SUPREME COURT OF QUEENSLAND

CITATION:	*Cincovic v Blenner's Transport Pty Ltd* [2017] QSC 320
PARTIES:	**GORAN CINCOVIC** (plaintiff) **v** **BLENNER'S TRANSPORT PTY LTD (ACN 052 473 051)** (defendant)
FILE NO/S:	BS No 8360 of 2016
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14-17 November 2017
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – BREACH OF DUTY – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – DUTY OF CARE – where the plaintiff was employed by the defendant – where the plaintiff was injured in an accident whilst riding a pallet jack as a scooter during the course of his duties – whether the defendant breached their duty of care to the plaintiff EMPLOYMENT LAW – LIABILITY OF EMPLOYER – DUTY OF CARE – FORESEEABILITY OF INJURY – whether there was a failure to provide a safe system of work – whether the defendant's breach caused the injury to the plaintiff – whether the plaintiff was contributorily negligent *Workers Compensation and Rehabilitation Act 2003* (Qld) Chapter 5, Part 8, Div 1, s305B(2) *Workers Compensation and Rehabilitation Regulation 2014* (Qld) Schedule 8, 9 *Blake v J R Perry Nominees Pty Ltd* (2012) VSCA 122, applied *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; HCA 37, applied

COUNSEL:	J Wiltshire for the plaintiff M O'Sullivan for the defendant
SOLICITORS:	Seymour Furlong Lawyers for the plaintiff Jensen McConaghy Lawyers for the defendent

[1] On 30 March 2014, the plaintiff sustained compression fractures to his spine when he fell backwards off a pallet jack ("the incident") at the defendant's depot at Darra in the State of Queensland. At the time the plaintiff was employed by the defendant as a truck driver.

[2] By claim filed 17 August 2016, the plaintiff claims damages for personal injuries allegedly occasioned by him as a consequence of the incident. The plaintiff alleges those personal injuries were caused by the defendant's negligence and breach of contract.

[3] There is no dispute the incident occurred at the alleged time and place. There is also no dispute the plaintiff sustained fractures of the spine as a consequence of that incident, and that those fractures caused the plaintiff pain and suffering for a period of time.

[4] At issue is whether the incident and the plaintiff's claimed personal injuries were caused by the defendant's breach of duty or breach of contract, whether the plaintiff was contributorily negligent, the nature and extent of the personal injuries occasioned by the plaintiff and the quantification of his damages.

Background

[5] The plaintiff was born on 3 August 1969, in Serbia. He migrated to Australia as an adult. After arriving in Australia, he undertook a variety of occupations. In recent years prior to the incident he worked as a truck driver, both for the defendant and on his own behalf.

[6] The defendant operates a road freight transport business. When the plaintiff first commenced work for the defendant in 2011 it operated a depot at Rocklea. Subsequently, it opened a second depot at Darra.

Incident

[7] The incident, which was filmed on CCTV, occurred when the plaintiff was transporting a pallet jack through the depot back to his truck. In doing so, the plaintiff rode the pallet jack like a scooter. He used one leg to push it several times before putting a leg on each tyne as the pallet jack travelled forward a distance towards the location of his truck.

[8] As the plaintiff was riding the pallet jack, another employee, Lee Starling, approached the plaintiff from behind. Starling accelerated in a running motion and used his foot to

push one of the tynes of the pallet jack. The plaintiff fell backwards off the pallet jack. The plaintiff's back and head struck the concrete floor.

Liability

Pleadings

[9] The plaintiff pleads that as a consequence of the incident he suffered compression fractures of the cervical and thoracic vertebrae, post-traumatic headaches and a psychiatric injury. The incident and the injuries were allegedly caused by the defendant's breach of duty and breach of contract, either directly through its own breaches or through its servant Starling for whose acts it is vicariously liable.

[10] The particulars of the alleged breaches are:

> "(a) failed to take reasonable care for the plaintiff's safety;
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> (b) failed to provide a safe system of work;
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> (c) through its servant, Starling, for whose acts it is vicariously liable, push the pallet jack when it was unsafe to do so;
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> (d) failed to conduct proper or adequate supervision of its employees;
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> (e) failed to instruct, train or direct the plaintiff that he was not to ride the pallet jacks;
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> (f) failed to implement, enforce and supervise a prohibition on employees riding pallet jacks;
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> (g) failed to instruct, train or direct the plaintiff in respect of safe methods of transporting pallet jacks when not under load;
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> (h) permitted, tolerated or allowed a practice of riding pallet jacks at the depot;
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> (i) failed to instruct, train or direct its employees, including Starling, as to a prohibition on pranks or horseplay, and to supervise and to enforce the prohibition; and
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> (j) permitted, tolerated or allowed a practice of pranks and horseplay at the depot."

[11] By way of defence, the defendant pleads that the plaintiff was using the pallet jack contrary to the way in which the plaintiff had been instructed, trained and authorised and was engaged in horseplay. The defendant denies it caused or contributed to the incident by its own negligence or breach of contract. The defendant alleges it is also not vicariously liable for the casual, spontaneous act of Starling in kicking the pallet jack.

[12] The defendant pleads that it had in place appropriate instruction, training, direction and supervision by which the plaintiff and his fellow employees were instructed not to ride the pallet jack as a scooter, were directed as to the proper and safe method of transporting pallet jacks and whereby horseplay was not tolerated at the depot.

[13] The defendant further pleads that the plaintiff was responsible for his own injuries, was contributorily negligent in undertaking that activity and that the risk Starling would kick

the pallet jack was not foreseeable, was insignificant and a reasonable person in the defendant's position would not have taken any precautions in respect of that risk.

[14] By way of reply, the plaintiff denies he was ever instructed, trained or authorised as to the use of the pallet jacks. Further, the plaintiff was not ever trained or instructed not to ride a pallet jack and never informed he was not authorised to ride a pallet jack. The plaintiff also denies he was engaging in horseplay in riding the pallet jack, that he failed to have regard for his own safety or that the activity involved obvious risk in the absence of a deliberate action on the part of Starling.

Evidence

[15] The plaintiff completed eight levels of schooling in Serbia. He commenced the ninth level but did not finish it. He left school around 16 and started playing drums in a band. The plaintiff also served a period of national service. He drove trucks and played music in the army.

[16] In about 1992, the plaintiff left Serbia and travelled to Russia where he worked as a labourer in the construction industry. He returned to Serbia after two or three years. He continued to play music in Serbia until he came to Australia in 1997. He came to Australia because he married a Serbian girl who had been born in Australia.

[17] The plaintiff initially worked in a factory during the day and as a cleaner at night. After approximately six months he stopped working in a factory. He continued cleaning various offices. In about 2001, the plaintiff commenced working for Frigmobile in the freezer room, loading pallets onto trucks for delivery. At some stage, the plaintiff started to drive trucks for Frigmobile.

[18] After a few years, the plaintiff bought his own tipper truck. He left Frigmobile in 2005 or 2006 and commenced his own business, contracting to a trucking company. He continued in that employment until his truck was damaged in the January 2011 floods. The plaintiff then commenced employment with the defendant.

[19] The plaintiff gave evidence that he went to the defendant's Rocklea depot in February 2011. He asked for a job. He was told to come in on Monday. When he arrived he was given a key to a truck. He was not given any training. A person he knew as Clayton, who the plaintiff had previously worked with at Frigmobile, told another employee, Craig Woodhead, there was no need to check the plaintiff as "he'll be alright".[1] The plaintiff was not asked to complete any paperwork in respect of his employment and not asked to show his licence.

[20] The plaintiff commenced work that day. It was some weeks before he received his first payment. The plaintiff had to ask Craig a few times about payment. Craig, at one point, joked "don't worry you'll be working for love".[2] After approximately two weeks the plaintiff received payment into his bank account.

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1 T 1-13/15.
2 T 1-13/45.

[21] The plaintiff accepted he signed some forms on 11 March 2011. Whilst those forms indicated he had received training, the plaintiff did not receive any training from the defendant. Apart from signing the form and inserting the date, the plaintiff did not complete any aspect of those documents. The plaintiff recalled signing the documents through a window in the Rocklea depot. He then just kept going to undertake his pick ups and deliveries.[3]

[22] The plaintiff said that despite the contents of one of those forms, he did not receive any training in relation to operation of a manual pallet jack. He learnt by observing others. Whilst the document said the length of training was 30 minutes, the plaintiff did not receive "any training, not even 3 minutes".[4] Similarly, the plaintiff did not receive any training in relation to entry and exit of trucks. He simply signed a completed form. He thinks he signed that form at the same time.

[23] The plaintiff also denied receiving a document entitled "Safe Work Procedure SWP 001" in relation to dos and don'ts in the operation of a manual pallet jack. The plaintiff said his natural language was Serbian. Whilst he can speak English, he has a poor ability to read English. The plaintiff could not recall reading that document. He could not recall anybody running through the document with him. The document was never read to him.

[24] The plaintiff accepted he had completed the inductee box of the document headed "Dos and Don'ts" with his signature and a date. He probably signed that document at the same time as the other documents, whilst at the Rocklea depot. He did not recall receiving any induction at the time he completed the document. The plaintiff never had any kind of induction for anything.[5]

[25] In late 2011, the plaintiff was able to replace his own truck. Initially, he could not afford to drive it himself. He employed a driver whilst he continued to work for the defendant. In February 2012, the plaintiff ceased working for the defendant and drove his own truck. He returned to the defendant in August 2012 because he wanted to make some more money. He continued to operate his own business during the week and worked for the defendant on weekends from August 2012 until the incident. The plaintiff said working for the defendant was different on weekends. The behaviour of employees at the depot was a little more flexible on weekends. When the plaintiff returned to the defendant in August 2012, he again received no training or induction.

[26] The plaintiff said all trucks in the defendant's fleet had a pallet jack in the rear of the truck to assist in moving the pallets from the front to the back of the truck. The pallet jack was kept in the back of the truck. On occasions when it was necessary for the forklift driver to remove the pallet jack from the truck to unload the truck, the pallet jack was placed near the truck. Sometimes, a truck driver would use the pallet jack whilst at the defendant's depot. Those occasions included when there were small pallets that needed to be moved in the dock area.[6]

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3 T 1-21/15.
4 T 1-21/25.
5 T 1-23/20.
6 T 1-15/25.

[27] On the day of the incident, the plaintiff commenced work at around 4.00am on the morning of 30 March 2014. He made deliveries throughout the morning. At the end of the shift he parked his truck at the Darra depot. His pallet jack was in the truck. He took his paperwork into the office. When he returned to the truck, the pallet jack was missing. Some fellow workers indicated the pallet jack was in the dry area.

