SUPREME COURT OF QUEENSLAND

CITATION:	*Berhane v Woolworths Ltd* [2017] QCA 166
PARTIES:	**BERHANE GHEBREIGZIABIHER BERHANE** (appellant) **v** **WOOLWORTHS LIMITED** ABN 88 000 014 675 (respondent)
FILE NO/S:	Appeal No 6979 of 2016 DC No 4729 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 142
DELIVERED ON:	8 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2017
JUDGES:	Gotterson and Morrison JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Dismiss the cross-appeal.** **3. Enter judgment for the plaintiff against the defendant in the sum of $231,211.45.** **4. Order the respondent to pay the appellant's costs of the appeal on the standard basis.** **5. The respondent is to pay the appellant's costs of the proceedings at first instance, to be assessed on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the appellant was employed by the respondent as an order selector in a large warehouse – where the appellant's employment required him to lift and stack heavy cartons more than 1,000 times per day – where the appellant had a pre-existing degenerative condition in his shoulder when he commenced work – where the strain caused by lifting the cartons aggravated that condition and caused a further injury – where the trial judge dismissed the appellant's claim on the grounds that there was no breach of duty or causation – where the

system of work involved lifting weights in excess of the recommendations of the relevant work safety guides – where a work success rating system encouraged selectors to work harder and faster – where casual employees were frequently sent home if their rating was less than the other employees – where expert evidence called at the trial supported that the workplace activities aggravated and accelerated onset of the injury – where a significant portion of the general population have the same degenerative condition – whether the respondent's duty was breached – whether the risk of injury to the appellant was foreseeable – whether a breach of duty caused the appellant's injury

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the respondent challenged the trial judge's assessment of quantum – where the respondent submitted that the pre-existing condition was responsible for the appellant's loss of working capacity – where the respondent challenged the trial judge's classification of the injury using Schedule 9 to the *Workers' Compensation and Rehabilitation Regulation* 2003 (Qld), submitting that item 97 applied, not item 96 – where the respondent contended that economic loss should have been assessed on the basis that it was improbable that the appellant would work beyond September 2012 and other medical problems would have prevented the appellant from continuing to work – where the trial judge made mixed findings as to the appellant's credibility as a witness – whether the trial judge's assessment of quantum accurately reflects the loss suffered – whether the assessment of damages is adequate

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305D
Workers' Compensation and Rehabilitation Regulation 2003 (Qld), Schedule 9

Amaca Pty Ltd v Booth (2011) 246 CLR 36, [2011] HCA 53, applied
Berhane v Woolworths Ltd [2016] QDC 142, related
Brkovic v JO Clough & Son Pty Ltd (1983) 57 ALJR 834; (1983) 49 ALR 256 considered
Calvert v Mayne Nickless Ltd (No 1) [2006] 1 Qd R 106; [2005] QCA 263, considered
Collings & Anor v Amaroo (Qld) Pty Ltd & Anor [1997] QCA 224, considered
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1; [1999] HCA 59, cited
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10, applied
Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147, applied
Robinson Helicopter Company Incorporated v McDermott (2016) 90 ALJR 679; (2016) 331 ALR 550; [2016] HCA 22, cited

Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, applied
Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19, cited

COUNSEL: S Doyle QC, with R W Morgan, for the appellant
R J Douglas QC, with R Morton, for the respondent

SOLICITORS: Shine Lawyers for the appellant
Hall and Wilcox for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** Mr Berhane was employed as an order selector (or "picker") in a warehouse operated by Woolworths Limited (**Woolworths**). He was required to lift and stack cartons of various weights and sizes, up to shoulder height and beyond. In the course of lifting and transferring the cartons he would also frequently have to reach away from his body, while holding cartons of various weights. In the course of a normal day he would make those movements over 1,600 times.

[3] When Mr Berhane was employed he had an asymptomatic pre-existing degenerative condition in his shoulder, called rotator cuff tendinopathy.[1] The strain on his shoulders from the work activities aggravated that condition and produced a form of bursitis in his rotator cuff.[2]

[4] Mr Berhane commenced proceedings claiming damages for personal injuries. His claim was dismissed on the basis that he had not proved that his injury was caused by any breach of duty on the part of Woolworths.[3] He appeals against the dismissal of his claim, contending that the learned trial judge failed to make a finding of the duty owed and mistook relevant evidence which led to an incorrect assessment of causation. As will become apparent, the central issue on appeal was that of the finding on causation.

[5] Woolworths cross-appeals on the quantum of damages assessed by the learned trial judge, the various heads of which totalled $231,211.45.

Background

[6] The background to the case was set out by the learned trial judge in a way that can be adapted for present purposes.[4]

[7] Mr Berhane started working for the defendant in August 2010 as an order selector.

[8] Mr Berhane complained of his shoulder injury on 22 June 2011. It was agreed that he suffered subacromial bursitis and impingement of the left shoulder. It was not contested that the work tasks contributed to the development of that condition.[5]

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1 Also referred to as rotator cuff tendonitis.
2 This was referred to as a subacromial bursitis and impingement of the left shoulder.
3 *Berhane v Woolworths Ltd* [2016] QDC 142. (**Reasons**)
4 Reasons [4] – [41].
5 As it was put in Reasons [8] and [43], there is no contest that Mr Berhane was injured as a result of his work activities, and the injury was a shoulder injury.

[9] For the purposes of his employment with Woolworths, Mr Berhane was examined on 17 August 2010 by a physiotherapist who conducted a 'Standard Musculoskeletal Assessment and Step Test'. The report, in effect, ticked all of the boxes relating to his musculoskeletal condition and gave him an 'average' assessment for the cardiovascular screening, declaring him suitable for the role of order selector.

[10] Mr Berhane worked at Woolworth's distribution centre at Larapinta. The two areas were the main chiller area (or temperature control department), and the produce area.

[11] There were three areas in the temperature control department of the distribution centre at Larapinta. One was "temperature control selections". In this area employees worked shifts up to eight hours during which they had one 10 minute break and one 30 minute break. If the shift was up to ten hours, the employee would have two 10 minute breaks and a 30 minute break.

[12] The produce area stocked mostly vegetables and fruit in crates and was predominately heavier lifting. Order selection required standing/walking, repetitive squatting, repetitive forward, upward and downward reaching, repetitive gripping and occasional twisting of the spine to reverse the machine.

[13] Mr Berhane operated a machine called an electronic pallet jack. It held two pallets on its tines. He was required to pick stock from shelves and place it onto the pallets. He took instructions through a headset. A programmed voice told him where to take the machine and how many cartons or crates of the various produce to stack onto the pallets. When the order was complete, the order selector was required to drive the machine to a despatch area where he was to set the pallets off the tines onto the floor of the warehouse and wrap the completed orders in plastic.

[14] Mr Berhane was one of about 10 to 15 order assemblers in the temperature controlled section. The temperature in the produce section was 5^{o}C and in the chilled products section, 0.7^{o}C. The workers' clothing was multilayered and included gloves and a cap. The pallets were each about 1.165 metres square. The height of the stacks from which the selector picked was generally less than 1.5 metres. The pallets stacked by the selector would be up to 1.8 metres, for ease of operation with a forklift.

[15] The heaviest carton weighed 17 kg but most of the cartons weighed 16 kg or less. A significant percentage of the crates or cartons weighed in the range of 13 to 17 kg. When assembling a stack, selectors lifted cartons of that weight from beyond the centre line of a pallet by stepping onto the pallet with one foot, the other remaining on the concrete floor. That is, the assembler would lift excessive weight at a reach, away from the body. Similarly, an assembler would reach forward to place a carton or crate of produce at the centre of the pallet being loaded.

[16] The system of work involved frequent lifting away from the body of weights in excess of recommendations of the Worksafe Victoria Guide to Manual Order Picking.[6]

[17] Mr Berhane would, on average, prepare 15 orders per day. This would involve stacking two pallets according to the instructions received over the headset.

[18] Repetitive forward reaching was required in all roles. Repetitive lifting of 0.5 kg to 16 kg, and repetitive forward, upward and downward reaching, was required throughout the shift.

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6 Accepted by the parties as being the relevant guideline.

