DISTRICT COURT OF QUEENSLAND

CITATION:	*Williams v Aldi Pty Ltd* [2013] QDC 141
PARTIES:	**LOVISA MAY WILLIAMS** **(plaintiff)** **and** **ALDI PTY LTD** **(defendant)**
FILE NO/S:	BD393/2011
DIVISION:	
PROCEEDING:	Trial
ORIGINATING COURT:	District Court
DELIVERED ON:	26 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6, 7, 8, 9 and 10 May 2013
JUDGE:	Samios DCJ
ORDER:	**Judgment for the plaintiff against the defendant for the sum of $27,435.67.**
CATCHWORDS:	PERSONAL INJURIES – quantum – soft tissue injury to right upper limb LEGISLATION *Civil Liability Act* 2003 s 59 *Civil Liability Regulations* 2003 Item 124
COUNSEL:	Mr J Kimmins for the plaintiff Mr D Kelly for the defendant.
SOLICITORS:	Shine Lawyers for the plaintiff Rodgers Barnes and Green Lawyers for the defendant.

[1] On 10 April 2008 Ms Williams purchased a gym ball from Aldi. On 11 April 2008 she was sitting on the ball studying when it burst and she fell to the ground. She hit

her tail bone and the palm of her right hand on the tiled floor. She placed her right hand back to break the fall.

[2] In her statement of claim Ms Williams claimed she suffered:-

(a) Injury to the lumbar spine;

(b) Injuries to the right upper extremity involving the right shoulder, elbow, wrist and hand;

(c) Injury to the right ulnar nerve;

(d) Complex regional pain syndrome; and

(e) Psychological sequelae.

[3] Liability is not an issue. Quantum of Ms Williams' damages is in issue.

[4] Aldi's defence admits Ms Williams suffered injuries to the right upper extremity involving the right shoulder, elbow, wrist and hand. However Aldi denies Ms Williams suffered the other injuries.

[5] At the conclusion of the trial Ms Williams claimed that she suffered the following injuries as a result of the fall: -

(a) A soft tissue injury to the right upper limb including the wrist, forearm and elbow causing ongoing pain, weakness and fatigue;

(b) A right ulnar nerve neuropathy;

(c) An injury to the median nerve; and

(d) An adjustment disorder with anxiety and depressed mood.

[6] At the conclusion of the trial Aldi accepted that Ms Williams suffered some short term musculo ligamentous injury to the right upper limb as a result of the fall. Aldi

submitted Ms Williams' condition has been grossly overstated and the court cannot be comfortable with any of Ms Williams statements regarding the extent or severity of her alleged symptoms.

[7] Ms Williams who was born on 20 April 1967 was 40 years of age when she fell. At the time of trial she was 46 years of age. She is naturally right handed.

[8] Her employment history shows that she has largely been involved in massage and natural therapies. She has undertaken a certificate IV in massage therapy, a diploma of remedial massage therapy and commenced a Bachelor of Biomedical Science which was deferred and then completed a Bachelor of Health Science in Western Herbal Medicine. As at the date of injury, Ms Williams had completed two thirds of the Bachelor of Biomedical Science. She changed to the University of Queensland as she wished to undertake medical studies.

[9] In October 2004 Ms Williams established a home massage business at Murrumba Downs. She was working also for other massage organisations. In February 2008 she ceased working for the other organisations. It is fair to say that leading up to her fall her receipt of gross income was increasing. Her income included that earned from the external organisations such as Caboolture Physio Therapy as well as from her home clinic.

[10] When Ms Williams gave evidence she said prior to her injury she intended to work as long as possible. She wanted to continue to run the home clinic which would give her a good income if she got into medicine. If she did not get into medicine, she would have continued to build up her home clinic. She also intended to use her years of professional work and experience to get better recognition within the

industry and hopefully be able to do things like talks. Her evidence was that she had an IQ of 134 and had been a member of Mensa. Apparently Mensa is a group of people with high IQ's. At the end of the trial Ms Williams submitted that completion of a medical degree was not an illusion.

[11] Ms Williams said that when she fell she felt a vibrating pain. It went up through her back and up through her arm. She described the pain as extreme. She said she wet herself. The next day on 12 April 2008 she attended her local medical centre. She was referred for x-rays of her right wrist. The next day she attended the Caboolture Private Hospital for x-ray's of her right elbow. These x-rays revealed no fractures of the elbow or right wrist. On 14 April 2008 she attended her general practitioner Dr McArthur who put her right arm in a splint. Then on 20 April 2008 she attended her general practitioner who referred her to Dr Patten, an orthopaedic surgeon. Ms Williams said she attended Dr Patten who sent her to Echo which is a hand and upper limb rehabilitation unit who fitted her with a "resting hand splint". Ms Williams said she wore that splint for about four months. She said she could take it off to shower. After that four month period she said she was given another splint. This was a semi-rigid splint. She wore that until at least November/December 2008.

[12] In Dr Patten's letter to Ms Williams' income protection insurer Asteron dated 6 June 2008, Dr Patten stated his diagnosis was one of musculo ligamentous sprain to the right elbow and was awaiting confirmation of any underlying pathology on the MRI investigation that was performed on this elbow. He stated she also has ulnar nerve paraesthesia secondary to a traction injury to her right ulnar nerve at the right elbow.

[13] At about the same time Ms Williams was seen by Dr Bradfield, neuro-physician. He saw Ms Williams on 14 May 2008. In his report dated 14 May 2008 to Asteron he states he is not convinced of any significant neurological disturbance. He considered as a legacy of her fall she most likely sustained a musculo-skeletal type injury without neurological involvement. He said he cannot be absolutely certain however that damage has not occurred to the ulnar nerve and considers this unlikely but will be arranging an EMG testing and will be seeing her for review. He thought because of the way she was posturing her arms she was at risk of developing complex regional pain syndrome or reflex sympathetic dystrophy. The EMG was performed on 27 May 2008.