[28] The plaintiff went to retrieve the pallet jack. He pushed the pallet jack with his foot. His intention was to ride the pallet jack back to the dock area so that he could return it to the inside of the truck before going home. The plaintiff placed a foot onto each of the tynes of the pallet jack whilst holding onto the handle with both hands. He was going slowly. He was intending to stop just before the dock area. The plaintiff felt secure.

[29] The plaintiff said as he crossed the floor from the dry area towards the dock area, he was approached from behind by Starling. The plaintiff was not aware that Starling was approaching him. He did not see Starling. The plaintiff was looking towards the front. The plaintiff accepted that shortly prior to the incident he looked in Starling's direction. The plaintiff said he was looking to see that he was not cutting off some person as he approached the door to the dock. As a professional driver, it was his habit to look to the left and right.

[30] The plaintiff accepted the CCTV footage depicted Starling running up to the plaintiff. The plaintiff did not have any knowledge or inkling Starling was about to kick the back of his pallet jack. He did not have any conversation with Starling prior to the incident. The plaintiff denied he was attempting to race Starling or attempting some sort of game with Starling. The plaintiff was "a little bit lazy to walk".[7] The reason the pallet jack crossed the path of Starling was because he was going to the doorway to exit to his truck.

[31] The plaintiff said he had ridden a pallet jack in that same manner at the defendant's depot prior to the incident. He did so on occasions when they were busy or waiting for loading. He did not do so every day. He maybe rode the pallet jack that way once a week, sometimes more, sometimes less. No-one ever told him not to do so. The plaintiff thinks he had ridden the pallet jack on occasions in front of his supervisors, Craig Woodhead and Steve Kajewski. On no occasion did either say anything to him.

[32] The plaintiff had seen other employees riding pallet jacks in that way. He did not ever see a supervisor or manager tell an employee not to do so. He did not ever see an employee be reprimanded for doing so. The plaintiff did not think he was doing anything wrong in riding the pallet jack. He had never recalled seeing anything in writing at the defendant's depot saying they were not permitted to ride on pallet jacks. There were no signs to that effect.

[33] The plaintiff had observed other workers at the defendant's depot using equipment not in their proper way. He had seen people using the forklift to lift workers whilst they were standing on the pallet jack. He had also seen workers using the forklift to do doughnuts on the wet floor in the chiller area. That would occur as often as three or four times per week. He saw workers being lifted on the tynes of the forklift to put

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[7] T 1-30/25.

stickers on pallets. On occasions, the forklift driver lifted them all the way to the ceiling until the worker "starts screaming to put him down".[8] He saw that a few times.

[34] The plaintiff also saw the forklift taking a pallet jack back to the dry area and stop so that the pallet jack slipped off the forklift and travelled 10-50 metres before hitting the wall. He saw that maybe a few times per week in the second period of his employment. Workers also called people names. They called the plaintiff "terrorist" every single day.

[35] In cross-examination, the plaintiff accepted that his signature appeared on documents indicating he had received approximately 30 minutes of training on manual pallet jacks, including a document listing how to properly use pallet jacks. The plaintiff accepted he circled the word "had" on one of the forms confirming the document had been read to him. The plaintiff denied the induction representative, Chris, read the document to him or that anyone else read it to him. The plaintiff denied receiving any such training.

[36] The plaintiff denied ever being shown a code of practice which prohibited fighting or engaging in horseplay or disorderly conduct at the defendant's premises. He denied ever receiving notice that an employee who engaged in that conduct would be subject to disciplinary action. He did not receive any notice stating that skylarking or horseplay with pallet jacks would not be tolerated by the defendant. The plaintiff was not aware of any allegation by Starling that the plaintiff had been involved in horseplay. However, Craig Woodhead told him two days after the incident it was his fault.

[37] The plaintiff denied any involvement with Starling that would constitute skylarking or horseplay. When he passed Starling he was traveling at faster than a walking pace but denied he was travelling too fast. He denied he put himself at risk by riding the pallet jack like a scooter. The plaintiff felt secure. He had his feet on the tynes and his hands on the handle. He was not moving fast and he did not see any kind of risk.[9] If Starling had not pushed him he would not have suffered the injury.

[38] The plaintiff accepted he was never taught by Woodhead to ride the pallet jack like a scooter. The plaintiff copied other people. He accepted he was taught to pull a pallet jack containing a load but did not accept he was taught how to use a pallet jack. He accepted that when pulling or pushing the pallet jack he would do so at a walking speed but denied riding the pallet jack like a scooter was reckless.

[39] The plaintiff did not accept that skylarking and horseplay was not permitted at the defendant's premises. The plaintiff saw people riding pallet jacks, doing burn-outs with forklifts in the wet area and forklifts lifting people on pallet jacks into trucks "with my eyes".[10] The supervisor was there and no-one said anything. That applied also to misuse of the forklifts.[11] Whilst he could not remember Woodhead being present when someone was riding the pallet jack as a scooter, he saw it happen in front of Steve Kajewski.[12]

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8 T 1-38/35.
9 T 2-42/45.
10 T 2-40/20.
11 T 2-45/35.
12 T 2-46/10-35.

[40] The plaintiff accepted that the defendant's workplace had a number of procedures for people to move around the workplace safely. There were painted pedestrian laneways. Workers also wore designated high visibility vests so that they were clearly observable.

[41] The plaintiff accepted that pallet jacks were mostly stored inside the back of the delivery truck. Most stock was moved around the depot using forklifts. He also accepted he was only at the depot whilst his truck was being loaded for deliveries or unloaded after deliveries.[13] He denied, however, that it was rare for the pallet jack to be outside the truck at the depot. The plaintiff said when the forklift drivers were unloading the truck they would pull everything from the truck. The pallet jack would be put to the side near the truck. The pallet jack was the last thing put back into the truck.

[42] Derrick Stuart worked for the defendant at various times between 2008 and 2013. Initially, he worked at their Rocklea depot as a truck driver. After the defendant opened the Darra depot, Stuart worked for the defendant as a forklift driver. For a time he was also in charge of running the Rocklea depot where he loaded trucks. Stuart denied ever receiving an induction when he commenced employment with the defendant.

[43] Stuart was required to use pallet jacks as a truck driver. They were mostly used in the back of the rigid trucks. They were rarely used at the depot. Sometimes, a pallet jack would be taken out of the truck at the depot by the forklift driver and removed from the dock area. In that event, the driver would have to retrieve the pallet jack. Stuart did not ever recall receiving specific training about the use of pallet jacks. He had to just "sort of figure it out".[14] He did not ever undertake a 30 minute training session or see a safe work plan with respect to the use of pallet jacks.

[44] Stuart said during his time with the defendant he did on occasions see workers ride a pallet jack like a scooter. It was something workers did to get across the area quickly. That happened at both depots. Stuart said "it was just something that you did. Well, something that a lot of people did so it never really stuck out in my brain, but pretty much the whole time I was there".[15] He was never told by anybody that he was not allowed to ride pallet jacks like a scooter.

[45] Stuart rode pallet jacks like a scooter in front of supervisors and managers, including Woodhead, Kajewski and the person who employed him, Brett Peace. There was no reaction from any of them. Stuart did not see anyone get reprimanded and Stuart was never reprimanded by anyone. The practice was quite common, once a week. It was nothing that was frowned upon. It was something you did if you were in a good mood "just mucking around".[16]

[46] Stuart said whilst he worked with the defendant he observed workers engaging in jokes or pranks. There was a lot of horseplay. It was "a pretty loose atmosphere".[17] People

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[13] T 2-44/15.
[14] T 2-74/30.
[15] T 2-75/25.
[16] T 2-76/10.
[17] T 2-76/20.

would turn the gas off on the forklifts. When people were being lifted up by the forklift, they would be put up higher. He did not observe workers being reprimanded for playing jokes. A worker might be told "Oh, come on settle down fellows" but there was never any written or official reprimand.[18]

[47] Stuart worked both during the week and on weekends. Towards the end of his time with the defendant it was just weekdays. In his experience, the atmosphere was pretty much the same whatever day, although a weekend was perhaps a little bit more relaxed because there were less people.

[48] In cross-examination, Stuart agreed that between 2008 and 2011 he left the defendant's employ six times. He would work elsewhere for a few weeks and then return to his old job. On 11 June 2011, he lost his driver's licence. He could no longer work as a truck driver but worked with the defendant as a forklift operator. When he first commenced work as a forklift driver he worked at the Darra depot. Later in 2011, he went to the Rocklea depot. He would work there in the morning and return to the Darra depot in the afternoon. He left the defendant's employ in 2013.

[49] Stuart did not undertake any induction when he commenced employment with the defendant in 2008. He filled out an application form after giving Brett Peace his resume. Stuart was not involved in any induction process through 2011, 2012 and 2013. He agreed the defendant was trying to implement something to make the system much safer at Darra. Rules were put in place to designate walking areas and the wearing of high visibility vests.

[50] Stuart agreed that in the Industrial Commission, he gave evidence that pallet jacks were left on or near the trucks normally. Stuart also accepted that in the Commission he had given evidence that using the pallet jack as a scooter was to get from A to B quickly and that he had once been told off for riding a pallet jack as a scooter. He may have been told he was not allowed to do so but said it was "definitely okay". He could not remember being told off at all. He did not accept that riding pallet jacks as scooters was not a regular occurrence. He accepted it was not once a week.

[51] Stuart did not accept that the defendant's workplace did not condone or permit horseplay. There was horseplay all the time. Supervisors or management "pretty much just turned a blind eye" to skylarking or did not care.[19] Examples of horseplay or skylarking included using a forklift to put someone higher up onto the rack to get something by pushing them higher and higher. Stuart accepted there were occasions when the person was lifted on the forklift tyne to place a sticker that needed to be placed on some cargo or to fix the racking. Stuart had been lifted in that way because he was small and nimble.

[52] Steve Kajewski commenced employment with the defendant in 2009 as a forklift driver. He was appointed the defendant's operation manager in 2010 or 2011. He ceased employment with the defendant in 2016 when he commenced work as operations

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[18] T 2-76/45.
[19] T 2-85/30.

manager for another transport company. Whilst working for the defendant he worked at both the Rocklea and Darra depots. He moved to the Darra depot in May 2011.

[53] Kajewski said that in his role as operations manager he had day-to-day involvement in the dock area, overseeing the actions of forklift operators and truck drivers. His role included checking what freight had come in through the local trucks to see if there was enough freight to start loading the long haul trucks. During that process he would walk around the dock area and the chilled areas. He worked Monday to Friday and every second weekend.