[19] In the temperature controlled section, order selection involved driving the auto select machine to the allocated area and repetitively picking selected grocery items to place onto a pallet for the store order. Employees in the order selection role were required to perform floor lifts, waist lifts and shoulder lifts frequently, that is to say, 34 to 66 per cent of the time. The lifts were of weights between 0.5 kg and 16 kg. Constant[7] forward reaching was required in all roles, and occasional[8] shoulder reaching was required in the order selection role.

[20] Mr Berhane was required to perform up to 2,160 such manual transfers a day. Some of these transfers required lifting to above shoulder height.

[21] The computer system which directed the process of selection, also produced an assessment of each completed order and the daily average. In general terms, if a worker was to complete each job at the job's expected completion time throughout the work day, the worker would achieve a performance rating of 100 per cent.

[22] Mr Berhane became very concerned about achieving 100 per cent. He was unable to achieve it for some time. Because he was a casual worker he feared that should he not achieve 100 per cent he would lose his job. That was not an unreasonable fear. An independent company had conducted a time and motion study and established the assessment system. During the day a moment would come when the manager had to decide whether there was enough work for the employees present. If not, the casual workers would be sent home those with less impressive percentage performances would be sent home first. New employees would take three or four months before being able to reach the 100 per cent target.

[23] Mr Berhane, fearing he would lose his job by failing to reach 100 per cent performance, felt compelled to work faster. He missed breaks. His impression of a review on 4 October 2010 was that his employment was threatened. The comment with respect to work outcomes on the performance review document read: "Performance needs to improve – looking at around 85 per cent for next review." A manager (Mr De Silva) explained that Mr Berhane's work outcome achievement was understandable and not an issue at that stage. A retired team leader (Mr Gorski) was of the view that it was very easy to achieve 100 per cent at the Larapinta Centre. He said that many staff were picking at over 100 per cent.

[24] Because of Mr Berhane's concern about the system and his job security, it was likely he took short cuts such as leaning across a pallet rather than walking around it, or carrying more than one item. Other workers did exactly that.

[25] The learned trial judge found that the system required many manual transfers, that is picking up crates and cartons weighing from three up to 17 kg from a range of heights that included ground level to above shoulder height, and stacking them in a similar range of positions.[9]

What workers were instructed to do

[26] The learned trial judge referred to evidence concerning what training was given to new employees. Part of that included a seminar entitled "Move4Life", relating to how workers were to lift and stack. Workers were advised to:

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7 That is, greater than 67 per cent of the time.
8 That is, between 6 and 33 per cent of the time.
9 Reasons [52].

(a) keep elbows low and near to the body when lifting;

(b) not to over-reach, but to put boxes directly in front of the worker;

(c) where an item was to be placed on the far side of a pallet, to walk around, keeping the load close to the body;

(d) to only lift one box at a time;

(e) to place large solid boxes on corners, and then use edges as a guide to fill the centre;

(f) keep 70 per cent of the weight on the worker's heels, and 30 per cent on the toes; if a box was held at arms-length, the weight would be all on the toes; employees were directed not to lean forward while carrying a heavy weight; and

(g) put light, small objects in the middle of the stack, and not stack heavy cartons on top of light cartons.

[27] In fact workers picked up more than one carton at a time on numerous occasions. According to a retired team manager,[10] there was no hard and fast rule as to whether one lifted more than one carton or crate at a time, and it was left to workers as a matter of each worker's common sense. Similarly, it was up to each worker to decide how to pack a pallet, even though there was a recommendation to walk around a pallet to place produce on the far side.

[28] The manager at the centre gave evidence that he and other leaders had a limited opportunity to keep a close eye on the 90 or 100 workers at that centre. That manager[11] agreed that in terms of stacking a pallet, workers could choose to reach across, or walk around, whichever felt safest to do.

[29] The expression "cube break" was used at the centre to refer to the system whereby the order selector could speak into a headpiece when it was considered unsafe to stack a pallet to 1.8 metres. The machine would then automatically close the order, and reassign the rest of that order to someone else. That expression was dealt with during the training of employees.

Findings by the learned primary judge

[30] The learned primary judge found that the system of work, requiring so many manual transfers, gave rise to the risk of musculoskeletal, including shoulder, injury.[12]

[31] Woolworths' response to the risk of musculoskeletal shoulder injury relied on employees understanding advice given to them during training, and importantly, using discretion as to how certain tasks should be performed. To some degree, the policies at the centre were not known by the supervisors, and therefore not enforced. It was likely that Mr Berhane knew of the term "cube break", but did not understand it and therefore did not know that strategy was available to him if he was concerned about excessive above-shoulder lifting.[13] The learned primary judge held that he was unable to form any conclusion about the number of above-shoulder lifts required.[14]

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10 Mr Gorski.
11 Mr De Silva.
12 Reasons [52].
13 Reasons [67].
14 Reasons [67].

[32] Mr Berhane would not have suffered his injury but for his degenerate pathology.[15]

[33] The work activities did not present an appreciable risk to a person who did not have Mr Berhane's shoulder condition.[16]

[34] The workplace activities gave rise to the risk of the type of injury which Mr Berhane suffered.[17] The risk of injury was the risk that, by carrying out the duties of an ordinary picker in the system of work implemented by Woolworths, an employee would suffer a musculoskeletal injury.[18]

[35] Woolworths was aware of the risk of harm, signified by the fact that it put in place systems for pre-employment examination, training, policies and supervision.[19]

[36] The training and induction program was comprehensive, and an adequate response to the risk of musculoskeletal injury, but only in theory.[20]

[37] In view of the risk, it was imperative that a response founded primarily on training and supervision, be diligently implemented. Certain policies or practices were not followed with the consequence that order pickers were allowed, or required, to reach, holding significant weights away from the body, in breach of Woolworths own training instructions, standards and guidelines, and standards and guidelines designed to reduce musculoskeletal injury. Multiple lifts were allowed in breach of the instructions. The essentially time-based assessment system, being one of highly repetitive manual transfers, was likely to encourage the taking of shortcuts, in part because of its target of 100 per cent transfers.[21]

[38] The failure to properly implement the system was a breach of duty.[22]

[39] None of the foregoing findings were challenged on appeal by Woolworths.

Finding as to causation

[40] The central issue on the appeal concerned the issue of causation, which was determined at the trial adversely to Mr Berhane. It is appropriate, therefore, to commence with an examination of that issue, commencing with the learned trial judge's finding.

[41] The learned trial judge referred to the fact that a breach of duty must be shown to have caused the injury, and then said:

> "Dr Blenkin's opinion, which I accept, and I have referred also to Dr Macgroarty's relevant evidence, is that the measures recommended in the Intersafe reports would not have altered the progress of the plaintiff's injury. That is, given the plaintiff's starting condition, performing the repetitive manual transfers involved in the order picking role, would inevitably cause the injury the plaintiff suffered."[23]

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15 Reasons [88].
16 Reasons [89].
17 Reasons [91].
18 Reasons [94].
19 Reasons [95].
20 Reasons [95].
21 Reasons [97].
22 Reasons [98].
23 Reasons [102]. The Intersafe reports were produced by a consulting engineer, Mr McDougall: AB 887, 961. They detailed many recommendations as to how the system of work could have been made safer.

[42] It was this finding that was critical to the learned trial judge's conclusion that causation had not been established, and the claim failed.[24]

[43] The contention advanced by senior counsel for Mr Berhane was that the evidence did not support that finding. To the contrary, the effect of the evidence was that Mr Berhane, given his pre-existing condition, would have developed the subacromial bursitis and impingement of his left shoulder in due course, but that the condition was aggravated (and its onset accelerated) because of the very kinds of activities which the trial judge had found were likely to have been engaged in by the employees. Further, that the workplace activities would have aggravated or accelerated the condition given the lack of proper implementation of the system of work.

[44] The passage of evidence to which the learned trial judge was evidently referring, appears in Dr Blenkin's report of 16 June 2015.[25] Dr Blenkin was asked to answer specific questions, one of which concerned whether recommended countermeasures would have had an effect. The relevant part of the report is as follows:[26]

> "**Whether or not any of the suggested countermeasures raised in the Intersafe reports would have, on the balance of probabilities, prevented the development of the condition in this particular plaintiff;**
>
> I note the suggested counter measures which seek to limit load and the frequency and range of lift.
>
> On the balance of probabilities the institution of such countermeasures would not have prevented the onset of rotator cuff tendonitis in [Mr Berhane]. To this end Mr Berhane is pre-disposed to the development of rotator cuff tendonitis because he has constitutional degenerate rotator cuff disease. This does not negate the view that I expressed in my original report that his work activities accelerated this underlying condition."