[14] Dr Bradfield reviewed Ms Williams on 3 June 2008 and in his report of that date to Asteron he stated he was pleased to report that the motor and sensory studies of Ms Williams' right ulnar and median nerves were normal. In particular the right ulnar nerve study was normal and showed no evidence of axonal loss or slowing across the wrist or elbow. Further, Ms Williams had informed him that the MRI showed no abnormality. However, Ms Williams told him her pain had persisted over the medial aspect of her right elbow and still comes on with physical activity and she described it as an excruciating burning pain which was eased by resting her arm on her head. She was also describing pain through her right wrist which came on with activity and can be triggered by turning doorknobs etcetera or pushing on her palm. She described the pain in the right wrist as a sharp jab of pain. Dr Bradfield said repeat examination revealed global weakness in her right upper limb which was most marked again distal. She had prominent weakness of finger flexion and also weakness of abduction of the fingers, wrist flexion and wrist extension and elbow extension. No muscle wasting was noted. There was no obvious colour

change in her hands and no swelling of the hand. He states that with her EMG studies being normal he would be confident that no intracranial, spinal cord, nerve root or peripheral nerve damage has occurred as a legacy of her accident. He states what would cause him concern is the development of complex regional pain syndrome but before suggesting occupational therapy and vigorous activity he considers she should have a clearance from her orthopaedic specialist and advised her along those lines. He states from a neurological point of view, he does not consider anything has been overlooked and discharged her back to the care of Dr McArthur but he advised Ms Williams if she is dissatisfied with her progress he would only be too happy to review her at any time. He states he would expect a gradual improvement in her symptom complex but would remain of the opinion that her symptoms at present prevent her from working in her usual occupation both on a full time and part time basis. He states he cannot prognosticate when she will be able to return to work or do any gainful employment.

[15] On 8 July 2008 Ms Williams saw Dr Gilpin an orthopaedic surgeon having been referred to Dr Gilpin by Dr McArthur. In Dr Gilpin's report to Dr McArthur dated 8 July 2008 he states that he did not think the diagnosis here is clear cut, principally because the symptoms are diffuse and atypical. He states the most likely thing is that Ms Williams does have an ulnar nerve problem although she has had nerve studies that suggest it is functioning normally. He states these two results are not incompatible because the nerve may work normally but be quite irritated. He states ultimately, further neural testing to get a "second opinion" on this matter may be required. He states Ms Williams has some minor autonomic signs in her right hand suggestive of a possible minor CRPS type syndrome. He states it is possible that she has a primary wrist problem and to help clarify this he suggested she should

have an MRI of this area as well. He states he will see her back with the results of this and her previous MRI's and in the interim will attempt to chase the result of the nerve conduction studies from Dr Bradfield. As the reports of Dr Gilpin show he referred Ms Williams to Dr Limberg a neurologist. In Dr Gilpin's report to Dr McArthur dated 29 August 2008 he states Dr Limberg's opinion is that there is no evidence of any significant neural problem in Ms Williams' right upper limb. He states she does have some evidence of minor median nerve dysfunction at the right wrist but Dr Limberg does not think that this in any way can be responsible for her more significant symptom complex. Dr Gilpin notes he has told Ms Williams that she has been through a very significant gambit of investigations which have not revealed a specific focal surgical pathology in any area. However he states he has no doubt that she has some soft tissue irritation in and around the medial aspect of the elbow and may well have some ulnar nerve irritation but there is certainly no objective evidence that any surgical treatment would benefit her here. He states the plan is to get her to continue with a conservative program.

[16] In his report to Dr McArthur dated 3 December 2008, Dr Gilpin states he saw Ms Williams on 28 November 2008 and she had made some recent progress with the program mapped out by Chris Brady working predominantly on her C6 area. He states he has examined her today and at this point cannot find any evidence of any surgical lesion to treat. He states he is happy to discharge her back to Dr McArther and leave Mr Brady to continue with the current program. He states hopefully she'll continue to make steady improvement.

[17] Dr Limberg's report to Dr Gilpin dated 12 September 2008 states since Ms Williams' fall she has complained of discomfort of her right hand and both the

lateral and medial aspects including paraesthesias in these distributions. She notes she has seen two neurologists with no neurological entrapment suggested. Dr Limberg states on examination on 12 September 2008 Ms Williams was extremely anxious and had evidence of a variable tremor of her right hand which settled with distraction. She stated she tolerated the nerve conduction studies, very poorly overall. Dr Limberg could not see evidence for ulnar nerve dysfunction at either the wrist or elbow but Ms Williams did have evidence of very minor right median nerve compression at her wrist. Dr Limberg states it would seem that this could explain an aspect of her complaints, however, clearly there is significant functional overlay to this presentation. Dr Limberg states given the very minor severity of the changes she suggested conservative management only at this stage.

[18] The evidence shows that Ms Willams attended physiotherapy from September 2008 until mid 2011. She said she did not continue with physiotherapy because Asteron would not continue to pay a half of the cost.

[19] Ms Williams' evidence was that over the last 12 months there has been little improvement in her condition and her arm bothers her. She said her arm aches and is heavy and does not have good stamina. She can do things but if she overdoes them she cannot do anything for a couple of days. She now only has a tender spot just above the elbow unless she hits it. She said she could put weight on her arm. Ms Williams also said that she first attempted to return to massage work in November 2008. However she could not continue with the massage work. She said she had weakness, pain and limited strength. She has been required to lodge forms with Asteron on a monthly basis to record her condition and massage work she has undertaken.

[20] Ms Williams also gave evidence that she has maintained her business throughout the financial years since her fall to the present time. She stated she did this because it was her business and she was studying towards qualifications in naturopathy and she has continued to do some business even though it has been on a limited basis compared to what it had been in the past. She stated she is still conducting business and wishes to maintain her professional credibility so that she can work on building up her naturopathic business. In addition she opened a health food business in February 2011. However the work involved was quite physically demanding and too demanding for her. She found in the first couple of months that she was not able to rest her arm at all at any time and that began to really wear her down. She could not physically continue to maintain the shop. Therefore the business ceased in April 2012.