[54] Kajewski received a generic induction when he commenced employment with the defendant. It listed what needed to be done in the job title as well as times of work and what happened within the business. He also received induction in respect of his tasks as a forklift operator. He received specific instructions in relation to general loading and unloading of trucks. Kajewski also recognised a training document in relation to manual pallet jacks. Kajewski went through a similar induction process.

[55] Kajewski believed he received a copy of the defendant's Code of Conduct on the day he started his employment. That Code of Conduct set out that the defendant encouraged safe, supportive, productive work environments and that fighting or engaging in horseplay or disorderly conduct could result in disciplinary action. In the normal process, the Code of Conduct was given to the employee at the time of induction.

[56] During his employment with the defendant Kajewski did not observe any instance when a truck driver or another employee rode a pallet jack like a scooter. He would have pulled that person up and gone down a line of disciplinary action.[20] He did not recall observing any horseplay. He did see one physical fight between two drivers at the Rocklea depot. Kajewski believed there were occasions when an employee was disciplined or reprimanded for inappropriate behaviour on the floor of the depot but could not recall any particular incident. The depot manager would have taken that course of action.

[57] Kajewski denied ever observing forklift operators doing skids on wet surfaces. If he had seen that he would have taken disciplinary action. There were occasions when a driver would be lifted by a forklift into the back of a truck with the pallet jack. That occurred to a height of approximately four feet. There was no other way of getting the pallet jack back into the truck. Otherwise, he only observed people being lifted by a forklift at the depot whilst inside a safety cage, locked onto the forklift to give the person a solid platform. That would occur when there was a need to check racking at a certain height.

[58] Workers wore high visibility clothing as a requirement on the depot site. The depot had designated pathways for pedestrians with painted yellow lines. Pedestrian traffic was to walk along that designated pathway whenever you needed to go within the warehouse areas. Kajewski said that after the incident a notice was sent out to depot managers about the inappropriateness of workers riding pallet jacks as a scooter.

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[20] T 3-13/10.

[59] Kajewski knew Starling. He was employed as a forklift operator. Starling received training in respect of entry and exit from trucks similar to the type of training Kajewski received on induction.

[60] In cross-examination, Kajewski accepted the plaintiff was "a pretty good worker".[21] Kajewski had never had to discipline the plaintiff. Kajewski got on well with most of his staff. He denied he had a laid back style of supervision. He denied he was happy to let his workers do their own thing as long as their job was getting done. He accepted his primary responsibility was long haul drivers. He did not have much to do with local drivers like the plaintiff. He denied the workplace was not as busy on weekends as during the week. There would be fewer staff. He denied his demeanour was more relaxed on the weekend. There was still a job to be done.

[61] Kajewski accepted he was not involved in the training or induction of truck drivers. He had no knowledge of what induction the plaintiff received but said everyone within the company went through a generic induction. He could not say the documentation received by the plaintiff or Starling was the same as the documentation he had received on induction. Kajewski accepted that training of truck drivers was difficult because they started at different times and were mostly out on the road.

[62] Kajewski did not accept it was usual for workers to ride an empty pallet jack around the depot. Pallet jacks were primarily based in the rigid truck. If forklift drivers were busy, a driver may use a pallet jack to take freight out of the back of the truck. Kajewski denied seeing the plaintiff or any other worker stand on a pallet jack and ride them while they were empty. Kajewski accepted there was no written document indicating that practice was not a safe practice. He also accepted there were not any signs in the workplace to that effect.[22] He thought it was more a common sense factor rather than a formal policy. Pallet jacks were not designed to be ridden. Kajewski never personally told the plaintiff he was not to ride a pallet jack.

[63] Kajewski did not accept it was common practice at the depot for workers to play jokes on each other. He did not accept it was common for workers to turn off the gas on the forklift. All bar one of the forklifts at Darra were electric. Kajewski did not accept forklift drivers at the Darra depot did doughnuts on the wet floor in the chiller room. That floor could be wet due to condensation but there was no room to be doing doughnuts. He did not ever see forklift drivers move a pallet jack and stop the forklift suddenly so the pallet jack would skid off along the floor.

[64] Kajewski accepted that a practice of having a forklift operator lift a pallet jack with the driver on the pallet jack was not a safe practice. However, it was a bit safer than allowing the pallet jack to fall on someone's head as it was being lifted into the back of the truck. He did not know of a practice of lifting workers via a forklift to place stickers onto loads higher up. Workers might be lifted in a cage to check pallets of freight in the racking. He denied that happened frequently without a worker being in the cage.

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[21] T 3-18/15.
[22] T 3-21/25.

[65] Kajewski denied there was regular joking and horseplaying and that he and other supervisors had a relaxed attitude and tolerated it. He believed workers would be disciplined or reprimanded for those sorts of activities.[23] He accepted people were called by nicknames. He did not recall workers frequently referring to the plaintiff as a terrorist. He denied it would be a bad career move for him to now admit he allowed workers to engage in pranks and horseplay.

[66] Lorimer Hunt is employed as the local operations manager for the defendant. At the time of the incident he was employed as the defendant's warehouse supervisor. He commenced employment with the defendant in 2012 as a forklift operator. He was promoted to warehouse supervisor approximately 12 months later. He remained in that position for 18 months before he left the employment of the defendant. He subsequently returned to the defendant's employment in his current position.

[67] Hunt received a written induction when he first started employment with the defendant. He was taken through the written documents and checked off in relation to the forklift operator side of the induction. The tasks he was taken through were specific to his duties as a forklift operator. An assessment for competency on the forklift was part of the induction process. That process took roughly 20 minutes. The induction process included giving him a copy of the Code of Conduct.

[68] Hunt's duties as warehouse supervisor were to supervise and instruct all forklift operators in relation to loading and unloading on the floor of the depot. He also supervised drivers whilst they were on the dock area. There were seven docks for individual trucks. The Darra depot had five electric forklifts and one gas forklift. Hunt worked Friday to Wednesday, often 12 – 13 hours per day. Weekends were a fair bit quieter but were not dead quiet. On a weekend, they would receive approximately 40 trucks a day. During a weekday it was between 30 and 100.

[69] Hunt said most of his days were spent on the docks. Every second weekend he spent in the office. Systems were in place for the safety of people moving around the dock. Workers wore high visibility vests and walked on designated walk paths except when crossing to go to the chillers or freezers. Pallet jacks were kept on the dock whilst trucks were being loaded and unloaded or if a truck left a pallet jack behind.[24]

[70] Hunt had not on any occasion seen anyone ride a pallet jack as a scooter like he had observed in the CCTV footage of the incident. He was not working on the day of the incident. He observed the CCTV footage the following day. Hunt had also not ever seen someone strike another worker as Starling did in that CCTV footage. If he had seen someone riding a pallet jack as a scooter he would have pulled them up and had words with them "like, you can't do it".[25]

[71] Hunt could not recall ever seeing any horseplay in the management of forklifts. He had not seen people doing doughnuts or burnouts at the depot. He had, on occasions when the floor was wet, seen forklifts slide when they first came out of the chillers because

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[23] T 3-24/5.
[24] T 3-28/20.
[25] T 3-29/10.

the forklift had no weight. Hunt had seen forklift operators lift people up on forklifts to put a label on a pallet or read a label but on no other occasion. Hunt recalled one occasion of horseplay when bread rolls returned on empty crates were thrown around by workers. Hunt pulled them up straight away. This event occurred before the incident.

[72] Hunt said Starling was no longer employed by the defendant. Hunt spoke to Starling after the incident. Starling was re-inducted and made to go through all the paperwork again. Hunt had to sign off on Starling's check sheet for the forklift practices. After the incident, a notice was sent around to the production depot managers with an instruction that pallet jacks were not to be ridden. Any disciplinary action was dealt with by management.

[73] In cross-examination, Hunt accepted the plaintiff was a good worker. He had never had any reason to discipline the plaintiff. He did not accept the work atmosphere was more relaxed on weekends. The workplace was always fairly fast-paced, especially on the floor. Hunt denied it was usual for workers to ride an empty pallet jack. It had never happened while he was there. If he had seen someone riding a pallet jack he would have pulled them up and told them not to do it again. He would not have subjected them to formal discipline.[26]

[74] Hunt said that part of the induction included instructions that work tools were to be used for their designated purpose, not other purposes. He accepted workers were not specifically told that pallet jacks were not to be ridden. He accepted it was not written down anywhere that pallet jacks were not to be ridden. He also accepted there were no signs in the workplace to that effect. Hunt never told the plaintiff it was prohibited to ride pallet jacks.

[75] Hunt did not accept that it was pretty common for workers to play jokes on each other at the Darra depot. He was not aware of workers turning off the gas to the forklift. Lifting workers on the tynes of the forklift to put stickers on stock was not a proper practice. He denied that on occasions a forklift operator might lift the worker a bit higher to give them a scare. There was a practice for forklifts to lift a pallet jack into the truck while a worker was standing on the pallet jack. That mostly happened at the Rocklea depot. That was not a particularly safe practice but was probably a safer option than other alternatives.

[76] Hunt had seen forklift operators move a pallet jack into the dry area by suddenly stopping so that the pallet slid off and across the floor. He would pull up that practice because it was not a good practice for equipment or people. He denied that pranks, horseplay and workers having fun happened on a regular basis at the defendant's depot. He denied he and other supervisors had a fairly relaxed attitude to that conduct. Workers would be told to pull their heads in. If they continued, it would be taken up through management.

[77] Hunt accepted there was an attitude where workers would joke around and call each other names. The plaintiff was regularly referred to as a terrorist. That was said in fun. He denied it would be a bad career move for him to admit in Court that he let workers

[26] T 3-34/25.

engage in pranks and horseplay in the workplace. It did not worry him, "There's plenty of other jobs out there if it come to that".[27] Hunt believed Starling was stood down for two weeks after the incident. He continued to work for the defendant thereafter.

[78] Craig Woodhead was employed by the defendant from 2010 until 2015. He worked at both the Rocklea and Darra depots. He also briefly worked for the defendant at Innisfail. Initially, he worked as a truck driver. He subsequently was appointed operations supervisor. After working at Innisfail he returned to the Darra depot as depot manager. Woodhead believes he received an induction when he first commenced employment with the defendant in 2010. He recalled being shown through the trucks and its operation. He also signed paperwork. He recalled receiving a code of conduct manual.

[79] Woodhead was depot manager at the time of the incident. His duties as depot manager were to oversee the whole operation. He also oversaw staff recruitment. As depot manager he would be both on the floor and in the office. He estimated he spent about 25 per cent of his time on the dock areas. Woodhead worked Monday to Friday and every third weekend.