[45] Dr Blenkin's original report[27] was based upon a review of previous medical information about Mr Berhane, as well as an examination. Part of the history noted by Dr Blenkin was that Mr Berhane had a pre-existing rotator cuff degeneration condition described as subacromial bursitis or rotator cuff degeneration. In giving his opinion, Dr Blenkin said:

> "Mr Berhane suffers from degenerate rotator cuff disease. In this respect the development of symptoms was inevitable. Given that he has worked at Lara Pinta leading up to the development of the symptoms in the shoulder the order of 12 to 18 months, I would have expected him to develop symptoms in the shoulder within five years in the absence of the work aggravation.
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> …
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> The work injury to the left shoulder, which is an aggravation of underlying rotator cuff degeneration, will not prevent Mr Berhane

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24 Reasons [103]-[104].
25 AB 701.
26 AB 702; Emphasis in original.
27 AB 664.

> from working to a nominal retirement age of 67 years albeit in a reduced role."[28]

[46] Dr Blenkin was plainly contrasting the answer to the question, with what he had said in his first report. The question asked if the countermeasures would **prevent** the onset of rotator cuff tendonitis. Dr Blenkin said it would not, but that conclusion did not negate his opinion that the work activities accelerated the condition.

[47] In his evidence at the trial, Dr Blenkin confirmed that he held the opinions expressed in his reports.[29] He was asked in cross-examination about the statement in his supplementary report, and whether he saw "a genuine connection between his workplace activities and his condition". Dr Blenkin's answer was:

> "Yes. There's – there's work activities – in my view – have aggravated or accelerated the underlying degenerate rotator cuff disease."[30]

[48] As cross-examination continued, Dr Blenkin was asked whether the surgical operation undergone by Mr Berhane[31] "was due to workplace activities?" His answer was in these terms:

> "It was due to his natural degenerate rotator cuff disease, and the work place activities.
>
> Yes. The way it was described to us by Dr Macgroarty, if I can do him justice, is that there was an underlying condition here. Because of the type of work the rotator cuff complex became inflamed. That in turn put pressure on the bursa, and because of its position under the bony arch, pressure ensues and pain and the lack of the ability to raise the shoulder. Is that the sequence that you'd accept? --- Yes. That is the process and it's come about for two reasons. One, the underlying degenerate rotator cuff disease and the work activities that he undertook. In the absence of the underlying degenerate rotator cuff disease it wouldn't have happened."[32]

[49] Shortly thereafter Dr Blenkin elaborated on the sequence of the onset of symptoms, and expressed the view that "the work has accelerated that process by a period of time".[33] Then followed this question and answer:

> "You say it's accelerated it. Do you also – will you also agree that one could say that the rotator cuff condition has been aggravated by the workplace practices?--- Yes."[34]

[50] In my respectful view, Dr Blenkin's evidence, properly understood, is that whilst the institution of the countermeasures recommended by Intersafe would not have prevented the rotator cuff bursitis from ever occurring, nonetheless the work activities without those measures had accelerated the underlying degenerate rotator cuff disease

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28 AB 675-676.
29 AB 300.
30 AB 301 lines 21-22.
31 In 2012 Mr Berhane underwent a surgical procedure to try to correct the bursitis in his shoulder.
32 AB 302 lines 34, 27-37.
33 AB 303 line 38.
34 AB 303 lines 40-42.

by some years. In other words, had the Intersafe measures been implemented the acceleration that was actually suffered would have been prevented.

[51] That is to the contrary of the learned trial judge's finding at Reasons [102].

[52] That conclusion is not diminished when one has regard to the evidence of Dr Macgroarty, who was of the view that both he and Dr Blenkin considered that there had been an acceleration of the injury.[35]

[53] The learned trial judge's finding on causation cannot be sustained.

The workplace activity and causation in fact

[54] The evidence which assists the resolution of this issue came from the experts, both engineering and medical.

Engineering experts

[55] Mr McDougall was the author of the Intersafe reports.[36] He referred to the key aspects in reducing the risk of musculoskeletal injury. They were associated with the frequency, reach distance and height of the lifts. Further, risk could be minimised through aspects of procedural control (such as how cartons should be positioned on pallets, ensuring that workers minimised reach distances by walking around pallets, sliding cartons where possible, limiting height of pallets, limiting the weight of cartons and crates, stacking lighter cartons at larger reach distances) but the procedural control needed to be enforced in practice by effective supervision.[37] Critically, he said the height of a stacking pallet should be kept below 1.4 metres, and "absolutely below shoulder height", and weight of cartons and crates should be reduced to 10 kg or less.[38]

[56] Dr Grigg was an engineer called by Mr Berhane. He gave evidence to the effect that a worker's shoulder and the rotator cuff complex would be placed under significant load by:

(a) manually handling weights up to 18 kg, several hundred times a day, at shoulder level or above;[39]

(b) reaching up with loads of five kg to 18 kg, to as high as shoulder height or above while the arms are extended;[40]

(c) lifting five to 18 kg loads above shoulder height;

(d) repetitively reaching out, while standing at one side of a pallet and with arms fully extended, and picking up a carton located in the middle or the far side of the pallet;[41]

(e) the risk of musculoskeletal injury to shoulders would be increased by repetitive lifting of weights exceeding 16 kg in relatively extended arm situations, lifting away from the body;[42]

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35 AB 246 line 22.
36 AB 887, 961.
37 AB 915-917.
38 AB 920.
39 AB 389 line 39.
40 AB 389 line 43.
41 AB 390 lines 6-20.
42 AB 392 lines 31-40.

(f) the risk is enhanced when lifting above shoulder or head height;[43] and

(g) the factors identified and measures described by Mr McDougall (paragraph [55] above) would be expected to minimise the risk of musculoskeletal injury to shoulders;[44] he would add the weight of the load affects risk, and the controls would include the use of a hook to pull cartons towards the worker rather than reaching as far and reducing the force on the shoulder.[45]

Medical experts

[57] Dr Blenkin was cross-examined as to the nature of the movements required at the workplace, and their impact on the rotator cuff. He agreed that: (i) the rotator cuff tendons are used when the arms are outstretched or overhead; (ii) if a person does a lot of activities on a repetitive basis with the arms, engaging the rotator cuff complex, and does them over periods of duration and with the arms outstretched from the body, they put a lot of pressure on the rotator cuff system; that would apply if there was repetitive or sustained force using the same part of the body continuously during a working day; (iii) repetitive movements in combination with load bearing affects the forces on the rotator cuff system; and (iv) repetitive tasks would include those done more than twice a minute, for longer than two hours.[46]

[58] In cross-examination Dr Blenkin:

(a) was asked to assume an average working day of about eight hours, involving repetitive manual handling of boxes and crates of weights anywhere between five kg and 18 kg, and involving reaching with the arms at 90 degrees, twisting the body, and reaching out with the arms in front of the body; he agreed that was the sort of activity which starts to engage the rotator cuff;

(b) agreed that if the worker had to reach to a low level and then reach up, with arms extended, to shoulder height or above, with weights of between five to 18 kg, that would put a significant or considerable load on the rotator cuff complex;

(c) agreed that force would be imposed on the rotator cuff complex if: the worker had to reach out with the arms, pick up a box or crate, and then place it, whilst standing on one side of the pallet, on the far side by reaching out with arms fully extended;

(d) agreed those forces would be greater when the weights were greater; and

(e) agreed that doing over 1,600 such transfers a day would be classed as repetitive and place considerable force on the rotator complex.[47]

[59] In his first report,[48] Dr Macgroarty noted the work history and the initial diagnosis of subacromial bursitis with an aggravation of "left shoulder subacromial bursitis with an aggravation of an underlying degenerative rotator cuff pathology".[49] His opinion

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43 AB 393 line 1.
44 Dr Grigg's report, AB 689, paragraphs 14 and 15(ii).
45 AB 392 line 24, AB 394 line 13-40.
46 AB 301 line 24 to AB 302 line 8.
47 AB 304 line 14 to AB 305 line 20.
48 AB 1120.
49 AB 1123.