[21] Ms Williams also said that as a result of her injuries she deferred the Bachelor of Biomedical science course. This took her outside the five years to complete the course. Therefore she undertook a Bachelor of health science in western herbal medicine.

[22] Ms Williams has also applied for various jobs since her fall. In some instances she did not get the job. In one other instance she got an interview but did not get the job.

[23] Ms Williams also gave evidence about her claim for special damages and for care and assistance she required following the fall.

[24] On 9 February 2009 Ms Williams suffered a stroke. She woke one morning and experienced symptoms. She got out of bed and fell over because her right leg did not work. The right side of her face was numb. She saw Dr McArther who referred

her to Dr Myers a consultant physician. She said her symptoms improved over a couple of months. However she still has symptoms. She says her right leg gets a little floppy if she is tired and she still has a partial area of numbness along the jaw line on the right side.

[25] Dr Gillett in his report dated 5 February 2010 refers to Dr Langley an orthopaedic surgeon assessing Ms Williams from a medical-legal perspective on two occasions. Dr Gillett says Dr Langley's reports dated 4/12/08 and 4/8/09 refer to improvement in function and Dr Langley's report clearly does not localise the signs of neurological deficit of observed nature. Dr Langley's reports were not put in evidence nor was Dr Langley called by either party.

[26] Dr Gillett orthopaedic surgeon saw Ms Williams on 5 February 2010. In his report dated 5 February 2010 he states the nature and extent of Ms Williams' injuries were seen to be soft tissue involving the right upper limb related to a fall. He states early working diagnosis suggests an ulnar nerve injury but that has not been proven by appropriate investigations. Overall her presentation of symptoms from the time of injury to the present would not be consistent with specific orthopaedic diagnosis that he could make. In general terms, the possibilities are to explain the overall symptom complex that she records would be some form of brachial neuropraxia and excluded based on neurological assessment over time. He states if she had a brachial plexus condition, he would expect more specific muscle wasting and localised signs but that is not the case. He states the second issue may be that she has sustained a variant of chronic regional pain to explain the pain symptom complex but there is no objective signs based on his assessment nor at any time in relation to examination by other persons. The other possibility is psychological

reaction to her pain and injury. He states in relation to the issues regarding the stroke, this is outside his area of expertise but based on the information provided with regards to assessment by a neurologist, normal MRI and overall presentation he does not believe this is a possibility. He is unable to explain her symptom complex over time. He states her present situation is one of a person that has inconsistent objective findings associated with the right upper limb. This relates to a full quarter type sensory disturbance, weakness of musculature in the presence of normal girth. Overall he does not believe there is a musculo skeletal pathological process that could explain her symptom complex. He recommended psychiatric or psychological assessment of the condition. Prognosis from an orthopaedic perspective is he cannot offer prognosis. Dr Gillett also stated he could not see any objective evidence to suggest long-term impairment regarding this event to the right upper limb of orthopaedic organic musculo skeletal condition. Also he states she has been unable to work because of pain and weakness and problems associated with the right upper limb but he is unable to explain why that is. He states measurement of whole-person impairment is not able to be made because he is not able to make diagnosis of orthopaedic nature. Dr Gillett recommended consideration of psychiatric opinion.

[27] Dr Tomlinson a neurosurgeon interviewed and examined Ms Williams on 16 March and 15 November 2010. In his first report dated 15 May 2010 he states Ms Williams injured her lumbar spine and her right upper extremity in the fall. He states she has made a satisfactory recovery from her lumbar spine injury. He states he agrees with Dr's Bradfield and Gilpin that Ms Williams may be developing a complex regional pain syndrome. However he states that over time this is improving spontaneously. He also recommended review by a psychologist and a

psychiatrist. In his second report dated 26 November 2010 he states Ms Williams has sustained an injury to her right upper extremity involving her right shoulder, elbow and wrist. He states her ongoing condition would be consistent with the injuries she sustained. He also noted she was considered to have a right ulnar nerve neuropathy which has mostly resolved. He estimated Ms Williams has a five per cent whole person impairment relating to her right upper extremity which occurred in the fall. Regarding the complex regional pain syndrome involving the right upper extremity he would provide an additional three per cent whole person impairment. That is, she has a pain-related impairment which appears to increase the burden of her condition. He again recommended review by a psychologist or psychiatrist because Ms Williams said her injuries had caused her significant distress. He also believed her condition would have an adverse effect on her ability to earn an income.

[28] Ms White, an occupational therapist examined Ms Williams on 14 April 2010. Ms White concluded that Ms Williams has taken on the symptoms of injuries she believes she has regardless of there being no objective reasoning for them. She states as with many of the specialists who have treated Ms Williams she is unable to explain her symptoms and the inconsistency observed. She believes Ms Williams sustained a musculo ligamentous injury to the right upper limb in the fall with no neurological involvement. She thought Ms Williams' symptoms and limitations would not persist after five months from the fall. She also thought it would be reasonable for Ms Williams to have received some assistance for the first three months following the fall.

[29] Dr Walden an anaesthetist has provided two reports regarding Ms Williams. These are dated 28 April 2010 and 24 April 2013. In his first report he states Ms Williams sustained a partial injury to the right ulnar nerve in the fall. He states the reason for his making that diagnosis is that Ms Williams reports symptoms of numbness in the region of the right upper limb that are supplied by the ulnar nerve. In addition, as time has passed, she experiences electrical shock and neuropathic pain features in the same region. He states this would imply that there was an initial injury to the right ulnar nerve that is now recovering (as evidence by the return of neural activity experienced as sharp stabbing pains and electrical shock sensations). However in his opinion, he believed that she would eventually make a full and complete recovery. He thought that could still take many months to occur. He also thought her condition would fully resolve and she will eventually be able to return to a normal occupation as a remedial massage therapist. In his second report dated 24 April 2013, Dr Walden assessed her whole person impairment at 8 per cent.