[80] Woodhead was involved in the training of the plaintiff in March 2011. He signed a certification of the plaintiff in respect of the manual pallet jack. He recalled completing this record of training a few weeks after the plaintiff commenced employment. There was not any practical training at the time because the plaintiff had already been doing day to day operations. The induction was going through the expectations of the business and how to operate equipment properly.[28]

[81] Woodhead and the plaintiff went through the document in respect of the use of the manual pallet jacks together. It would have taken approximately 30 minutes because English was not the plaintiff's first language. He undertook the same process in relation to entry and exit of a truck. He certified the plaintiff as competent. He would not have done so if he did not believe the plaintiff was competent in respect of the training he gave him.

[82] Woodhead had seen people within the industry ride a pallet jack as a scooter. He could not recall whether he had seen that occur at the defendant's Darra depot. If he had seen someone riding the pallet jack as a scooter, he would have pulled them up and had a conversation with them. If the practice continued he would have escalated it to a disciplinary procedure.

[83] Woodhead denied ever seeing the plaintiff ride the pallet jack like a scooter at the Darra depot. He had not seen other examples of horseplay or skylarking by workers at that depot. There was a bit of banter but nothing that was of an unsafe nature. He did not ever see forklift drivers do doughnuts on wet surfaces. He denied that anyone rode pallet jacks as scooters in the Rocklea depot. It was a very small depot where you could see everything from the office.

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[27] T 3-37/25.
[28] T 4-5/20.

[84] Woodhead was not present on the day of the incident. He had already given his notice so another manager was taking over. He was not involved in any action being taken against Starling. When Starling joined the defendant in 2012 there was a more formal procedure in respect of induction. A lot of policies and procedures were tightened up over the time Woodhead worked for the defendant.[29]

[85] In cross-examination, Woodhead said he did not know whether the plaintiff received any further training when he returned to the defendant's employ in August 2012. The plaintiff was a pretty good worker who was reliable. He had never had to discipline the plaintiff for anything.

[86] Woodhead was present at the depot on the first day the plaintiff commenced employment with the defendant in early February 2011. Clayton Reid, the defendant's then business development manager, told the plaintiff to come to the depot for a job. Reid had worked with the plaintiff at Frigmobile. The plaintiff came very highly recommended by Reid. The plaintiff was essentially recruited and hired by Reid. Woodhead believes the plaintiff was shown around the business by other staff.

[87] Woodhead could not recall whether the plaintiff worked for several weeks before being paid by the defendant. He accepted the wages records indicated the plaintiff's first payment appeared to represent more than one week's work. He also accepted the paperwork signed by him on 11 March 2011 was some weeks after the plaintiff commenced employment with the defendant. Training truck drivers was a matter of catching the truck driver between runs.[30]

[88] Woodhead denied he saw the process of training as a formality. Woodhead took it seriously. He was very new in his role and wanted to make sure things were done properly. He denied he did not do any pallet jack training with the plaintiff or take the plaintiff through the safe work procedure.

[89] Woodhead accepted he had given evidence in the Industrial Commission to the effect that the plaintiff's training for the pallet jack and getting in and out of trucks would have taken close to 20 to 30 minutes together. However, he believes each process took 20 to 30 minutes.[31] He recalled going through the training with the plaintiff but could not recall the specifics of that process.

[90] Woodhead agreed the operating procedures for manual pallet jacks dealt with procedures for its operation under load. There is nothing in the written document about how not to use a pallet jack in terms of riding it as a scooter. There was also nothing in the document about how to move a pallet jack when it was not under load. Woodhead did not ever tell the plaintiff not to ride a pallet jack like a scooter. There was not any formal rule that workers were not to ride pallet jacks like scooters. There were no signs to that effect.

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[29] T 4-7/2.
[30] T 4-11/30.
[31] T 4-13/20.

[91] Woodhead's approach to supervision was that things needed to be done. If he needed to be stern with workers he would, but he did not adopt "a Hitler approach". He was happy to let workers do their thing as long as the job was done. He did not micro-manage people. He did not accept the workplace was more relaxed on weekends. The workplace was still busy. Things needed to be done in a shorter timeframe. However, the volume of trucks were smaller and there were fewer people around.

[92] Woodhead accepted that in evidence at the Industrial Commission he said he had from time to time seen employees at the defendant's depot riding a pallet jack like a scooter. On those occasions, he would stop the worker and give them a verbal warning not to do it, just to push or pull the pallet jack along. Woodhead could not now recall whether they were Blenners' employees. He had seen it in the industry. He had never seen it when he was a manager. He denied ever seeing the plaintiff riding a pallet jack as a scooter. He also denied such a practice was a relatively common event at the defendant's depot around the time of the incident.

[93] Woodhead accepted that workers would joke around and banter from time to time at the Darra depot. He denied ever seeing workers turn off the gas on the gas forklift or lift workers on the tynes of forklifts. Workers used safety cages if they were lifted by a forklift. He denied there were occasions when forklift drivers would lift a worker a bit higher as a joke in order to scare them. He denied it was common for forklift drivers to lift a worker with their pallet jack into a truck. He denied that forklift drivers would do doughnuts on the wet floor of the chiller room or would throw a pallet jack off the tynes off the forklift so that it would slide across the floor. Woodhead also denied the supervisors had a fairly relaxed attitude to jokes and horseplay.

Quantum

Pleadings

[94] The plaintiff claims that as a consequence of the incident he sustained compression fractures of his C7, T1, T2, T3 and T4 vertebrae, together with post-traumatic headaches and a psychiatric injury. He has suffered and continues to suffer pain and loss of enjoyment of the amenities of life together with a loss of income and a diminution in his capacity to earn income in the future. He has also required medical, therapeutic and ancillary treatment and will require it into the future. As a consequence of his injuries, he is commercially unemployable and will be for his working life.

[95] The defendant admits the plaintiff suffered compression fractures to the specified vertebrae, as a consequence of which the plaintiff endured pain and suffering and limitations on his amenities of life for a period of approximately six months. However, the plaintiff's physical injuries healed without significant ongoing pain and disability. The defendant asserts the plaintiff's ongoing complaints of pain and disability are exaggerated and the plaintiff has the capacity to undertake employment, and has had since approximately six months after the incident.

Plaintiff's evidence

[96] The plaintiff said in the few seconds after the fall there was black in his eyes and he could not breathe. The plaintiff thought he was dying. Starling told him he had to move from the camera because he did not want to lose his job. The plaintiff thinks Starling and someone else helped lift him up. They took him into the smoking area. They asked the plaintiff if he wanted an ambulance. The plaintiff said "call him because I can't breathe here".[32] An ambulance was called and the plaintiff was taken to hospital.

[97] The plaintiff thought he remained in hospital for three or four days. His time in hospital was terrible. It was painful, he was vomiting a lot and he had problems with sleeping. He had pain in the middle of his back and in his neck. When the plaintiff first came home he could not do anything at home. Neighbours had to help him with housework and looking after himself. Initially, he required a wheelchair to move around because he was in really severe pain. After a few months he was able to stand with the assistance of a walking stick.

[98] The plaintiff obtained assistance from Blue Care with domestic cleaning and socialising. He used a chair in the shower. The plaintiff used a motorised scooter whilst shopping at the local supermarket until the end of 2015. It was too painful to walk too far. He also received rehabilitation services at hospital. The plaintiff was sent to see a pain specialist, Dr Atkinson, maybe four times. Dr Atkinson told him he was not suitable because the treatment would be too painful for him. Dr Atkinson said the plaintiff had "some mental problems" and sent him back to the hospital.[33]

[99] The plaintiff accepted he gave Dr Coyne a history of not having driven since the incident. The reference to not driving was driving a truck. Dr Coyne did not ask him about driving a car. The plaintiff drove himself to and from the appointment with Dr Coyne. The plaintiff accepted that whilst attending on Dr Coyne and other medical examinations he walked using a walking stick. He agreed he walked slowly and stiffly but said he saw Dr Coyne in the morning, when his pain was worse. Video footage of him moving around a shopping centre was taken on the afternoon of 4 February 2017.

[100] The plaintiff accepted the video showed him lifting bags into the boot without any obvious difficulty. The items were all light. The plaintiff always takes his medication before going to the shops. That makes him feel better and reduces his pain. That is especially so in the afternoon when it is getting warmer. He feels a bit better than in the morning.[34] The plaintiff travels to the shops even if he has pain because he is trying to get his life back. His doctors have told him to socialise with people and to walk as often as possible. He lives by himself. He does not have a choice. Otherwise, he would be locked in his room. He goes to the shopping centre to be like everybody else.[35]

[101] The plaintiff denied telling Dr Garg he had a new girlfriend who was going to marry him but since he had injured his back she had not come back from an overseas trip. He

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[32] T 1-31/10.
[33] T 1-43/40.
[34] T 1-95/40.
[35] T 1-96/20.

agreed that at the time of this consultation his wife had not returned from overseas. His wife had returned on 17 September 2017. She was still at his house.

[102] The plaintiff denied he no longer needed medication or assistance around the house from about September 2014. He denied he used a walking stick in order to obtain financial gain. The plaintiff accepted video footage of him walking around a shopping complex revealed he was able to sit for a period of time at a coffee shop, undertake his own grocery shopping and place the groceries in his motor vehicle before driving home. He denied video footage of a man mowing his footpath was the plaintiff. It was his next-door neighbour Phil, who mowed the lawn for him for some months.

[103] The plaintiff denied he did not need to use a walking stick. He uses a stick most of the time primarily to feel secure. It also supported his body weight when walking so as to ensure he did not collapse. He was scared to walk too far without a stick. He felt more secure with the stick, especially in places like supermarkets where he had a fear of people bumping into him. If he is bumped by somebody it causes very severe pain. He needs the stick to help him stand up, especially when he first wakes in the morning. He also uses a stick if he is walking a distance as he feels much better and experiences less pain.[36]

[104] The plaintiff accepted he told Dr Todman that prior to the incident he had been in good health with no past history of any spinal injuries, headaches or related symptoms. The plaintiff accepted a review of his medical records revealed he had prior problems with panic attacks, including having attended the Ipswich Hospital in 2010. Further, over a month before the incident he had attended his general practitioner complaining of anxiety symptoms and shortness of breath. He also had reported difficulties with neck pain prior to the incident and of having experienced headaches. The plaintiff denied he did not tell Dr Todman about that history because he wanted to inflate his claim. He did not have headaches like he now had, being headaches every single day and throwing up.[37]

[105] The plaintiff said from time to time prior to the incident, when he was working long hours and not drinking water, he would suffer headaches. They were not like the headaches he experienced after the incident. Further, whilst he had stress, anxiety, panic attacks, back pain and headaches prior to the incident, that did not mean he was not in good health. Those conditions never stopped him from doing his job or having a normal life. He went to the doctor about headaches prior to the incident because he was worried he may have some tumour or cancer. He went to make himself feel better.