was that Mr Berhane had suffered a significant aggravation of the degenerate pathology as a result of heavy lifting in the workplace.[50] He then noted that the degenerate soft tissue changes were age related and constitutional and offered this opinion in relation to the consistency of injury:

> "I believe that repetitive heavy lifting and overhead activities in the workplace would cause a significant aggravation of pre-existing degenerate pathology in reference to the left shoulder complaint. I support the complainant's current complaint is as a direct result of workplace activities."[51]

[60] Dr Macgroarty produced a second substantive report after a second examination of Mr Berhane.[52] In that report he adhered to his previous opinion on consistency of injury, but also expressed the view that in terms of the pre-existing injury, he was "aware of investigations suggesting age related degenerative changes which would be typical for someone in this age bracket".[53]

[61] In his evidence in chief Dr Macgroarty described the injury as a workplace aggravation:[54]

> "So this gentleman … has some degenerative changes in his rotator cuff, which is normally described as rotator cuff tendinopathy. … It's a degenerative condition and it occurs with aging. ... As a result of his workplace activities … and as a result of the overtime injury in 2011, he's aggravated that underlying degenerative rotator cuff problem … and has then developed a bursitis. And a bursitis is an inflammation in the bursa tissues which sits above the rotator cuff. And his workplace activities have led to that inflammation or bursitis. So the workplace diagnosis … is subachromial bursitis with secondary impingement, the impingement being pinching of the bursa under the coracoacromial arch, which is a bony roof. … And it's an aggravation of the underlying degenerate changes that's led to that secondary condition of bursitis."

[62] In the course of answering a question, Dr Macgroarty described the movements that would engage the rotator cuff:[55]

> "The rotator cuff tends to be used when your arms are outstretched or overhead, and the reason for that is when we empower the big muscles around the shoulder, the deltoid muscle, which is what gives us most of our strength around the shoulder, that would tend to force the arm bone to move out of the socket, because it's a very shallow socket and we need that to have such good range of movement of the shoulder. So the rotator cuff tendons and muscles, their primary function is to counterbalance that, so to keep the arm bone or the humeral head nicely centred in the socket. So when your arm is by your side, there's

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50 AB 1125.
51 AB 1126.
52 AB 1192.
53 AB 1197.
54 AB 231 lines 10-27; AB 233 line 41 to AB 234 line 2; AB 244 lines 25-29.
55 AB 235 line 34 to AB 236 line 2. See also AB 251 lines 6-37.

> very little use of the rotator cuff muscles. When your arm is away from the body or overhead or in any position like that, particularly when it's weighted, you engage the rotator cuff muscles and tendons to contract and pull on that humeral head to keep it nicely centred in the socket, while the big muscles, like the deltoid and other muscles, do the work of what's required to do that heavy lifting or overhead activity. So in other words, muscles around the shoulder work even with your arms by your side, but not very much is coming from the rotator cuff. So … a good way to carry things is by your side."

[63] Then Dr Macgroarty gave his opinion as to what movements would cause stress on the rotator cuff:[56]

> "Yeah, so the light weights – most or the vast bulk of the light weights may not be a problem?---In a younger patient with a normal tendon, normal shoulder, yeah. Repetitive isn't a problem. It's the weight and the load on the shoulder.
>
> And you just – you said to us a couple of times that having your elbows in here, as I'm demonstrating close to my body, is fine. It's when they're away from the body with your wings out like a chicken that's the problem?---Or overhead.
>
> Or overhead?---Anything – when the shoulder is raised from about the horizontal or above, either in the forward plane, in the abducted plane or in between, anything at that level or above on a repetitive basis, particularly with load, will put significant stress across the rotator cuff, which, if it's degenerate and tendinopathic, can cause pain in the tendinopathic tendon but also can lead to bursitis and impingement because of the extra load and that pinching of the bursa, yes."

[64] Dr Macgroarty was also asked whether a particular event caused the injury or whether it developed over time, and answered:[57]

> "Well, it can be either. As I said, the most common is it's an over time thing due to repetitive, as I said, heavy lifting away from the body or repetitive, as I said, heavy lifting away from the body or repetitive overhead activities. That would be the most likely mechanism for producing a bursitis, particularly in someone who is prone to developing it because they have got tendinopathy, that swelling of the tendon and that narrowing of the space. So the most likely mechanism of injury is an over time thing with the repetitive activities, but it is still possible as a one-off event for that – if it's a significant enough event, for that to trigger the onset of bursitis."

[65] As can be seen from the passages of Dr Macgroarty's evidence it was the repetitive heavy lifting away from the body or repetitive overhead activities that were the cause of the acceleration of the condition. As he put it, at horizontal or above is when it is most likely, because that is when the rotator cuff is the most actively engaged.[58] He then explained that in more detail:[59]

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56 AB 251 lines 24-37.
57 AB 252 lines 38-46.
58 AB 254 line 25.
59 AB 254 line 35 to AB 255 line 2; emphasis added.

> "… the reality is you can't really reach out for too many things even at desk height without getting your arm to about at least 80 degrees of abduction. So it's really at about that **horizontal and above and with heavy weights that you're putting that a lot of excessive force and load across the shoulder, in particular, the rotator cuff**. Now, in a young person with a normal tendon, you might often get away with that as a one-off event – not always, and I notice in some of the reports it said it's impossible for this condition to happen in a younger person. It's not. People as young as 20 can get bursitis, but it's just not as common or likely. But **if you put someone who's predisposed with degenerative changes in their tendon and then you load that shoulder up at horizontal or above and particularly with heavy weight or repetitively, it's quite common for them to end up aggravating not only the tendinopathy which causes the pain but then to develop bursitis**."

[66] Taking all of the evidence summarized above, and the learned trial judge's findings as to the system of work,[60] one can state the features of the system of work that are relevant to the issue of causation in fact:

(a) repetitively transferring loads of about three to 17 kg;

(b) doing so using the arms to both lift and reach away from the body;

(c) lifting from a low height to the horizontal or above, and above the shoulders and head;

(d) reaching away from the body to place cartons in, and retrieve cartons from, the middle of a stack; and

(e) doing the above repetitively during the day, meaning over 1,600 such transfers a day.

[67] That is a description of what Mr Berhane was required to do, because of a negligently implemented system, during the average working day. The medical experts were agreed that those features caused the aggravation or acceleration of the condition suffered by Mr Berhane.

[68] Further, the conclusion reached in paragraph [50] above is sufficient to establish that had proper supervision been imposed (such as the Intersafe measures being implemented) the acceleration that was actually suffered would not have occurred.

[69] Senior counsel for Woolworths submitted that Mr Berhane's work involved many lifting movements, only some of which were those lifting or reaching movements that would place a load on the shoulders and aggravate the rotator cuff. Others involved non-contentious movements. The submission was that Mr Berhane's claim should fail unless he could show that the aggravation or acceleration was caused by acts in the first category and not the second, and that could not be done.

[70] I do not accept that contention. The approach advocated is an attempt to dismantle the particulars of negligence when the whole system of work was found to be unsafe and therefore negligently deployed.[61] The work required an employee to engage in

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60 See paragraphs [25] and [30] - [38] above, and Reasons [52], [95] and [97].

61 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, [1999] HCA 59, at [65] per McHugh J.

both types of movements, without distinction. The evidence established that over 1,600 lifts were made on an average day, many of which were the type to place loads on the rotator cuff. The finding by the learned trial judge was that the system of work as a whole was deficient in that there was inadequate supervision, leading to the result that the protective measures taught in the training programme were ignored. Added to that was the pressure put on employees to work faster so that they achieved their 100 per cent mark. The evidence plainly permitted the conclusion that over his employment period Mr Berhane was required to perform many of the movements that were those which caused the aggravation or acceleration of the condition.