[30] Dr Saines a neurologist examined Ms Williams on 31 March 2010. He states that as a result of the fall there was a partial dysfunction of the right upper limb afterwards which was initially thought to be ulnar neuropathy. However he states, further investigations particularly with electrophysiological studies, did not confirm this lesion. Radiology of the elbow and wrist were normal. He states Ms Williams has been examined by a number of specialists and no cause has been found. He states she has undertaken occupational therapy and physiotherapy. He states she has made a slow improvement. He states at present there is no evidence of a neurological lesion involving the right upper limb. There is unusual dysfunction of this limb and some posturing of the right foot. This is not due to an organic neurological disorder or disease. He states he is optimistic she will continue to recover and believes that

the resolution of any legal aspects would be beneficial. He cannot suggest any additional treatment which may be of assistance to her over and above that already recommended. More specifically he states Ms Williams may have suffered a soft tissue injury to the right upper limb from the jarring involved in the incident. He states this would be understandable in the circumstances but such an injury should have recovered. He states there is no evidence that she suffered a significant injury to the bones or joints in the upper limb. He states Ms Williams still describes pain and dysfunction of the right upper limb and, as such, the condition is not resolved. However, there is no evidence that there is an underlying specific injury. He anticipated full recovery and would not attribute a whole-person impairment.

[31] Ms Williams has been examined by another occupational therapist Ms Stephenson. Ms Stephenson's two reports are substantial documents. In Ms Stephenson's reports she noted Ms Williams' symptoms and concluded Ms Williams would be unable to resume her career as a massage therapist.

[32] Dr Byth a psychiatrist examined Ms Williams on 24 February 2011. He diagnosed Ms Williams as suffering an adjustment disorder with anxiety and depressed mood. Dr Byth says following the fall she was concerned that her physical diagnosis was slow to be clarified, and she had only a partial improvement with physiotherapy. She was upset that she could not continue with massage work, and she had to refer her clients to other therapists, which she found difficult. She was also concerned that she could not help much around the family home, and she disliked being inactive and dependant on other people. She found she was limited in studying her naturopathy, and she was disappointed to have to postpone starting to study medicine. He states following the injury she gradually developed a psychological

reaction of anxious and depressed mood, accompanied by low energy levels, social withdrawal and difficulty with memory. He states her anxiety and depression have fluctuated in the mild to moderate range of severity. He states that she was prescribed anti-depressants and she was recommended for counselling, however, she has not proceeded with these treatments. He recommended she be referred to a specialist psychiatrist for treatment over the next 12 months. He states her anxiety and depression have partly improved with the passage of time, however her remaining symptoms are following in a chronic course. He states she would have been unlikely to develop these ongoing features of anxiety and depression but for the injuries sustained in the fall. He assessed a whole-person impairment of 7 per cent. He states the condition is causing mild to moderate psychiatric impairment and will need specialist treatment over the next 12 months.

[33] On 10 July 2012 a private investigator arranged to have Ms Williams perform a massage upon him in her studio at home. Ms Williams was unaware he was a private investigator. It is agreed by those who have seen the recording of what took place on the DVD that the filming of Ms Williams is over a period of about 82 minutes, however, the period of massage is about one hour. The DVD was shown to a number of the Doctors and occupational therapists who have provided reports regarding Ms Williams.

[34] Although I took it that it was intended to be a surprise to Ms Williams that she had performed a massage on 10 July 2012 upon a private investigator, evidence was lead from her about that particular massage. As it turns out, the police came to Ms Williams' house on that date during the massage because the neighbours had seen the private investigator in the street earlier in the day and had reported their

suspicions to the police. The massage was interrupted and the private investigator spoke to the police outside and then the massage resumed.

[35] Ms Williams' has been required to send monthly forms to her income protection insurer, Asteron. In these forms she has disclosed she has done massages. She said she has done massages in a very limited capacity and was unable to make any meaningful return to massage therapy.

[36] Further in her evidence in chief by reference to the period that included the massage of the private investigator, Ms Williams stated that whilst giving a massage towards the end she would start to experience quite a lot of discomfort. By the time she had finished and the client had gone, she would usually try heat or resting. She said it would hurt a lot like when you run on a sprained ankle and that it wouldn't be good for much at all for a couple of days afterwards, even for basic stuff. She said the whole arm was just tired and sore and just ached. Specifically regarding the massage of the investigator she said only every few months would she try to do a male client to see if she could do a heavier massage. She struggled with the last five minutes or so but then she was a little nervous as well. She wanted to get him out of there fairly quickly and she did experience a lot of pain after that one. She said she cancelled an elderly lady that she had booked later in the week and saw her the following week. She said her symptoms were in the right arm mainly but also her left shoulder was starting to play up a bit by then too.

[37] At no time did Ms Williams say, including during cross-examination, that there was something she could not do and was then shown to be able to do it. That is, Ms Williams has not said at any time on oath or otherwise, that she can only do one

massage in one day and has then been shown to be able to do 10 massages in one day.

[38] When Dr Limberg was called, although she was not shown the DVD, she confirmed the significant functional overlay referred in her report in 2008 were the aspects of Ms Williams demeanour during the consultation and the tremor. However she did say that is something that "we do see with a degree of anxiety". Nevertheless Dr Limberg said Ms Williams' symptoms could not be explained in their entirety.

[39] Dr Gillett was shown the DVD. He stated in his report he was unable to make any orthopaedic diagnosis and the DVD would indicate to him, in a variety of actions, that Ms Williams has a normal upper limb. Also in his report he noted that she held her little finger and ring finger flexed but on the video there is no evidence of that posture. So he said the DVD would indicate a normal right upper limb and he was unable to identify any orthopaedic pathology which was going to explain the symptom complex that she had at the time of his report. He said the video shows she would appear to be better.