[106] The plaintiff said his back was better now than it was in 2014 but he still had problems. He had a burning pain in the middle of his back, especially in the morning when he woke up. He also had pain in his back when he turned around. The pain was present most of the time. He experienced a lot of headaches, especially on the right side. His pain varied during the day. It also varied with medication. Certain activities made his pain worse. When he sneezed or coughed he felt a pain like someone was stabbing him with a knife. He could not then breathe deeply and had to take short breaths.

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[36] T 2-34/25.
[37] T 2-47/45.

[107] Certain activities around the house caused his pain to worsen. He found driving uncomfortable after 10 minutes. The plaintiff had to be careful when bending down or pulling items. He could not lift anything too heavy. Twisting aggravated his back. The plaintiff was able to prepare food, clean plates, wash his clothes and hang out the washing. He was unable to undertake gardening work. The plaintiff continues to receive assistance from Blue Care, once per fortnight. They attend for one and a half hours doing mopping, vacuuming and cleaning the bathrooms. The plaintiff was not able to bend in the bathroom and was worried he would slip on the floor. He had previously collapsed in the kitchen in 2014 and required four stitches to his fingers.

[108] The plaintiff has not been able to mow his lawn since the incident. The plaintiff paid for mowing and whipper snipper services. He produced a number of invoices from Ned and John Lawn and Pool Services. The plaintiff prepared those invoices. He asked Ned for proof of payment. Ned told the plaintiff he could write up anything he needed for his records. The plaintiff created the invoices and signed his signature on each invoice. The plaintiff now receives mowing services from Derrick Stuart, for free.

[109] The plaintiff said prior to the incident he played the drums and sang at various church events. He has not been able to play the drums since the incident. He cannot keep the beat. He cannot sit for lengthy periods of time. Whilst he continues to attend church, he does not go often. He previously would help a lot with his tipper truck. He goes to church when people are not there. He does not feel comfortable and is a little bit sensitive about his problems. He is also no longer able to go to the gym.

[110] Since the incident, the plaintiff cries a lot and is sad and upset. Prior to the incident he would smile and was friendly. Small things now upset him. He raises his voice. He sometimes cannot control himself. As a consequence, the plaintiff had been referred for treatment for psychological symptoms. The plaintiff joined a Men's Shed to help his mental health. He had recently attended hospital due to his psychological condition. He felt like he had been bullied at the mediation. He had been told things he had not done. He was very sensitive and could not take it. He was taking a lot of medication.

[111] The plaintiff has undertaken six or seven sessions with a psychologist. He has been prescribed medication for his psychological symptoms. The plaintiff also takes medication for back and neck pain. He takes the medication in the morning when he wakes up. He takes more medication if he is going somewhere or doing something. When he comes home he may take further medication. If he is at home or not doing anything he tries not to take the medication.

[112] The plaintiff married a Serbian girl in 2010. They had met in Serbia in 2007. She moved to Australia. He supported her while she studied at Southbank. His wife returned to Serbia for a holiday at the end of 2013. After the incident, she decided to remain in Serbia. The plaintiff said his wife had come back to Australia at the end of September 2017. Her visa had expired on the same day she arrived in Australia. She is presently staying with the plaintiff but the relationship is not like before. The plaintiff thinks she may have a relationship in Serbia.

[113] The plaintiff was unable to drive for a period after the incident. It was less than a year. He was now able to drive a car, with difficulty. He could not drive a truck. His ongoing problems with his spine mean he would not be able to drive a truck. The plaintiff tried to keep his trucking business going after the incident, however, one of the drivers had an accident in his truck in October 2014. It took months to have the truck fixed by the insurance company. During that time, if he was offered jobs he would give them to other people with their own trucks. As he was having many problems with this arrangement, he decided to sell his truck. He sold it for $60,000. He received just over $30,000 after the bank was repaid its finance. He has not operated his business since selling his truck.

[114] The plaintiff said he would not now be able to work as a labourer. He was unable to lift due to his injuries. He had been to Centrelink to look for other work. So far they had not been able to obtain any suitable work.

[115] In cross-examination, the plaintiff accepted that in the financial year 30 June 2015 his trucking business had an income of $77,656. He had not driven the truck at any stage in that financial year. He had employed subcontractors who used their own trucks to complete contracts for his business. The plaintiff also employed drivers to drive his truck. The plaintiff accepted that once he sold his truck he could no longer operate his trucking business. If he wished to continue to do so he would have to purchase another truck.

[116] The plaintiff accepted he created the receipts for Ned's lawn mowing services. He had written all of the details on those documents, including the name Ned and placing his own signature. He denied he had signed beside the word Ned to make the document look like a legitimate document. He created the invoices after WorkCover requested receipts for the claimed services in response to the plaintiff's request for reimbursement from WorkCover for those expenses. The plaintiff wrote out the receipts with the intent of getting WorkCover to pay those expenses. He denied the claimed expenses were untrue.

Medical evidence

[117] Dr Kar, consultant psychiatrist, assessed the plaintiff on 10 October 2014. The plaintiff came to the interview with a walking stick. The plaintiff complained of an ongoing inability to undertake employment and many day-to-day activities. He gave a history of an onset of psychiatric problems in the context of a lot of stress from his loss of employment and the consequent pressure on his financial obligations. His relationship with his wife had also become strained with the wife unwilling to return to Australia. He expressed concern the defendant was unsupportive which increased his stress.

[118] The plaintiff gave a history of ongoing pain which required medication. He was also taking antidepressants and strong medication for headaches. The plaintiff said he had a past history of panic attacks which had worsened since the incident. He was now irritable and angry with little social contact. His pain was worsened by various types of physical activity, although he had experienced some physical improvement in more recent times.

[119] Dr Kar opined that whilst the plaintiff complained of ongoing physical incapacities as well as anxiety and depression, from a psychiatric perspective, the plaintiff had no incapacity for work. The plaintiff had opioid dependence. His pain was subjectively exaggerated and his motivation reduced by the side effects of the opioids. He also had pre-existing vulnerabilities and anxiety. It was likely his anxiety and depressive symptoms would resolve when those substances were ceased. His abnormal illness behaviour with exaggerated pain and low motivation to work was secondary to the side effect of the opioids which could cause insomnia and headaches. Dr Kar did not consider the plaintiff had a current adjustment disorder.

[120] Dr Kar re-assessed the plaintiff on 1 June 2017. The plaintiff remained on a very high dose of opioid medication, leading to the development of tolerance and dependence. He was also on two different antidepressants. In Dr Kar's opinion, there was no clinical benefit in the treatment of his claimed psychiatric problems. Neither the opioids nor the antidepressants had demonstrated any improvement of function or relief of pain.

[121] In Dr Kar's opinion, the plaintiff's severe chronic opioid dependence overshadowed his clinical picture. It was likely his behavioural changes and distress are as a consequence of the opioid dependence, not from any psychiatric condition. Opioids cause secondary anxiety and depression symptoms. They also cause sexual dysfunction and sleep disturbance, problems reported by the plaintiff and claimed as party of his injury. These symptoms would resolve after cessation of opioids.

[122] Dr Kar maintained that opinion in evidence. Dr Kar did not accept that the plaintiff's psychiatric symptoms were as a consequence of the incident. The plaintiff's ongoing complaints of pain and incapacity as well as low mood would not improve until rectification of his opioid dependence. In Dr Kar's opinion, the plaintiff's motivation was playing a major role in the continuation to claim psychiatric injury and disability. His opioid dependence completely overshadowed his clinical picture and posed a risk to his health and life. The plaintiff required treatment for severe chronic opioid dependence and cessation of opioids, benzodiazepines and Duromine (phentermine).

[123] Dr Kar accepted that video footage of a person walking and moving in a shopping centre is not adequate evidence to make a decision on the existence of a psychiatric condition.[38] However, the video footage of the plaintiff revealed no obvious signs of pain or instability or of any incapacity to undertake household tasks.

[124] Dr Wong, Psychiatrist, has treated the plaintiff since 25 August 2014. In his opinion, the plaintiff suffers from a chronic adjustment disorder with anxious and depressed mood. This medical condition was secondary to the pain and physical consequence of the injuries sustained in the incident. The plaintiff's symptoms of depression and constant negativity had existed throughout his treatment of the plaintiff. Those symptoms were consistent with the clinical diagnosis of adjustment disorder with anxiety and depressed mood. Notwithstanding ongoing treatment, there had been very little change. There was probably little prospect of significant improvement in the future.

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[38] T 3-54/25.

[125] Dr Wong accepted that chronic pain is a complex issue with multiple factors which can be complicated by issues such as loss of work, relationships and social interactions. However, the plaintiff's presentation had been consistent over the period of his treatment. Dr Wong accepted the plaintiff displayed some abnormal illness behaviour, but considered his negativity was part of his personality. Dr Wong did not consider the plaintiff had psychotic symptoms, although he did present with symptoms of being mistrustful. The plaintiff's use of a walking stick was consistent with his observations at appointments. He considered the plaintiff's use of a walking stick was for security.

[126] Dr Wong did not accept Dr Kar's opinion that the plaintiff's depressive symptoms were caused by his opioid medication. The plaintiff had been on a similar dosage for a significant period of time without any substantial escalation or opioid seeking behaviour. Whilst the plaintiff would have a level of opioid dependence, it was consistent with his prescribed dosage. Further, whilst opioid medication can have some depressive side effects, there are many people with chronic pain on opioid medications with no depressive symptoms.

[127] Dr Wong maintained that opinion in evidence. Whilst he acknowledged that as the plaintiff's treating psychiatrist he was there to assist the plaintiff's recovery, his opinion was based on his clinical judgment. That judgment took into account pre-existing psychiatric symptoms such as anxiety, stress and panic attacks. A degree of vulnerability is normal and quite common in his practice. An anxiety disorder is extremely common in older persons in society. Not everybody reaches out for help.

[128] Dr Wong did not accept that someone taking the plaintiff's level of opioid medication would mimic many of the symptoms ascribed to an adjustment disorder or major depression. The plaintiff did not have withdrawal symptoms and there was no evidence of an abuse of the drugs. Dr Wong did not accept the opioid medication explained the plaintiff's depression.