[71] The learned trial judge examined the causation issue on the basis that s 305D(1)(a) of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) was applicable.[62] On the basis that the relevant injury caused by the breach of duty is the acceleration of the pre-existing condition, the conclusion in paragraph [50] above is sufficient to satisfy s 305D(1)(a).[63]

[72] However, senior counsel for Mr Berhane also put the case on causation on the basis of s 305D(2) of the *Workers Compensation and Rehabilitation Act.* For that purpose the "but for" test in s 305D(1) is inapplicable, and the test is whether the breach materially contributed to the injury.[64] At trial the case was conducted on the basis that the workplace activities[65] materially contributed to the acceleration of the pre-existing condition.[66] If those workplace activities were carried out as a result of Woolworths' breach of duty, as they were, then the case as conducted would engage s 305D(2). The conclusion reached in paragraph [50] above would also be sufficient to satisfy s 305D(2).

[73] Therefore, contrary to the finding made by the learned trial judge,[67] causation in fact was established.

The duty of care

[74] The learned trial judge ultimately did not make a finding that Woolworths owed a duty of care. His Honour set out to examine the issue of the duty,[68] and in the course of that examination turned to the question whether the fact that Mr Berhane had the rotator cuff condition made the risk unforeseeable.[69] His Honour identified that Woolworth's pleading did not expressly plead that the condition made the risk of injury unforeseeable, but did plead the failure to disclose the condition, which would have put Woolworths on notice of the vulnerability. His Honour then referred to a submission by trial counsel for Woolworths:[70]

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62 Reasons [99] and [103].

63 *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19, at [16].

64 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [2011] HCA 53, at [70]; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [2013] HCA 10 at [45]; *Strong v Woolworths Ltd* (2012) 246 CLR 182, [2012] HCA 5, at [26]; *Prasad v Ingham's Enterprises Pty Ltd* [2016] QCA 147 at [90].

65 Being the repetitive heavy lifting, up and away from the body, summarised in paragraphs [25], [37], and [66] above.

66 Reasons [5]; Defendant's concession at AB 17 lines 16-26; Plaintiff's submissions, paragraphs 78-85, AB 1671; Defendant's submissions paragraph 69, AB 1692.

67 Reasons [103].

68 Reasons [85] and following.

69 Reasons [88], first sentence.

70 Reasons [89].

> "He submitted, and I accept, that the effect of the evidence of Dr Blenkin and Dr Macgroarty is that the work activities did not present an appreciable risk to a person who did not have the plaintiff's condition. But that opinion is sustainable even if the plaintiff's condition were typical for his age."

[75] In that passage there was a finding that the work activities did not present an appreciable risk to a person who did **not** have Mr Berhane's condition. To similar effect is a passage in the learned trial judge's reason when dealing with whether Woolworth's response to the risk was adequate:

> "And I particularly take into account Dr Blenkin's opinion that the system – as described by Mr McDougall in the Intersafe Report, which includes assertions by the plaintiff excessive to the plaintiff's ultimate case – did not create a significant risk to employees without the plaintiff's pre-existing condition."

[76] But Mr Berhane did have the condition, and, as senior counsel for Mr Berhane contended, the findings as to risk to someone **without** the condition did not assist any relevant issue. However, those findings are evidently the basis upon which the learned trial judge held that the system of work was unsafe because of the failure to diligently implement the supervision of it.[71]

[77] The learned trial judge referred to the fact that an employer is not required to enquire into the question whether each employee may be unfit because of some constitutional defect or weakness,[72] and then said:[73]

> "On the other hand, it is arguable that an employer such as the defendant, with large national operations, employing many order pickers in very large distribution centres, and which would likely seek expert guidance with respect to workplace practices, ought to be aware of the incidence of degenerate shoulder conditions in the community of its workers. This case is different from, for example, *Finn* because, as I have found, the workplace activities gave rise to the risk of the type of injury which the plaintiff suffered. Because of the view I take of other matters, it is unnecessary to decide whether no duty arose because the plaintiff's injury was not foreseeable."

[78] Thus, no finding as to the duty was made. The "other matters" referred to in that passage were the findings on causation.

[79] Woolworths submitted that there was no duty because of Mr Berhane's pre-existing condition.

[80] Thus it is necessary to examine whether the fact that Mr Berhane was part of the cohort of 10 to 15 per cent of the population (those who have rotator cuff disease) meant that there was no duty notwithstanding that the risk to an employee in that cohort was foreseeable.

[81] It was agreed between the parties that the evidence established, and the learned trial judge found, that: (i) of the general population, 10 to 15 per cent of people aged 40 to

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71 Reasons [97]-[98].

72 Citing *Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd R 29.

73 Reasons [91].

49 years would have degenerative rotator cuff disease; (ii) that increased to 20 per cent when aged 50 to 59 years; and (iii) of that cohort, 10 to 15 per cent would develop bursitis.

[82] Of course, statistically the initial cohort would include persons who did not work in areas like that where Mr Berhane worked, which required repetitive heavy loads placed on the shoulders.

[83] Senior counsel for Mr Berhane disclaimed any attempt to plead a higher or particular duty based on the pre-existing condition, but submitted that a cohort of 10 to 15 per cent of the general population was, nonetheless, a significant segment, such that exposure of them to a risk of loading the shoulders in a way to accelerate their condition was foreseeable, and therefore there was a general duty of care, broad enough to accommodate those with that condition.

[84] Assistance is gained from this Court's decision in *Calvert v Mayne Nickless Ltd (No 1)*.[74] In that case an employee nurse, who had a pre-existing degenerative condition in her spine, sought damages for a back injury. The progressive degeneration in her spine would have occurred even if she had not sustained the injury, but had been accelerated by it. The trial judge had found that: (i) the employee was at particular risk of back injury because of the degenerative condition of her spine, a matter of which the employer was unaware; (ii) the employer knew that there was a relatively high incidence of back injuries among nurses involved in moving patients; and (iii) it was reasonably foreseeable that if a nurse with a degenerative condition like that of the plaintiff was transferring a patient from a bed to a chair, she might sustain injury.[75]

[85] Jerrard JA[76] addressed the question of whether the pre-existing degenerative condition affected the question of to whom the duty was owed. His Honour referred to part of *Brkovic v JO Clough & Son Pty Ltd*[77] where the injured worker was described by Gibbs CJ as being "within the normal range of health and strength", and then said:[78]

> "Mr Wilson SC submitted that a normal employee was a person without the susceptibility that the learned judge had found Ms Calvert had. Mr Wilson SC did not challenge the finding by the learned judge that the pre-existing degeneration in Ms Calvert's spine was quite common in persons of her age (32 years 4.5 months as at 7 March 1998), and I consider that finding does not take Ms Calvert out of the class of people within the normal range of health and strength, referred to by Gibbs CJ in *Brkovic*. In that case, that appellant had injured his back on two prior occasions, and those earlier injuries had rendered that appellant susceptible to a back injury; the report of the case does not suggest that the appellant's susceptibility from earlier injury was within the normal range of health and strength, or that that appellant's susceptibility to injury was no greater than as a result of degenerative changes quite commonly seen in a person of that appellant's age."

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74 [2006] 1 Qd R 106; [2005] QCA 263.
75 *Calvert* at [13]-[15].
76 With whom McPherson JA and Atkinson J concurred.
77 (1983) 49 ALR 256.
78 *Calvert* at [64].

[86] *Brkovic* was not a case where the injured worker tried to establish that there was a particular or higher duty by reason of a pre-existing condition. Gibbs CJ[79] cited part of the decision of the Full Court, which demonstrates the bounds of the issues:[80]

> "… the appellant failed to show that the system of work of which he complained did create any risk of injury to **an ordinary worker, by which I mean to a worker of ordinary or average strength and physical soundness**. It was not the appellant's case that the respondent owed to him any particular or a higher, duty because he knew or ought to have known that he had a damaged back."

[87] Gibbs CJ referred to an argument that the worker in that case was owed a higher duty because the employer knew or suspected that he had a back condition. His Honour contrasted two positions, one a worker in the normal range of health and strength, and another where the claim was a higher duty:[81]

> "With all respect to this argument, no ground has been shown for disagreeing with the conclusion reached in the Supreme Court. There is no evidence that a worker, within the normal range of health and strength, would have been put at risk by the system adopted by the respondent. All that the appellant had to do was to bend down and tug on a pipe. The fact that the pipe might jam would not have been likely to endanger a normal employee. The appellant was placed at risk because of the pre-existing condition of his back. However, it was not pleaded by the appellant in his statement of claim that the respondent knew of his injury or owed him any special duty."