[40] Although it was suggested to Dr Gillett the DVD does not give any indication of strength, Dr Gillett said his observation of the DVD would be normal in relation to things like strength. He said he could not find in his assessment in 2010 any objective findings that would indicate why she would have lack of strength. Therefore he said the DVD shows her using her right upper limb in a normal fashion and there is a lot of forceful actions in the DVD in relation to the massage that she is performing. He agreed though there is no formal testing of strength in relation to the DVD, but the DVD shows normal function of the right upper limb.

He accepted the DVD would not be able to show full strength of the right arm. Again it was suggested that the DVD would not reveal fatigue. However, Dr Gillett said Ms Williams did not seem to have any fatiguing phenomena during the DVD. Again it was suggested the DVD would not show whether Ms Williams was experiencing pain in her right arm while massaging. However, Dr Gillett said the DVD did demonstrate that Ms Williams shows no outward signs of pain such as facial grimacing and so forth. Dr Gillett confirmed with further questioning that at the time of his assessment he did not think Ms Williams had an ulnar nerve lesion. Dr Gillett rejected that the only inconsistent finding he could refer to regarding Ms Williams was the lack of wasting of the right upper limb. Dr Gillett said the main inconsistent finding was the sensory disturbance in the whole of the upper limb to light touch. He said that was just not anatomical.

[41] Dr Gilpin was also shown the DVD. Dr Gilpin had written reports to Dr MacArthur saying that there was some evidence of minor median nerve dysfunction at the right wrist. Further, that he had no doubt that Ms Williams had some soft tissue irritation in and around the medial aspect of the elbow and may well have some ulnar nerve irritation, but there was certainly no objective evidence that any surgical treatment would benefit her. He was asked in the context of the DVD whether there was in fact any neurological issue being suffered by Ms Williams at the time of the massage. Dr Gilpin said that the ulnar nerve is responsible for most of what is called the intrinsic, that is the small muscle function of the hand, and that contributes considerably to grip strength and functional gripping in small movements of the hand. So when a person that has a significant decline in ulnar nerve function he would expect to see primary weakness and a lack of endurance particularly if performing a task similar to the tasks Ms Williams was performing in

that massage. He said there were no signs of weakness or lack of endurance that he observed in the massage. He said that if Ms Williams was in such pain that she was not using her arm on a regular basis, he would have expected to have seen wasting of her arm. He said there did not appear to be any wasting of either arm or hand area on the DVD that he saw. When re-examined, Dr Gilpin said in relation to the DVD allowing one to gauge the level of strength in Ms Williams right upper arm he said that it is obviously not as good as performing a grip strength test but he thought it was reasonable. He also said he could looking at the DVD gauge whether Ms Williams arm was fatigued. He said it does take a reasonable endurance to continue the sort of activity that was outlined on the DVD. Again with respect to the suggestion that the DVD may not allow one to gauge whether or not a person is experiencing pain, Dr Gilpin said that unless she is very good at hiding pain that he thought the answer was "yes". Dr Gilpin said Ms Williams either got better or she's made a better show of hiding her symptoms.

[42] Dr Tomlinson was also called and commented on the DVD. He said the DVD shows Ms Williams setting up the client on the bench and moving over various parts of his body over the course of an hour. He said she seemed professional. She didn't try to stress her body by sort of too much bending over when she moved around the person. She didn't express much emotion and move from one body part to the next. He said he did not know whether she'd done 20 massages that day or just done one. He said she seemed to complete the task satisfactorily. He didn't know whether the client was satisfied at the end. Regarding the DVD showing her strength, he said the only way you could tell if she had full strength would be if you put her on a grip. He said using your arms for an hour you could get fatigued at the end. He said he had nothing to gauge the massage on. He said watching the DVD,

Ms Williams did not seem to experience pain. She didn't seem to grimace to him. He said he did not see her at full extremes of range. She seemed to just continue from one body part to the next without a break. He said you'd have to ask how she felt or ask the client. Dr Tomlinson appeared to say that there may have been some inconsistency between Ms Williams' report of symptoms and the DVD in terms of spasming. He did not see spasming. He said that the DVD would not allow him to reach an opinion that Ms Williams could work as a full-time or part-time massage therapist. He said the reason for that is, if she said she can only do one a day "that's fine". If she said she was doing 10 a day well that is "different". He agreed with Dr Gilpin's opinion that you can still have ulnar nerve irritation but normal nerve conduction studies. When cross-examined Dr Tomlinson agreed that Ms Williams in the DVD was not favouring one arm over the other and she used both arms in the same way. He agreed she appeared to perform the massage for the entire hour in a professional manner with no obvious signs of discomfort that he could see.

[43] When Dr Byth gave evidence he referred to the psychiatric impairment as "mild" coming out at 7 per cent. Dr Byth said that Ms Williams seemed to be able to form rapport with the customer, and able to interact with him fairly normally in the DVD. He agreed Ms Williams looked well dressed and well kept. Also that the premises appeared tidy. Dr Byth did not agree it was unusual that Ms Williams would refuse anti-depressant medication given her background in naturopathy and natural remedies. That is although Dr Byth would prefer medically tested and proven treatments wherever possible. Regarding the DVD, Dr Byth agreed Ms Williams told him that her hand and wrist pain are increased by writing and putting pressure on the right wrist. That she said as a result she has given up massage therapy and studying at university. He agreed that from his observations in the DVD that Ms