[129] In Dr Wong's opinion, the plaintiff continued to present clinically as someone who has chronic pain, an anxiety disorder and a depressive disorder. He did not think his major depression or adjustment disorder had ever reached a degree of remission. His chronic condition was in partial remission, at the very best. Such a condition cognitively impaired concentration and information processing, rendering the plaintiff unsafe to go back to driving trucks. That was different to driving short distances in a motor vehicle.

[130] Dr Richard Williams examined the plaintiff on 10 August 2015. He diagnosed the plaintiff as suffering wedge compression fractures of C7, T1, T2, T3 and T4 which had healed. The prognosis generally for resolution of symptoms would be over a period not exceeding six months in the majority of similar cases. Dr Williams noted that due to an excess of pain related behaviour associated with his examination, a range of motion model was not able to be employed in the assessment of the plaintiff's impairment. The whole person impairment applicable to the incident was 10 percent.

[131] In Dr Williams' opinion, the plaintiff's condition was unlikely to be improved by future physical measures or operative intervention. There was considerable influence of psychiatric disorder on the plaintiff's current perception of pain. These psychosocial

influences were major determinants in the plaintiff's current capacity in terms of employment and in activities of daily living. The plaintiff's inability to resume employment appeared mainly due to psychiatric conditions. The physical injuries had united uneventfully and would not constitute an impediment to the resumption of employment in isolation.

[132] Dr Williams provided a diary note following consideration of the surveillance material on 15 November 2017. Dr Williams opined that based on that surveillance footage the plaintiff was minimally reliant on his walking stick, suggestive of the walking stick being an affectation. Further, there was no obvious incapacity shown. The plaintiff was fully capable of unloading groceries into his car. There was considerable evidence of a psychiatric disorder.

[133] In evidence, Dr Williams accepted that a trauma sufficient to cause fractures to five vertebrae could also have associated trauma to the surrounding muscles, ligaments and supporting structures of the spine. After a period of perhaps three to six months you would not expect to see specific evidence of such soft tissue injury on MRI examination. Further, as the fractures heal the associated soft tissue injury would also dissipate over time. Dr Williams accepted there were, however, cases where symptoms will persist notwithstanding healing of the physical injury. In such cases people can have ongoing pain and disability.

[134] The plaintiff's reporting of significant pain involved distribution of pain which was wide-spread and not necessarily concordant with the specific injuries. Dr Williams accepted that the plaintiff's condition, when he examined the plaintiff, was stable and stationary. In his opinion, any persistent symptoms were heavily reliant or heavily influenced by psychosocial factors, including a psychiatric condition. It was unlikely the spinal condition alone was the cause of the plaintiff's persistent disability. In the plaintiff's setting, the symptoms may be considered related to a chronic pain syndrome.

[135] Dr Todman, Neurologist, examined the plaintiff in November 2015. The plaintiff gave a past history of no prior spinal injuries, headaches or related symptoms but of continued ongoing symptoms of pain in the cervicial and thoracic spine as well as headaches and secondary depression since the incident. The plaintiff had not been able to return to any paid employment, was separated from his wife and was living alone. He had difficulty with all household chores that involved bending, lifting and cleaning.

[136] Dr Todman recommended a continuing programme of rehabilitation as well as assessment by a pain management specialist and ongoing treatment by a psychiatrist. He assessed the plaintiff's cervical spine injury and thoracic spine fractures as each constituting an 8 percent whole person impairment. The frequent post-traumatic headaches represented an additional 3 percent whole person impairment. The symptoms would continue to affect the plaintiff in his day-to-day activities. He was currently unable to work in any capacity and would require ongoing assistance with household duties.

[137] Dr Todman reassessed the plaintiff in September 2017. The plaintiff reported ongoing symptoms of pain, frequent headaches and secondary depression. There was daily neck

pain at generally a high level and daily headaches. The plaintiff continued to need help with daily activities. He had been unable to return to any paid employment. Examination showed restricted cervical spine movement and reduced thoracic spine forward flexion. Strength, reflexes and sensation were normal in all limbs.

[138] In Dr Todman's opinion, the plaintiff's ongoing symptoms are directly related to the incident. Whilst his treatment to date had been appropriate, responses had only been marginal. It was likely his symptoms would be ongoing at this level. Dr. Todman had not observed any signs of malingering or abnormal illness behaviour. The impairment ratings remained as per his original report. Having regard to his chronic pain and the use of medication and his secondary depression it was unlikely the plaintiff would return to any employment in the workplace for the foreseeable future. He would also require assistance for a range of domestic tasks.

[139] Dr Todman elaborated on that opinion in a diary note. The compression fractures sustained by the plaintiff were consistent with causing the pain and symptoms reported by the plaintiff. Spinal injuries are often associated with muscle, ligament and supporting structure injuries which may not be evidenced radiologically but which can be the source of ongoing pain. The plaintiff was continuing to complain of pain and required ongoing pain medication with no other causes for the pain, suggesting any ongoing pain was subsequent to his injuries. Whilst many people recover from these types of fractures, a proportion of patients continue to experience ongoing pain. Dr Todman considered the plaintiff had a chronic pain syndrome secondary to his injury but the physical injury was the predominant cause.

[140] Dr Todman did not consider the use of a walking stick was an affectation. Whilst using a walking stick would not ease pain, it would provide psychological support and balance, in circumstances where pain medication can cause imbalance. The video evidence of the plaintiff walking normally and undertaking shopping was not inconsistent with the plaintiff's reported symptoms and presentation. Variation is common from day to day with medication.[39] The plaintiff was able to walk normally into Dr Todman's rooms. He did not use a walking stick. Dr Todman would expect the same presentation in a shopping centre. It was also not inconsistent that the plaintiff was able to drive a motor vehicle over short distances but would report an increase in pain after a drive.

[141] Dr Todman maintained those opinions in evidence. He accepted that his assessment of the plaintiff's restrictions in cervical and thoracic spine movement were approximations. It was theoretically possible the plaintiff's pre-accident restrictions may have been similar. He also accepted the plaintiff's medical records revealed a past history of stress, anxiety, pain in the neck and ongoing headaches. That history was not inconsistent with the plaintiff's reports of having been in good health prior to the incident. The attendances in that history were over a period of 11 years. They covered a range of complaints. None of those complaints were serious or life threatening. More than 50 percent of the population experiences headaches. The relevant question is the magnitude of the symptoms and the impact they have on the person's life. There were no periods of time away from work or incapacity with domestic tasks.

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[39] T 2-4/15.

[142] Dr Coyne, Neurosurgeon, assessed the plaintiff on 15 April 2016. The plaintiff gave a history of ongoing pain in his lower cervical and upper thoracic spine which was constant and aggravated by coughing, sneezing and taking a deep breath. He also experienced on a daily basis right-sided headaches associated with nausea, vomiting and dizziness. The plaintiff used a walking stick to mobilise but did not have any lower limb pain, weakness or sensory disturbance. The plaintiff denied any prior history of spinal pain or injury.

[143] Dr Coyne's examination revealed the plaintiff presented with a flat affect, mobilised with an antalgic gait using a walking stick and performed all movements slowly and stiffly accompanied by complaints of pain, sighing and groaning. No cervical spine extension was present and other cervical spine movements were restricted to 25 percent of normal range. Thoracic spine movements were restricted to 50 percent of normal range.

[144] In Dr Coyne's opinion, the plaintiff sustained mild vertebral body compression fractures in the incident. Those fractures could conceivably result in some degree of persisting pain but the fractures themselves would have healed over several months. Subsequent spinal imaging did not demonstrate any progressive loss of vertebral body height or loss of spinal alignment. Accordingly, the plaintiff's level of pain reporting and disability is uncommonly high considering the nature of the injuries. It was difficult to offer an explanation for this level of pain disability, except that his original injury appeared to have evolved into a chronic pain syndrome with considerable abnormal pain behaviour.

[145] In Dr Coyne's opinion, there was no specific further therapy to offer in the circumstances. It was likely his prognosis for future employment was poor. It was difficult to imagine him returning to any form of meaningful employment. However, that ongoing incapacity primarily related to non-organic factors and his development of a severe persisting pain syndrome with abnormal illness behaviour rather than the effects of his physical injuries. Whilst it was reasonable to expect some degree of residual pain and restriction in the capacity to participate in employment and other activities of a particularly heavy physical nature or which cause considerable jarring to the spine, it would have been generally expected that the plaintiff's physical injuries, once healed, would not have resulted in an incapacity for physical activity.

[146] Dr Coyne assessed the plaintiff's whole person impairment at 12 percent as a result of the mild cervical and thoracic spine compression fractures sustained in the incident. Dr Coyne did not alter that assessment when he undertook a further assessment in October 2017. A permanent impairment assessment is based on an objective criteria and that impairment does not necessarily equate to disability. As pain was subjective, Dr Coyne was not able to opine whether the plaintiff did not have any ongoing pain.

[147] In evidence, Dr Coyne accepted that the spinal fractures sustained by the plaintiff could be associated with trauma to surrounding muscles, ligaments and supporting structures. However, even allowing for soft tissues injuries, the injury would be expected to have healed within months. The level of ongoing pain and disability reported by the plaintiff was inconsistent with what would be expected from a well healed injury. The plaintiff

now has a severe chronic pain syndrome. His lack of improvement is likely due to psychosocial factors, rather than the physical injury.[40]

[148] Dr Coyne considered the video evidence of the plaintiff walking and shopping was inconsistent with aspects of the plaintiff's presentation in his rooms. On examination, the plaintiff had demonstrated an inability to move his lumbar spine at all. On the video, the plaintiff was bending his lumbar spine. Whilst the video surveillance was some 10 months later, Dr Coyne did not accept the symptoms would vary so significantly day to day. It would be unusual for a patient to go from having no movement of the lumbar spine to being able to bend to 50 percent of normal range of movement. That variation was beyond a normal variation just purely on the basis of a physical injury.[41] Such a marked difference is a feature of abnormal pain behaviour.

[149] Dr Coyne accepted, however, that nothing in the surveillance video showed the plaintiff doing anything particularly strenuous or altered his view on the plaintiff's employability. In the overall context, it was difficult to imagine the plaintiff returning to a form of meaningful employment.

[150] Dr Garg, Psychiatrist, assessed the plaintiff on 5 September 2016. The plaintiff gave a report of being in good health prior to the incident but experiencing ongoing pain and restriction of movement since the injury. The plaintiff said his life had completely changed; he was in constant pain; he felt depressed; he no longer smiled; and he was easily irritated, often getting into a rage. The plaintiff felt paranoid and thought people were laughing at him because of his physical disability. He worried about his safety and believed everyone left him alone since he had become disabled. He reported episodic panic attacks, a loss of appetite and depressive symptoms.