[88] Thus, as *Calvert* shows, if the pre-existing degenerative condition is quite common in persons of the employee's age that can be a basis for concluding that the employee is nonetheless within the class of people within the normal range of health and strength.

[89] In my view, Mr Berhane's pre-existing condition should be assessed the same way. The condition is sufficiently common that it should be found that a significant segment of the population has it, and it becomes more prevalent as one gets older. The risk of injury to such a segment of the population is foreseeable. Accordingly the duty that should have been found was not a special or higher duty, but rather the normal duty to take reasonable care not to expose Mr Berhane to a risk of injury. The risk here was the risk of musculoskeletal injury to the shoulders from the required system of lifting and transfers.

The pleading issue

[90] Senior counsel for Woolworths submitted that the statement of claim did not plead that in assessing the duty of care Woolworths owed, foreseeability or breach, it was relevant to have had regard to the fact that Mr Berhane had a special disability, namely that he was in a percentage of employees with a pre-existing shoulder condition.

[91] For several reasons that contention should be rejected. First, the pleaded injury was an aggravation to a pre-existing condition. Thus, the statement of claim pleaded that:

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79 With whom Mason, Murphy, Wilson and Brennan JJ concurred.

80 *Brkovic* at 835; emphasis added.

81 *Brkovic* at 835.

(a) paragraph 3: the duty of care owed to Mr Berhane was to take reasonable care to avoid injury to him;

(b) paragraph 6: the injury was "an aggravation of underlying constitutional degenerative changes in his left shoulder"; and

(c) paragraph 7: that injury was caused by the negligence, specifically (iv) "requiring … [Mr Berhane] to work under pressure and at an excessive speed" and (v) "requiring … [him] to lift boxes between [certain weights] from ground level to above shoulder height", … "when it knew or ought to have known that this posed a foreseeable risk to [him] when lift repetitively".[82]

[92] As was submitted by senior counsel for Mr Berhane, paragraph 7 of the statement of claim was a pleading of knowledge or means of knowledge on the part of Woolworths, that the requirements pose a risk to Mr Berhane in the context of his having a pre-existing condition.

[93] Woolworths denied liability, alleging that: (i) Mr Berhane had a longstanding history of left shoulder pain since 2011; (ii) any injury was "a transient aggravation of an underlying constitutional degenerative rotator cuff tendonitis"; (iii) his history of neck and lumbar spine pain was "due to normal physiological ageing"; and (iv) he had a "pre-existing degenerative condition of the left shoulder".[83] However, there was no denial of the alleged knowledge or means of knowledge.

[94] Further, Woolworths specifically pleaded that Mr Berhane contributed to his injury because he had "failed to disclose [his] pre-existing shoulder degeneration at the standard musculoskeletal assessment performed by [Woolworths] … which would have put [Woolworths] on notice that [Mr Berhane] had a vulnerable shoulder and neck condition".[84] In the Reply that allegation was denied on the basis that Mr Berhane was not aware of his pre-existing shoulder degeneration when he underwent the assessment, nor did he have any special vulnerability to the injury suffered by him.[85]

[95] Secondly, and not surprisingly given Woolworths' pleading, the case was conducted on the basis that it was relevant to lead evidence as to the special disability issue, and that issue was addressed in submissions at the trial. The evidence was raised in Dr Blenkin's report dated 16 June 2015, in response to this question raised by the solicitors for Woolworths, "how common is the development of subacromial bursitis in people who have the plaintiff's degenerate shoulder condition".[86] That report was tendered by Woolworths. Further, the Reasons themselves reveal how the case was conducted beyond the pleadings.[87]

[96] Thirdly, for the reasons given above it was not necessary, in order to succeed in proving the relevant duty, to show that Mr Berhane fell into a special disability category.

Conclusion on liability

[97] For the reasons given above the issue of liability should have been determined in favour of Mr Berhane.

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82 AB 1630-1631.
83 Defence paragraph 6; AB 1641-1642.
84 Defence, paragraph 7.3, AB 1642.
85 Reply, paragraph 6.3, AB 1647.
86 AB 702.
87 Reasons [89]-[91].

The cross-appeal on quantum

[98] The learned trial judge assessed quantum under separate heads of damage, as follows:[88]

Head of Damage	Amount
General damages	$12,950.00
Past economic loss	$121,371.52
Interest on past economic loss (after subtracting Centrelink payments and the Woolworths statutory claim)	$5,554.31
Loss of past superannuation benefits	$11,226.86
Fox v Wood	$6,522.00
Future economic loss	$105,000.00
Loss of future superannuation benefits	$9,975.00
Special damages	$36,702.50
Interest on special damages	$142.50
Future special damages	$2,500.00
Total	$298,994.69
Less refund to Woolworths	$67,783.24
	$231,211.45

[99] Senior counsel for Woolworths advanced a number of points challenging the assessment of quantum. They include:

(a) damages should have been limited to 30 September 2012, on the basis that the opinion of Dr Davies was that by that stage Mr Berhane's pre-existing degenerative condition was responsible for his symptoms and any loss of work capacity;

(b) the shoulder injury should have been classified as falling into item 97 of Schedule 9 to the *Workers' Compensation and Rehabilitation Regulation* 2003,[89] rather than item 96; item 97 relates to a "soft tissue injury with considerable pain from which the injured worker makes an almost full recovery in less than 18 months"; the consequence is that general damages should have been assessed at $4,720 rather than $12,950;

(c) in respect of past economic loss, the claim should have been limited to 30 September 2012 because of the opinion of Dr Davies;

(d) further, various medical issues sustained by Mr Berhane[90] meant that it was improbable that Mr Berhane would have worked over the period to 30 September 2012; those problems mean he would not have worked after 30 September 2012, even if he had not suffered the problem with his shoulder; therefore the trial judge's approach in taking potential earnings to trial and

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88 Reasons [128].

89 This refers to Reprint 4, applicable as at 22 June 2011.

90 Including neck pain, back ache and an ankle fracture.

reducing them by one third was not open; instead, the appropriate assessment of past economic loss was no more than the nett statutory benefits of $31,200.94;

(e) no allowance should have been made for future economic loss, on the basis that Mr Berhane's other medical problems would have prevented him from working; and

(f) the consequence of those submissions being accepted meant that the total sum for damages was $11,304.88.

General challenge

[100] The contention advanced was that the adverse findings against Mr Berhane's credit, including what might be discerned from a covert video which was tendered in evidence, meant that no significant award of damages should be made. In this respect, reliance was placed on what was said by McPherson JA in *Collings & Anor v Amaroo (Qld) Pty Ltd & Anor*:[91]

> "A plaintiff who is guilty of dishonesty or misstatements to his legal advisers, his medical consultants, and the court hearing his claim necessarily places himself in a difficult position if his deceit is discovered. It leads the court with the impossible task of attempting to assess his true condition by reference, not to what he has said about it, but to what he and others might have said if he had told the truth."

[101] The learned trial judge did not accept Mr Berhane as a reliable witness with respect to the extent of his injury.[92] That was for a number of reasons including: a video showed him to be capable of greater movement and use of his shoulder than he exhibited to examining doctors, or claimed in his testimony; Mr Berhane told the engineer Mr McDougall that he prepared 16 to 20 orders per shift, whereas the evidence established only 15 orders per shift; Dr Blenkin considered that Mr Berhane was not demonstrating a true range of motion when he examined his shoulder in July 2013; an occupational therapist (Ms Noble) considered that Mr Berhane was applying "sub-maximal effort", and was overprotective of his arm; Mr Berhane was untruthful in testimony about what he could do with his left arm, which testimony was contradicted by the video evidence which, whilst it did not show that Mr Berhane had no restriction of movement or pain, "plainly shows a greater range of movement than he was prepared to demonstrate to those who examined him before trial and to admit in evidence".[93]

[102] Whilst acknowledging those difficulties, there was no doubt that the medical evidence established that Mr Berhane did have a pre-existing condition, namely rotator cuff tendonitis, and the work activities contributed to the development of bursitis in the rotator cuff.

[103] There was also no question that Dr Jhamb had investigated the shoulder and diagnosed subacromial bursitis, as a consequence of which a course of cortisone injections was administered and then a surgical procedure was performed on the shoulder in February 2012.