Williams seemed to be massaging with both hands. He agreed she told him that she had reduced speed and dexterity in her right hand and tends to bump and drop things. Dr Byth said he did not notice any of that when he watched the DVD. However, he said it was a relatively short period that she was being observed. Further, he said whether she would have fatigued after that he does not know. He agreed Ms Williams told him that she avoids repetitive activities including vacuuming and mopping and that a single massage involved repetitive activities on his observation of the DVD. He agreed that he noted in his report Ms Williams appeared to be in some discomfort in her right hand during the interview. He agreed that there was no discomfort noted in the DVD with her right hand. Regarding Dr Byth's observations of Ms Williams being moderately anxious and mildly depressed during his interview for his report, he appeared in part to agree that was not demonstrated in the DVD. However, Dr Byth said the DVD was registering a snap shot of her when she is performing her work with her customer so he would expect her to try and be upbeat and friendly and accommodating to the client. He said whether he didn't see her for long enough to know whether she was still anxious and depressed at other times. He seemed to agree she did not appear to be anxious and depressed in the DVD. However he said when he interviewed her she seemed to be fairly relaxed giving him the impression of an honest indication of her mental state at the time and her history of moods and emotional changes around the time he was seeing her. When it was suggested to him that from his observations of the DVD he would not be able to maintain that she has a psychological or psychiatric condition that prevents her from performing massage therapy Dr Byth said that all he can say from the video is that she performed a single massage for an hour or so but it doesn't tell him what she was doing the other 23 hours of that day. Further, he said as far as he knew when he saw her two years

earlier she had more consistent depressed and anxious moods. He agreed without examining Ms Williams he could not be confident that she maintains the same level of psychiatric and psychological impairment that he assessed in 2011.

[44] Dr Patten's opinion after viewing the DVD was that Ms Williams demonstrated fine motor dexterity as she took off a jumper that she was wearing, using her hand. He also did not notice any wasting of muscles of her right hand. She started massaging using both hands and her right hand was receiving pressure from not only the compression from her left hand but her upper body weight. He said she did not look in distress. He also did not see any facial grimacing or discomfort. He also noted her at one stage karate chopping the arms and legs of the client with the outside of both of her hands. He said this is the area that Ms Williams has complained of hypersensitivity and numbness, but she was quite happy to use body force to use the outside border of the hand to karate chop up and down the clients' legs and arms with no distress. He also could not see any wasting of her upper limb musculature. He also said she had absolutely no functional impediment at all during the DVD. He said there was no avoidance behaviour or neglect of that limb. Although he gave a long answer in cross-examination I took him to say that he did not agree that just watching the DVD you could not ascertain what forces were involved in the massage. He felt the client received quite a decent massage. He was of a view that moderate forces were involved in the massage. He agreed that you could not tell from the DVD what forces were used with the right arm or what forces were used with the left arm. Regarding whether from the DVD one could say Ms Williams could work as a full-time masseur, Dr Patten said he could not comment on whether that means she would only be able to perform one treatment a day or one treatment a week. However from the period he saw her, she did not seem impaired. As to

whether the DVD would reveal pain over the period of the massage he said Ms Williams did not seem to pause at any point. She did not sit and rest. She seemed to be smiling. He did not notice any facial grimacing. He said one would need to ask her if she experienced pain.

[45] Ms White also gave evidence and commented on the DVD. She said her observations of the DVD were that there were no signs of Ms Williams favouring the effected side. Ms White did not see any signs of fatigue or any signs there was any functional limitation. She said there was no indication to her throughout the massage and at the end of the massage that Ms Williams could not have backed up that massage with another massage. Ms White saw no indicators that Ms Williams body would not be able to continue on. Ms White said she would not change her opinion about the level of gratuitous assistance with daily activities Ms Williams would have required. When cross-examined Ms White would not agree there was no evidence that Ms Williams could continue into another massage following the massage on the DVD. I took her to say that from her observations, her opinion would be that Ms Williams could continue with another massage. She said it would not be necessary to ask Ms Williams whether she could continue with another massage. She said the body will give you the indication of whether you are capable of continuing to perform tasks. Ms White said that as an occupational therapist that is what she would be looking for. Ms White would not agree that the DVD did not show whether Ms Williams was feeling fatigue at the end of the DVD. Ms White said that if Ms Williams was feeling fatigue towards the end of the DVD then there would be some changes in posture. She said there would have been different dominance in use of the upper limb. I took Ms White to say there would be more use of the left upper limb if there was fatigue of the right upper limb. Ms White

said she could gauge, by just viewing the DVD, body fatigue. She said there were no overt signs of discomfort.

[46] When Ms Stephenson gave evidence she said the opinions in her reports were altered after having watched the DVD. Ms Stephenson said she considered Ms Williams would be able to undertake at least one massage a day in an occupation as an adjunct to other health-related activities that she is qualified for. Further, regarding shopping, she could quite possibly manage shopping if she did not carry big bags and a few bags to the car. Ms Stephenson said Ms Williams could certainly manage shopping based on what she saw on the DVD. Ms Stephenson said Ms Williams can certainly do a one-off massage but she does not know about Ms Williams' endurance. She said there is more than just what is seen on the DVD. Although she said she accepted there was no regional pain syndrome at present, she said a person who has a history of regional pain syndrome has to be very careful in their lifestyle and in their work as they age, and if she were their therapist she would say that they could work full-time but be very careful what you do in your lifestyle and what you do in your work so you do not get aggravation of symptoms or recurrence of symptoms. Ms Stephenson said that would be the thing that is unseen and intangible, and she did not think that sort of thing can be seen on the video. She said you would have to watch a person over the course of a day and take into account medical histories, and you have to take into account the client's self-report. She said for her there is some grey area there. It is not just black and white that she would say Ms Williams has no impairment. She would say for one massage Ms Williams has no impairment, and she would be prepared to say she could do that every day, which would mean that instead of doing five massages a day as a massage therapist, she could do one and could compliment that with other

tasks that she is qualified for. Ms Stephenson said Ms Williams did not show any limitations on the DVD but then she was saying that she could do an occasional massage but with some delayed pain or fatigue after. Ms Stephenson said it is not the end of the story for a person and there are other things that need to be considered and to be cautious because a regional pain syndrome person can have aggravation in symptoms as they age. When it was suggested to Ms Stephenson that medical opinion was that Ms Williams never had a complex regional pain syndrome, Ms Stephenson said, regardless of a diagnosis, the first time she saw Ms Williams she presented with a significant pain condition. She said if it is not diagnosed as regional pain syndrome then she definitely had a significant pain condition. She said such a person would need to be careful of doing the work of a masseuse. Ms Stephenson said it would be her opinion regardless of what her diagnosis is, because the first time she saw her she had significant pain in her presentation. Ms Stephenson agreed that her opinion was based and anchored on Ms Williams being a witness of truth in reporting of matters to her regarding pain. Ms Stephenson said when she saw Ms Williams on 18 March 2010 she was displaying to her significant issues with respect to pain.