[151] In Dr Garg's opinion, the plaintiff had developed severe depression and anxiety due to his disabilities. He required ongoing medication. His symptoms of severe anxiety and depression were more probably than not attributable to the incident. Dr Garg considered the plaintiff would benefit from ongoing treatment but as he has received treatment for almost two years with little improvement he had a poor prognosis for his depressive symptoms. It was likely the depressive symptoms had perpetuated due to his physical disability and social isolation. It was likely he would develop a permanent psychiatric disability if his physical disability did not improve. The plaintiff was unable to be employed in the short term due to his psychological conditions.

[152] Dr Garg reassessed the plaintiff on 2 November 2017. The plaintiff reported ongoing symptoms of pain and headaches, feelings of hopelessness and frustration and needing pain medication to undertake outside activities. He felt he was being treated like a criminal or a terrorist even though he was trying to do everything he could to get better. The plaintiff reported feeling anxious and depressed most of the time and most days, difficulty falling asleep, a lack of appetite and limited energy. He also found it difficult to concentrate and reported a loss of trust in others.

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[40] T 4-27/22.
[41] T 4-28/1.

[153] Dr Garg opined that the plaintiff suffered from a major depressive episode, although he did not appear as unwell as at his initial examination. In Dr Garg's opinion, the symptoms were in partial remission. The plaintiff's ongoing psychiatric symptoms could not be explained by the psychological effects of a substance or medical condition. They could be explained by a psychological trauma caused by a sudden loss of job, relationship and physical abilities. It was also possible the plaintiff had some personality vulnerabilities that were exacerbated while he was depressed, causing the presentation of psychotic features like paranoia.

[154] Dr Garg did not believe the plaintiff's opioid use fulfilled the diagnostic criteria of opioid dependence. He was taking that medication in accordance with his prescriptions. His attempts to not use painkillers, despite pain, were supported by the number of prescriptions that had been filled in the past. If anything, the pain medication enabled the plaintiff to perform his social and recreational activities rather than interfering with them. Accordingly, Dr Garg did not agree with Dr Kar's opinion that the plaintiff did not have a psychiatric disorder.

[155] Dr Garg did agree with Dr Kar that there was a possibility of an exaggeration of psychiatric symptoms given possible financial gain but considered it unlikely the plaintiff was faking his psychiatric symptoms. The consistency of his complaints over the previous three years, the collateral history obtained by his treating psychiatrist and the psychologist, his assessment by mental health clinicians and other medical practitioners, the lack of unusual atypical or bizarre symptoms in his previous psychiatric examinations and the consistency of his mental state examination as well as his reported attempts to try to normalise his life, rendered it unlikely. Further, a patient who is malingering would be unlikely to report an improvement in symptoms.

[156] In Dr Garg's opinion, the plaintiff's psychiatric injury was currently unstable due to ongoing stress. However, his current functioning was likely to change once the medical problems and compensation claim had been settled. He assessed his whole person impairment for psychiatric injuries at 6 percent.

[157] Dr Garg maintained those opinions in evidence. Dr Garg did not consider that the plaintiff's presentation in the course of the video surveillance was inconsistent with his reported symptoms and presentations at previous examinations. Dr Garg accepted the plaintiff had no psychiatric or psychological reason for using a walking stick. It could be to present himself as an invalid. However, if the plaintiff felt more secure with a walking stick the use of that stick would not be an affect. That was his understanding of why the plaintiff used a walking stick.[42] Dr Garg was unable to comment on whether his presentation in the surveillance video was inconsistent with his reported complaints of pain. That would depend on the level of pain.

[158] Dr Garg did not accept that the opioids the plaintiff was taking could mimic depressive symptoms. Whilst people intoxicated with opioids may have some similarities with a depressive syndrome, depression is a different disorder. Some of the symptoms which occur in depression are not seen in opioid dependence or intoxication. Dr Garg also opined that having opioid dependency did not rule out a person having depression.

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[42] T 2-71/20.

Other evidence

[159] Stuart gave evidence that he kept in touch with the plaintiff after the incident. Stuart felt sorry for the plaintiff. After Stuart started his own lawn mowing business, Stuart offered to mow the plaintiff's lawn. He started mowing the plaintiff's lawn in August 2017. He has mown it three or four times. He does not charge the plaintiff. He also helped the plaintiff by washing his car and house and cleaning out the garden shed.

[160] Stuart said there was a difference between the plaintiff now and before the incident. The plaintiff used to be more energetic. He used to be so positive. Now he is "crippled", gets migraines and has completely changed from the person he knew. Whenever he saw the plaintiff, the plaintiff had his walking stick with him. He had never seen the plaintiff use a wheelchair.

[161] Phillip Peters, the plaintiff's neighbour between January 2015 and December 2016, regularly mowed the plaintiff's lawn for him. Peters helped the plaintiff in other ways such as giving him a hand moving furniture and with other household tasks. It was hard for the plaintiff to do things with his injury. His two sons also would mow the lawn occasionally. It was a means by which his sons could earn a bit of pocket money. Peters liked to have a nice lawn next door to his house. The plaintiff paid $50 each time the lawn was mown for him. Peters did not provide invoices. During that period Peters observed the plaintiff using a cane or walking stick. The plaintiff also drove a car quite regularly.

Findings

Generally

[162] Whilst I accept the plaintiff's evidence as to the circumstances of the incident and, in particular, his evidence that he was not skylarking with Starling at the time of the incident, I did not find the plaintiff a reliable witness. He was prone to exaggeration, both in relation to the extent of skylarking in the workplace in general and as to the ongoing effects of his injuries.

[163] I am satisfied the plaintiff was prepared to tailor his evidence in an effort to enhance its acceptance. A clear example of such conduct was his creation of false invoices to support the provision of mowing services. Whilst he acknowledged he was the author of those invoices in evidence in chief, it is the circumstances in which those invoices were created and provided to the defendant which is of most concern. They were created in response to a request for proof of the provision of those services. That request occurred in the context of the plaintiff's solicitors demanding payment of those services.

[164] Against that background, the provision of manufactured invoices which, on their face, appeared to be legitimate, with the inclusion of a signature beside the word "Ned", is reprehensible conduct. The only rational inference is that the plaintiff did not inform his own solicitors of the falsity of those invoices. That indicates the level to which the plaintiff was prepared to go to enhance acceptance of his claim.

[165] There were other instances of a willingness to tailor his evidence. The histories given to the various doctors significantly understated the plaintiff's past experience of panic attacks, neck pain and headaches, particularly in the 12 months prior to the incident. I am satisfied the plaintiff gave those histories, intending to convey to the doctors that there was no relevant history in circumstances where the plaintiff's major ongoing physical disability was of pain and headaches.

[166] It is also significant that the plaintiff did not call his wife as a witness. If, as the plaintiff swore in evidence, his wife has returned to Australia and is presently living with him, it is inexplicable that the plaintiff would not have called her to give evidence of the significant change in his physical capacities and demeanour since the incident. The failure to call that witness is not explained by their continued estrangement. That relationship is close enough to allow them to continue to reside in the same residence.

Liability

[167] Whilst there is no dispute as to the circumstances in which the plaintiff sustained spinal fractures when he fell from the pallet jack on 30 March 2014, there is substantial dispute as to the work practices adopted at the defendant's Darra depot and the defendant's knowledge of those practices.

[168] I do not accept much of the plaintiff's evidence as to the circumstances of his employment. I do not accept the plaintiff's evidence that he received no training and induction in that workplace. That evidence is inconsistent with the documentation signed by the plaintiff in March 2011. It is also inconsistent with the evidence of Woodhead and Kajewski, which I accept, as to the level of training and induction in the workplace both before and after the plaintiff's employment.

[169] I accept the plaintiff did receive training in accordance with the documentation signed on 11 March 2011. I accept that training occurred some weeks after the plaintiff commenced employment with the defendant. I also accept the plaintiff received a form of Code of Conduct at that time which specified there was to be no horseplay or skylarking in the workplace.

[170] I do not accept the plaintiff's evidence that the defendant condoned skylarking or horseplay at its depots. That evidence was inconsistent with the evidence of Woodhead, Kajewski and Hunt. I accept that each would have stopped such practices and spoken to the individual worker.

[171] Whilst the plaintiff and Stuart gave evidence that the riding of pallet jacks like a scooter was condoned as was the use of other machinery in acts of horseplay, I do not accept their evidence that these events were a regular occurrence at the defendant's Darra depot. Each of Woodhead, Kajewski and Hunt impressed me as individuals who took their duties as supervisors seriously. I accept their evidence that should such activities have occurred in their presence they would have taken steps to cease that practice and to speak to the individual worker.

[172] That does not, however, mean that pallet jacks were not ridden like scooters from time to time. I accept workers did on occasions ride the pallet jack like a scooter. Woodhead specifically accepted that he had given evidence in the Industrial Commission to the effect that he had observed such practices in the past at the Darra depot. Whilst he gave evidence that on those occasions he immediately took steps to speak to the individual worker, it is significant that he and the other supervisors all gave evidence that no general instruction was ever given that pallet jacks were not to be ridden in that manner.

[173] Having regard to all of the evidence, I am satisfied the practice of riding a pallet jack like a scooter was not something which was prohibited by the defendant. The plaintiff was never instructed not to do it. No worker was formally disciplined for doing it. There was no written instruction ever issued by the defendant to that effect nor was signage put in place. The lack of written instruction or signage is significant in the context of evidence of knowledge of such a practice at the depot by at least Woodhead, a person with supervisory responsibility in the workplace.

[174] As Woodhead was aware that this practice occurred from time to time, it was the defendant's duty to take steps generally to prohibit it. Merely instructing individual workers to stop was insufficient to ensure that the practice was not adopted by others. It was obviously a dangerous practice. The risk of injury from it was high.

[175] The failure of the defendant to instruct workers not to undertake that activity and to establish and enforce a system of work which did not permit such activity constitutes a breach of the duty of care owed by the defendant to the plaintiff pursuant to Chapter 5 Part 8 Division 1 of the *Workers Compensation and Rehabilitation Act* 2003. A reasonable person in the position of the defendant would have taken steps to instruct workers not to engage in that practice and to establish and enforce a system of work which prohibited that practice. The risk of injury in the event of workers being allowed to undertake that practice was high as was the likely seriousness of that injury. The burden of taking precautions to avoid the risk of injury was far from great.[43]

[176] That conclusion does not, however, mean that the plaintiff is entitled to succeed in his allegation that the defendant is directly liable for the incident and any injuries consequent upon that incident. In order to succeed the plaintiff needs to establish that the taking of such steps would have avoided the occurrence of the incident and his injuries. No evidence was led by the plaintiff that he would have complied with such an instruction. In those circumstances, the plaintiff fails in his claim for direct liability.