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91 *Collings & Anor v Amaroo (Qld) Pty Ltd & Anor* [1997] QCA 224, 7.
92 Reasons [19].
93 Reasons [12]-[18].

[104] The learned trial judge reviewed the medical evidence in some detail,[94] including the views of various practitioners as to whether the continuing pain that Mr Berhane complained about was occurring, and whether he was displaying his true range of movement. The learned trial judge also referred to the video made on 13 March 2013. His Honour also took into account the competing views of Dr Macgroarty and Dr Blenkin as to the degree of permanent impairment. His Honour rejected Dr Macgroarty's assessment of the whole person impairment in these terms:[95]

> "Taking into account all of the above, I am not prepared to act on the basis of Dr Macgroarty's assessment of whole person impairment. I do accept [Mr Berhane] continued to experience pain, consistently with an aggravation of the degenerative rotator cuff, as opposed to an exacerbation, as Dr Macgroarty has described the difference. So, I consider Dr Blenkin's assessment to have been under the mark. Having regard to items 96 and 97 of the *Workers' Compensation and Rehabilitation Regulation* 2003, I consider the [Mr Berhane's] injury to sit in the middle of the moderate shoulder injury range and ascribe an injury scale value of 10. This equates to an award of $12,950."

[105] What is plain about the learned trial judge's finding is that he accepted the evidence, given by Mr Berhane, and supported by the reports of the various doctors, that there was continuing shoulder pain more than two years after the first onset of symptoms. The significance of the reference to the difference between aggravation and exacerbation in the passage above, is that Dr Macgroarty's evidence was that exacerbation was where, after the onset of pain, the patient receives treatment and goes back to an asymptomatic, or pain-free, state.[96] Aggravation was where the pain persisted or increased notwithstanding treatment.[97] Plainly, his Honour found that Mr Berhane's pain was persisting over time.

[106] The history of shoulder pain was detailed by the learned trial judge. His Honour referred to Dr Jhamb who conducted the surgery in February 2012.[98] Pain was still evident when Mr Berhane was examined by Dr Davies in June 2012, and when Dr Jhamb saw Mr Berhane again in September 2012.[99] Pain was still evident in January 2013 when Dr Macgroarty first examined Mr Berhane and in July 2013 when Dr Blenkin examined him.[100]

[107] Notwithstanding the learned trial judge's findings adverse to the credibility of Mr Berhane, on the issue of ongoing pain he accepted his evidence, supported, as it was, by the medical experts. There is no reason why that finding was not open to his Honour.

[108] *Collings* is a more extreme case, by far, than the present one. In *Collings*, the claim for injuries was for post-traumatic stress consequent upon a robbery. The plaintiff fabricated evidence as to the assault upon him, revealed by CCTV when he was seen, after the robbery, hitting himself on the face. That was contrary to his answer to an interrogatory, in which he claimed to have been struck by one of the robbers. There

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94 Reasons [105]-[114].
95 Reasons [116].
96 AB 242 lines 26-44.
97 AB 242 line 45 to AB 243 line 7.
98 Reasons [107].
99 Reasons [110].
100 Reasons [111]-[112].

were other problems with his evidence, including that although he claimed to be a total invalid, there was evidence that he continued to play soccer[101] and that he participated in a house cleaning business. As a consequence of the adverse credit findings, the trial judge was not satisfied that the robbery caused any post-traumatic stress disorder. It was in that context that the statement by McPherson JA was made.

[109] Unlike *Collings*, Mr Berhane's case is not one where the findings of credit led to a total rejection of the evidence supporting the claim, nor is it a case where the underlying discreditable conduct which led to those findings extended to fabrication of evidence.

[110] As to Dr Davies, the only evidence from him was the report which was tendered.[102] That report reveals the following:

(a) Mr Berhane had "pain in all movements and [was] globally tender all over the shoulder including round the bicipital";

(b) his opinion was not that Mr Berhane's pre-existing degenerative condition was responsible for his symptoms, as he stated that Mr Berhane "has aggravation of pre-existing rotator cuff degeneration"; and

(c) he prescribed cortisone injections "to try and settle any ongoing inflammation down"; and in that respect expressed a prediction in these terms: "I believe that within three months of this injection any symptoms are related to his pre-existing condition rather than his work related aggravation".[103]

[111] Senior counsel for Woolworths also submitted that Mr Berhane was pain-free on the video, but that is contrary to the unchallenged finding made by the learned trial judge. His Honour found that the video "does not show that [Mr Berhane] has no restriction of movement or pain"[104] and that one "cannot say he experienced no pain".

[112] The challenge to the findings of the learned trial judge on this aspect cannot be sustained. Those findings were open to his Honour, and plainly were to the effect that Mr Berhane had ongoing symptoms of pain some years after the initial onset of the symptoms.[105]

[113] The findings by the learned trial judge that the injury should be classified as falling into item 96 in Schedule 9 of the *Workers' Compensation and Rehabilitation Regulation* 2003, was plainly correct based upon his finding of continuing pain, consistent with an aggravation of the degenerative rotator cuff. Item 97 would be applicable only if it could be said that Mr Berhane had made an "almost full recovery in less than 18 months". That was clearly not the case.

[114] The challenge to the award of general damages fails.

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101 Which he denied in the witness box until confronted with hospital records showing an injury caused by playing.

102 AB 659.

103 AB 660.

104 Reasons [18] and [115].

105 The reference to an entry in medical records by Dr Qazi (AB 522) does not assist. It is evident that the complaint to Dr Qazi was of neck pain radiating to the left arm. On examination, Mr Berhane was "tender over C6 to T2", and the note is that there was "full range of movement at left shoulder". Absent Dr Qazi being called to give evidence about the examination, little or no reliance can be placed upon that entry.

Past economic loss

[115] Senior counsel for Woolworths submitted, on the same basis as for the general damages, that the loss should be limited to the period ending on 30 September 2012. For the same reasons, that should be rejected. The learned trial judge's finding in rejecting that approach was that "the medical evidence leads me to find that [Mr Berhane's] continued pain is properly understood as the result of the aggravation of the pre-existing condition by the workplace activity".[106] Notwithstanding that, his Honour then examined the evidence from various sources suggesting that Mr Berhane would not have worked during certain periods between the date of injury and trial. That evidence is essentially the same as that relied upon before this Court. His Honour rejected the submission that it was most unlikely that Mr Berhane would have worked after 30 September 2012, for reasons which cannot be impeached.[107]

[116] Plainly, the learned trial judge weighed all of those considerations in his assessment. No good reason was advanced to this Court for taking a different approach.

[117] The approach of the learned trial judge was to take potential earnings of the period to trial, and then reduce them by one-third[108] to take account of the chance that Mr Berhane might not have been able to work because of other reasons. That is a significant discount and cannot be shown to be in error.

[118] The learned trial judge had otherwise adopted the average nett weekly earnings which had been propounded by Woolworths. No specific ground was advanced challenging the adoption of those figures, even though a slightly different rate was advanced in Woolworths' written outline.[109] There is no basis for departing from the figures adopted by the learned trial judge for this component.

Future economic loss

[119] The learned trial acknowledged the difficulty in assessing future economic loss, describing it as "very problematic" because of the evidence that Mr Berhane's shoulder would have become symptomatic in any case, the evidence of his other physical complaints, and the fact that the evidence of the occupational therapist (Ms Noble) was affected because it relied upon the opinions of Dr Macgroarty and Dr Blenkin as to Mr Berhane's disability, which were not consistent with the video.[110]

[120] Senior counsel for Woolworths contended that no allowance should have been made at all for future economic loss. This was on the basis that Mr Berhane's "other medical problems would have prevented him from working".[111]

[121] The difficulty with that contention is that no attempt was made to convert the evidence of Mr Berhane's complaints to various doctors of temporary complaints or injuries, into expert opinion evidence upon which one could confidently find that they would have a permanent impairment on the ability to work. The evidence did not approach anywhere near that level of certainty. The basis for the contention, therefore, is speculative.

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106 Reasons [119].
107 Reasons [120].
108 Reasons [121].
109 Respondent's outline, paragraph 49.
110 Reasons [122].
111 Respondent's outline, paragraph 57.