[47] Ms Williams' husband Paul Bray also gave evidence in support of her inability to do household tasks including gardening and brushing Ms Williams' hair.

[48] The private investigator also gave evidence. He said during the massage he felt both hands applying pressure on him on multiple occasions and there was no variation in pressure between the two hands. When cross-examined he did not agree with the suggestions there was a difference in the pressure being applied by each hand.

[49] Ms Williams submitted that the DVD evidence was of little probative assistance given that it was for a relatively short period on only one day.

[50] I found when Ms Williams was cross-examined she would not accept that in the numerous attendances to her general practitioner Dr McArthur she made no mention of an injury to her lumbar spine. Dr McArthur's records do not show any mention by Ms Williams of an injury to her lumbar spine. However, her responses were that her arm was her main concern and her back was only a minor nuisance or a mild or a minor issue. However, her statement of loss and damage states she has pain in her lower back and in her statement of claim she claims she suffered an injury to the lumbar spine. I would have thought she would answer she did not tell Dr McArthur she had hurt her back even if as she says her arm was the main concern. In addition if she did hurt her back and was making a claim about it I would have thought Ms Williams would have mentioned it at some stage to Dr McArthur in 2008 and 2009.

[51] In addition, Ms Williams was cross-examined about a document which became Exhibit 35. The document is headed "Information sheet to take to Dr Gilpin". Ms Williams agreed her handwriting appears on the document. However I consider she avoided acknowledging that it was her document. Considering its contents and the fact it has her writing on it and Dr Gilpin was a person she was going to see in 2008, the only conclusion I can draw is that it was Ms Williams' document and she prepared the information in it. Ms Williams said she did not recall writing the document. However the contents could only come from her. I consider the document in the context of this trial has significance because in it appears the following: "Arm is best in morning so do all work requiring use of the arm, (vacuuming, hanging out washing, gardening and cleaning the chook pen) in

morning I continue until the arm becomes too sore. Then rest of day I do things that rest the arm such as studying, or light work such as folding clothes or preparing dinner." The last time Ms Williams saw Dr Gilpin seems to be 28 November 2008. I consider this exhibit then was produced by Ms Williams at some stage before 28 November 2008. Her statement about what she was doing at that time, I consider, is inconsistent with what Ms Williams claims to have been her need for care and assistance set out in Exhibit 16, her schedule of past care. I did not accept Ms Williams' claim that she did not recall doing the document or writing it.

[52] I also found Ms Williams' answers to questions about Dr Langley unpersuasive. When asked about seeing Dr Langley she said she could not remember. Later she said she remembered the name but did not recall going to the Gold Coast to see him. She said unfortunately in 2008 she did experience a lot of memory problems still that year, and so it is very hard to remember who she saw and the events of that stage. However later when it was suggested to her she saw Dr Langley on 29 July 2009 and she did not tell him about problems with her back, she said, "I didn't think it was relevant." I consider that implies she did have a back problem and remembered the visit to Dr Langley to reply she did not think it was relevant to tell Dr Langley. I would have thought if she did not remember the visit to Dr Langley and what was discussed with Dr Langley Ms Williams would say she did not remember what she told him about her back rather than say she did not think it was relevant.

[53] In addition, doctors in 2008 and 2010 who reported on Ms Williams, to my mind, questioned whether her complaints were genuine. Dr Limberg, who saw Ms Williams on 12 September 2008, said there was significant functional overlay to

her presentation. EKCO Occupational Services, who saw Ms Williams to provide her with hand therapy, noted on 24 September 2008 that there was nil muscle wastage and it was noted that at presentation there were some inconsistencies in presentation. Dr Gilpin, who saw Ms Williams on 8 July 2008, said the symptoms were diffuse and atypical. Dr Gillett, who saw Ms Williams on 5 February 2010, was unable to explain her symptom complex over time. He stated her present situation is one of a person that has inconsistent objective findings associated with the right upper limb. Dr Saines, who saw Ms Williams on 31 March 2010, said there was no evidence of a neurological lesion involving the right upper limb. He said there is unusual dysfunction of this limb and some posturing of the right foot. He said this is not due to an organic neurological disorder or disease. Dr Saines was aware Ms Williams in February 2009 developed right-sided weakness after a headache attack. Finally, Ms White found on her examination on 14 April 2010 many inconsistencies in the presentation.

[54] I found Ms Williams' demeanour in court questionable. She gave evidence over a number of periods of time. At times she would enter the courtroom bent over, taking small steps and holding her hands together in front of her, portraying incapacity. She would also at times answer questions in a sad and deliberate tone with gaps between the words. Sometimes when answering questions, her voice would be trembling portraying incapacity. The way Ms Williams answered questions was not consistent during the trial. I consider the way she portrayed herself was not genuine. While being involved in the adversarial process that is our system of justice is not pleasant to say the least, I was of the view Ms Williams was seeking to evoke sympathy. I did not accept she was genuine.

[55] Although there were limitations to the use to which the DVD could be put, which the doctors who commented upon it in some respects accepted, the weight of the evidence from the specialist medical practitioners and Ms White, occupational therapist, was to the effect that Ms Williams had no impairment. Although Ms Williams submitted she had revealed her capacity to do limited massages to Asteron even before the massage on the private investigator I do not accept that is evidence in her favour. I consider to Asteron Ms Williams may have been minimizing her capacity for work to enable her to receive income protection payments. Of course, Dr Tomlinson and Dr Byth and Ms Stephenson were of the view that the DVD only shows that Ms Williams can do one massage which she has not denied. The other doctors and Ms White who saw the DVD did concede the difficulty of assessing strength or fatigue or pain or all of those things. However, I accept they could observe Ms Williams doing a massage from which they concluded Ms Williams had no impairment. From their evidence that Ms Williams had no impairment I took those doctors and Ms White were of the view Ms Williams could do the work of a massage therapist full time and did not have the need for the care and assistance claimed.

