of occupations which might be suitable having regard to her education and work experience by reference to the tasks she would be required to undertake and her functional restrictions. He concluded that her prospects for securing and sustaining employment on the open labour market in the future were “poor to negligible”. Neither his methodology nor his assumptions were questioned and his conclusion was not challenged. What is more, no comparable analysis was undertaken at the behest of the Auxiliary, which might have cast doubt on the reliability of Mr Dwyer’s opinions. Certainly, none was tendered.
163. The Master’s conclusion ought not have come as a surprise to the Auxiliary. During oral argument he was understandably dismissive of a submission made by Mr Muller on behalf of the Auxiliary that Ms D’Amico could work in a clerical position doing “keyboard work” typing with her left hand. When the Master asked whether the Auxiliary did not have an evidentiary onus on the Auxiliary to establish the availability of suitable work, he received a non-responsive answer.
164. The Auxiliary also complained about the figure the Master put on Ms D’Amico’s probable earning capacity but for the injury. On this question, too, the Master’s reasons are wanting. In this case, however, that is likely to be the result of the way the case was argued. The claim made on Ms D’Amico’s behalf in the “Further Amended Statement of Particulars No 4” was for \$650 net per week and counsel for the Auxiliary did not quarrel with that figure in his submissions. Indeed, apart from a submission about the effect of s 184(4) of the *Workers Compensation Act 1951* (ACT), the only submissions Mr Muller made on the subject of damages went to the question of whether Ms D’Amico was totally or partially incapacitated for work. In the absence of any argument to the contrary, the Master was entitled to conclude that there was no issue about the income Ms D’Amico would have earned but for her injury. He was under no obligation to trawl through the evidence to see whether, despite the way the case was conducted, her claim was justified.



165. In all these circumstances, I would not interfere with the Master's assessment of the value of Ms D'Amico's earning capacity.

I certify that the preceding thirteen [13] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Katzmann.

Associate:

Date: 12 August 2016