[122] Reference to the reasons of the learned trial judge reveal that his Honour found that Mr Berhane would remain unfit to be an order picker, and would likely be unable to carry out the heavier lifting duties in his trade as an electrician.[112] Further, his Honour's assessment of Mr Berhane was that he was an intelligent person capable of improving his English language skills and achieving further education. On that basis, his Honour found that he "impresses as man who would rather work for his living", and he was "not unemployable and an assessment of future loss of earning capacity must take into account the chance that he will gain employment".[113]

[123] What follows from that point of the Reasons is a careful analysis by the learned trial judge of the evidence touching upon the future loss of earning capacity. His Honour took into account the evidence of the occupational therapist, the prospect of left shoulder symptoms becoming manifest by the age of 55, and the evidence of Doctors Macgroarty and Blenkin as to when the shoulder would have become symptomatic.[114]

[124] Two things must be borne in mind when examining the evidence as to when the shoulder would have become symptomatic. First, Dr Macgroarty was not saying that, absent the workplace activity, symptoms would definitely occur in Mr Berhane's shoulder at age 55, or even 60. It was clearly a prediction or chance based upon his experience with similarly aged patients. As Dr Macgroarty said, "We can't stipulate that all patients do [become symptomatic], because we know some don't".[115] One would be forgiven for thinking the same must be the case with Dr Blenkin's opinion as to five years, but as will become apparent there was good reason to discount that opinion, being arbitrary and speculative.

[125] Secondly, the doctors were not expressing the view that a symptomatic shoulder necessarily meant a complete inability to work. There is no sensible basis upon which one should leap to the conclusion that, absent the strain put upon the shoulder by the work carried out at the Woolworths warehouse, if the shoulder became symptomatic, that would mean the cessation of any form of employment.

[126] In his report Dr Blenkin addressed the question of how many years might have passed, absent the aggravation or acceleration caused by the workplace activities, before Mr Berhane became symptomatic in the left shoulder. It was his opinion that he would develop symptoms within five years.[116] However, he expected Mr Berhane to work to age 67, albeit in a reduced role.[117]

[127] In evidence Dr Blenkin was asked to comment upon his reference to the five year period. He agreed that there was a "good deal of guesswork" in respect of that assessment, and it was "arbitrary" to speculate about it:

> "Look, it is arbitrary. When I selected five years, I chose to err on what I might describe as the generous side of when I expected that to occur."[118]

[128] Dr Blenkin considered that the symptomatology evident from the passage of time would be comparable.[119] He was also asked whether he thought the work activity was having an ongoing effect on Mr Berhane's condition. He responded:

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112 Reasons [123].
113 Reasons [120] and [124].
114 Reasons [124]-[125].
115 AB 243 line 21.
116 AB 675.
117 AB 676.
118 AB 308 lines 17-19.
119 AB 308 lines 23-29.

> "Well, as we've discussed, I nominated five years as … the accelerant period, and given that we're four years past that, … I know this is being arbitrary, but another 12 months and I would – anticipated the situation would be the same as it is now, and that he would have become symptomatic, and he would have needed to have surgery, and the situation would be comparable."[120]

[129] Dr Macgroarty did not address that question of the development of symptoms over time in his reports. However, he did in his oral evidence. He described the question as "a little arbitrary because there's no literature or science that's out there that states categorically it always occurs at this age or this age".[121] He said that doctors go on their experience, and on the basis of patients that they treat. He continued:

> "Now, most surgeons would argue that even in the absence of any workplace injuries, if someone's demonstrated ageing or tendinopathy degeneration, even in the absence of workplace injury, probably somewhere between the age of 55 and 60 they possibly and probably [would have] become symptomatic anyway. We can't stipulate that all patients do, because we know some don't, but as a general rule we would sort of say that from experience – and this has been my experience - … a lot of patients by the time they're 55/60, even if they're not in heavy manual labouring jobs or asked to do a lot of repetitive work that stirs the shoulder up or aggravates the shoulder, … because they've got this tendinopathy, they'll start to notice symptoms."[122]

[130] Thus the evidence of Dr Macgroarty, based on his own experience, was that some patients do not become symptomatic at 55 to 60 even when they have rotator cuff disease, but "a lot of patients by the time they're 55/60 … **start to notice symptoms**".[123] Dr Mcgroarty did not qualify that opinion on the basis that the symptomatic state would be the equivalent of the present state of the symptoms in Mr Berhane's shoulder.

[131] By contrast, Dr Blenkin's selection of five years was, on his own concession, guesswork and arbitrary speculation. Importantly, Dr Blenkin offered no evidence that his selection of five years was based upon his own experience.

[132] There is no doubt that the learned primary judge weighed the above evidence in determining the period of time over which future loss of earning capacity should be assessed. His Honour assessed future loss of earning capacity on the basis that Mr Berhane would have worked to the age of 67.

[133] In my view, it must be concluded that his Honour rejected the evidence of Dr Blenkin in so far as he said that after five years the symptoms would have been evident, and comparable. Dr Macgroarty's evidence, based on experience, was that symptoms would start to be experienced (if at all) at a much later time, when patients were between 55 and 60 years old. Given his Honour adopted a more extended period of time, it is evident that he accepted Dr Macgroarty's evidence over Dr Blenkin's on that point. Moreover, his Honour's reference to "the prospect of left shoulder symptoms"[124] recognised that the assessment involved weighing the chance that the symptoms would manifest.

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120 AB 310 lines 3-10.
121 AB 243 lines 14-16.
122 AB 243 lines 17-26.
123 Emphasis added.
124 Reasons [125], first line.

[134] Dr Blenkin's report expressed his view that the injury "will not prevent Mr Berhane from working to a normal retirement age of 67 years albeit in a reduced role".[125] That evidence was plainly accepted by the learned trial judge, as it formed the basis for his assessment of future loss of earning capacity.

[135] In that state of the evidence, it is my view that the learned trial judge's selection of assessment of the loss of earning capacity through to age 67, but heavily discounted by 75 per cent, cannot be demonstrated to be in error. Put another way, I am unpersuaded that it can be demonstrated that his Honour's findings were contrary to incontrovertible facts or uncontested testimony, or were glaringly improbable or contrary to compelling inferences.[126]

[136] The learned trial judge assessed future loss of earning capacity on the basis that Mr Berhane would have worked to the age of 67, and earning at about $840 per week. Neither of those figures was the subject of separate attack. His Honour then discounted the consequent figure by 75 per cent, which, on any view, was a significant discount to accommodate any other vicissitudes in Mr Berhane's life. His Honour described the discount as "very significant".[127]

[137] In my view, it is important to remember that when the doctors referred to the condition becoming symptomatic, that is not necessarily indicative of a loss of earning capacity. It would only be when the symptoms became severe enough to prevent Mr Berhane from doing the work as an order picker, or in any of the other forms of heavy employment for which he had some qualification, that one would have an assessable lost earning capacity. The possibility that the earnings across that time would be less than he would make as an order picker working for Woolworths, or indeed in any other job, was accommodated by the application of the significant discount of 75 per cent.

[138] Finally, it was submitted that the learned trial judge did not take into account the fact that other medical problems would have prevented Mr Berhane from working.[128] That submission suffers from the fact that there is no basis to find that the other medical problems would have prevented Mr Berhane from working. In fact, the learned trial judge found to the contrary.

[139] In my view, no good reason has been shown to disturb this aspect of the assessment of damages.

Conclusion on quantum

[140] For the reasons given above, the cross-appeal challenging the learned trial judge's assessment of quantum should be dismissed.

Disposition of the appeals

[141] For the reasons given above, I would propose the following orders:

1. Allow the appeal.

2. Dismiss the cross-appeal.

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125 AB 676.

126 *Robinson Helicopter Company Incorporated v McDermott* (2016) 331 ALR 550; [2016] HCA 22, at [43].

127 Reasons [126].

128 Respondent's outline, paragraph 57.

3. Enter judgment for the plaintiff against the defendant in the sum of $231,211.45.

4. Order the respondent to pay the appellant's costs of the appeal on the standard basis.

5. The respondent is to pay the appellant's costs of the proceedings at first instance, to be assessed on the standard basis.

[142] **DALTON J:** I agree with the reasons of Morrison JA and with his proposed orders.