[56] These considerations I have referred to when examining Ms Williams' evidence are not I consider answered by Dr Byth's evidence that Ms Williams' when he saw her was suffering a mild to moderate anxiety disorder and depression.

[57] Dr Byth agreed when commenting on the DVD that many symptoms Ms Williams claimed to have when he saw her two years earlier were not reflected in the DVD.

[58] It is correct that Dr's Gillett and Tomlinson recommended Ms Williams be seen by a psychologist or psychiatrist.

[59] However, that does not persuade me that therefore Dr Byth's opinion is an answer to the way Ms Williams answered questions in court and behaved in court and performed during the DVD. It is also not an answer to exhibit 35 in the context of her claim for damages for care and assistance in 2008.

[60] In addition, when Dr Byth gave evidence he referred to Ms Williams' condition as mild. That may have been simply a slip on his part. However, my impression of Ms Williams from viewing the DVD was that there was no anxiety and depressed mood demonstrated. That was Dr Byth's view. I consider how Ms Williams appeared in court was inconsistent to how she appeared in the DVD. In the DVD she did not appear incapacitated at all.

[61] Further, I consider how Ms Williams appeared in the DVD is inconsistent with the complaints Ms Williams made to Ms Stephenson. In particular Ms Williams claimed when she saw Ms Stephenson on 18 March 2010 the heaviest weight she lifted in daily life was a cup of water. Even if it is said Ms Williams may have improved, still her complaints to Ms Stephenson in April 2013 are not reflected in the DVD.

[62] Therefore because of these considerations I do not accept Ms Williams is a truthful witness. I am not persuaded to accept the evidence of Mr Bray because I consider Ms Williams was not truthful in her evidence. I am satisfied Ms Williams has grossly exaggerated the effects of the fall upon her.

[63] I prefer the evidence of Doctors Gilpin, Limberg, Patten, Gillett, Walden and Saines and the evidence of Ms White to that of Dr Tomlinson, Dr Byth and Ms Stephenson. I do not act on the evidence of Dr Tomlinson, Dr Byth and Ms Stephenson as their evidence depends upon the truthfulness of Ms Williams.

[64] I am not satisfied Ms Williams suffered a right ulnar nerve neuropathy or an injury to the median nerve as a result of the fall.

[65] I am satisfied Ms Williams suffered a soft tissue injury as a result of the fall. This was a soft tissue injury to the right upper limb. However I do not accept that this soft tissue injury caused ongoing pain, weakness and fatigue beyond about five months after the fall. I do not accept that because Ms Williams saw Drs Gillett and Saines in 2010 the extent of her ongoing pain, weakness and fatigue should be measured by a period from when she fell to when she saw those doctors. That is because I consider Ms White is correct to say Ms Williams' ought to have recovered in a short period of time. I also accept Ms White's evidence that Ms Williams would have required three months of care and assistance.

[66] I am satisfied Ms Williams did not suffer a complex regional pain syndrome because of the fall.

[67] If it needs to be said, I am satisfied Ms Williams did not suffer an injury to the lumbar spine in the fall.

[68] I am not satisfied Ms Williams suffered an anxiety disorder and depression caused by the fall.

[69] Therefore, I consider Ms Williams' damages are to be assessed under item 124 of the *Civil Liability Regulation* 2003 for minor upper limb injury. That is a range of 1 to 5. I assess the ISV at 5. Therefore, I allow Ms Williams for general damages the sum of $5,000.

[70] Regarding past economic loss, I accept before the fall Ms Williams had the capacity to work as a massage therapist. Although her business was earning income, she had expenses leaving little profit. The approach I take in this case is that as an average massage therapist in Australia Ms Williams could earn approximately $50,000 per annum. In round figures that is about $950 per week. Allowing for the tax-free threshold the amount of tax to be withheld on $950 per week is $160. That is a net figure then of $790 per week. Five months of lost income is about 20 weeks. I therefore allow Ms Williams $15,800 for past economic loss.

[71] Ms Williams is also to be entitled to interest on the past economic loss, which I allow at 1.5% per annum, which is $237 for 5.2 years, which is a sum of $1,232.40.

[72] For past special damages I allow five months of the out of pocket expenses claimed, that is to 11 September 2008. That is a sum of $1,613.00.

[73] Of the travel expenses claimed, I again allow those to 11 September 2008. That is 1,548.50 kilometres. At 52 cents per kilometre I allow the sum of $805.22.

[74] Ms Williams also claims the Medicare refund. Again allowing that claim to 11 September 2008, that is a figure of $2,648.25.

[75] I also allow pharmaceutical expenses at six tablets per day for 5 months at $3 per packet of 20, which is a sum of $135.00.

[76] I do not allow the costs of retraining, as I do not accept those costs were caused by the fall.

[77] I allow interest on the past out of pocket expenses, travel expenses and pharmaceutical expenses at 1.52% for 5.2 years on the sum of $2,553.22, which is a sum of $201.80.

[78] Regarding the *Griffiths v Kerkemeyer* damages claimed, I refer to s 59 of the *Civil Liability Act* 2003. I do not accept Ms Williams was provided services for six hours per week and for at least six months. Therefore I make no allowance for gratuitous services.

[79] Therefore summarising, I allow Ms Williams the following:-

(a)	General damages	$5,000.00
(b)	Past economic loss	$15,800.00
(c)	Interest on past economic loss	$1,232.40
(d)	Past out of pocket expenses	$1,613.00
(e)	Past travelling expenses	$805.22
(f)	Past Medicare expenses to be refunded	$2,648.25
(g)	Past pharmaceutical expenses	$135.00
(h)	Interest on past special damages	$201.80
	Total	**$27,435.67**

[80] Therefore I give judgment for Ms Williams against Aldi Pty Ltd for the sum of $27,435.67.

[81] I will hear the parties on the question of costs.