[177] A different conclusion, however, is reached when consideration is given to the defendant's vicarious liability for the acts of Starling in kicking the pallet jack. There is no doubt that act was the cause of the plaintiff's falling from the pallet jack. A consideration of the CCTV footage amply supports that conclusion. The plaintiff was not, for example, freewheeling on the pallet jack with his hands away from the handle, nor was he travelling at excessive speed.

[178] The doctrine of vicarious liability has as its foundation the proposition that employers choose to take on employees, knowing there will be consequences, including the

[43] Section 305B(2) of the Act.

assumption of the risk that in carrying out duties and functions relevantly connected to that employment, the employee will cause injury or damage to others.[44] An essential requirement for the establishment of vicarious liability is that the act be said to have been undertaken in the scope or course of the wrongdoer's employment. That requirement provides the objective rational basis for liability and its parameters.[45]

[179] Vicarious liability can apply to harm caused by an employee's unauthorised acts, including intentional wrongdoing. However, for vicarious liability to arise in such a circumstance, there must be a connection between the wrongdoer's wrongful act and the employment.[46] The difficulty which arises in the determination of whether an employer is vicariously liable for the actions of the wrongdoer is in the determination of whether the particular act can be said to be in the course or scope of that employment. That requires a consideration of the connection between the wrongful act and the employment and whether it would be fair and just to ascribe vicarious liability for that wrongful act.

[180] In the present case, it is significant that whilst kicking the tyne of the pallet jack could not be said to have been an act which was authorised by the defendant, the act occurred on the floor of the depot between fellow workers in the context of the pallet jack being transported from one section of the depot to another. The act of one fellow employee to push the pallet jack on which the plaintiff was travelling could properly be seen as an action to assist in the transportation of the pallet jack to its desired location.

[181] To that extent it can properly be viewed as an act undertaken in the course of Starling's employment. It was not an act completely devoid of any relationship to that employment. It could not be said to have been designed to deliberately harm the plaintiff or to unlawfully damage the defendant's equipment. It could also not be said to be unjust or unfair to hold the defendant responsible for Starling's actions.

[182] Having considered the context in which the incident occurred, the respective positions of the plaintiff and Starling, the workplace within which the incident occurred and its practices and procedures, I am satisfied Starling's act, whilst unauthorised, is properly to be viewed as having occurred within the scope and course of his employment with the defendant. The defendant is properly to be held vicariously liable for that act and any consequent injuries sustained by the plaintiff.

[183] There is no basis for a finding of contributory negligence. Whilst the plaintiff ought not to have ridden the pallet jack, he was not acting recklessly in complete disregard for his own safety. The ridding of a pallet jack in that way was a practice he had observed others use at the depot. He was never instructed not to do so. There was no written instruction or safety sign to that effect.

[184] Further, the plaintiff was travelling at a moderate speed. Nothing he did encouraged Starling's response. There was no reason for him to anticipate that response. Had

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44 *Blake v J R Perry Nominees Pty Ltd* (2012) VSCA 122 at [41]-[42].
45 *Prince Alfred College* (2016) HCA at [40]; (2016) 258 CLR 134.
46 *Blake* at [45].

Starling not taken that action the plaintiff would have safely completed the task of returning the pallet jack to his truck.

[185] Having regard to all of those circumstances, I am satisfied the plaintiff did not fail to exercise reasonable care for his own safety. The plaintiff was not responsible for his own injuries.

[186] I am also satisfied that the risk Starling would kick the pallet jack was foreseeable and not insignificant. A fellow employee may well, wrongly, see that action as helpful to push the plaintiff along his way.

[187] A reasonable person in the defendant's position would have taken precautions to prevent that risk. Those precautions were easily undertaken. They included specific instruction and direction and enforcement of those instructions and directions within the workplace.

Quantum

[188] The rejection of the plaintiff as a reliable witness extends to his evidence as to the consequence of his injuries, both in the past and presently. I am satisfied the plaintiff's evidence as to his level of ongoing disability and impact on his day to day activities was exaggerated. A clear example of that was the difference in his presentation, including reliance upon the walking stick, in the video surveillance of his attendance upon Dr Coyne's rooms and in his attendance in Court each day. The limitation on movement and reliance on the walking stick was in stark contrast to his movement in the surveillance video of his activities at the shopping centre. Those activities included shopping for items which were taken from shelves, the pushing of a trolley with relative ease and the removal of shopping bags from that trolley and their placement into the boot of his motor vehicle.

[189] I accept Dr Coyne's evidence that the variations exhibited in his movement of his lumbar spine are not explained by medication or the good day variation. As Dr Coyne observed:

> "It would be unusual to go from having no movement of the lumbar spine to being able to sort of bend to 50 percent of normal range of movement. That is sort of beyond what is a normal variation just purely on the basis of – of a physical injury."[47]

I accept such a marked difference is a feature of abnormal pain behaviour whilst being examined by the doctor. However, I accept the plaintiff continues to suffer from some ongoing pain as a consequence of the spinal fractures he sustained in the incident. I also accept that ongoing pain is of a magnitude which requires the taking of pain medication from time to time. I accept the use of a walking stick assists in balance. The use of pain medication would render the plaintiff susceptible to the risk of imbalance. It is not

[47] T 4-27/48 – 4-28/2.

unreasonable in those circumstances that the plaintiff would use a stick as support. To that extent, I do not accept the use of a walking stick was purely for affectation.

[190] Whilst I accept that the plaintiff has ongoing pain and disability, I do not accept that the physical consequences of that pain and disability is itself of a sufficient magnitude to render the plaintiff commercially unemployable. In that respect I accept the evidence of Dr Williams. However, as a consequence of his physical injuries, the plaintiff developed a significant psychiatric overlay. The development of that condition arises in the context of vulnerable personality traits which were clearly evident prior to the incident, having regard to the respondent's regular attendance on doctors in relation to conditions where he was concerned he had a more significant medical condition.

[191] I accept the evidence of Dr Garg that the plaintiff has, as a consequence of the injuries sustained in the incident, developed a major depressive disorder. That evidence is consistent with the observations of Dr Wong, who has been treating the plaintiff for a significant period of time. I do not accept Dr Kar's evidence that the plaintiff's ongoing symptoms are explained by opioid dependence or that a finding of relevant psychiatric illness is precluded whilst the plaintiff is medicated by opioids. Whilst the plaintiff is dependent on opioids, that dependence does not extend to abuse. Indeed, the plaintiff appears to limit his use of those opioids.

[192] As Dr Garg observed, the plaintiff has presented consistently to a number of psychiatrists over an extended period of time. The fact the plaintiff attended a shopping centre, enjoyed a coffee and completed his own shopping is consistent with a person who is endeavouring to continue with his life, albeit in the context of significant depression. The behaviours evidenced on the video surveillance were not inconsistent with the existence of a significant psychiatric overlay.

[193] The existence of this psychiatric condition significantly exacerbates the consequences of the plaintiff's ongoing physical disabilities. I accept that as a consequence the plaintiff is commercially unemployable, having regard to the time period that has elapsed since the incident and the consistency of his presentation psychiatrically.

[194] On that basis I assess the plaintiff's damages as follows.

Pain, suffering and loss of amenities

[195] Item 86 of the *Workers Compensation and Rehabilitation Regulation 2014* Schedule gives as ISV range of 5 to 15 for a moderate cervical spine injury – fracture. A similar ISV range applies for a moderate thoracic injury – fracture (Item 91). In addition to the fractures, the plaintiff has the psychiatric overlay. Item 12 of the Schedule provides that a moderate mental disorder has an ISV range to 2 to 10.

[196] Section 3 of Schedule 8 of the Regulations provides that in the assessment of the ISV for multiple injuries, a court must consider the range of ISV's for the dominant injury. Section 4 allows the court to assess the ISV for multiple injuries at a higher rate than the maximum dominant ISV if the court considers the level of adverse impact is so severe that the maximum dominant ISV is inadequate to reflect the level of impact.

[197] I am satisfied the plaintiff's dominant injury is either the cervical spine injury or the thoracic spine injury. Each has a maximum ISV of 15. I am satisfied that ISV is inadequate to reflect the level of impact on the plaintiff, having regard to his multiple injuries. I accept the plaintiff's submission that an uplift of at least 25 per cent is appropriate. I assess the plaintiff's damages as an ISV of 19, which translates to $32,010.

Special damages

[198] The parties agreed special damages at $23,614 if I accepted the plaintiff has ongoing disability as a consequence of his injuries. As I do accept the plaintiff has such ongoing disability, I assess the plaintiff's special damages at $23,614.

Interest on past special damages

[199] After excluding the amounts paid by WorkCover and Medicare, the plaintiff's out of pocket expenses total $6,459.61. Interest thereon, as calculated pursuant to s 306N of the Act, is $330.70.

Past economic loss

[200] The plaintiff pleaded at paragraph 8(c)(i)(C) of the amended statement of claim that at the time of the incident he was earning a combined income of approximately $1,400 net per week. The defendant's defence did not address that allegation. As a consequence, the allegation is taken to be admitted. Further, the financial material placed before the Court supports the assertion that the plaintiff was at the time of the incident earning a combined income of approximately $1,400 net per week.

[201] In those circumstances, there is no reason why past economic loss ought not to be assessed on the basis of a loss of $1,400 net per week from the date of the incident to the date of judgment, less income earned in that period. Calculated to 1 December 2017, that is a loss of $1,400 per week for 191 weeks. This totals $267,400. After deducting the income earned, $34,965, the plaintiff's past economic loss is $232,435.

Interest on past economic loss

[202] After the WorkCover net weekly benefits of $57,809.71 are excluded, interest should be awarded on $174,626, being $9,021.

Past loss of superannuation

[203] Past loss of superannuation was agreed at 9.5 per cent on his employment income. Past loss of superannuation is $9,408.

Future economic loss

[204] The plaintiff had a good work history prior to this incident. That history included working two jobs or operating his own business whilst also being employed by the defendant. That good work history must, however, be tempered by a consideration of events in the years shortly prior to the incident. In August 2012, the plaintiff returned to work with the defendant on weekends to supplement his income from his trucking business. During that time, the defendant used drivers. On occasions, he had subcontractors undertake contracts on his behalf. This resulted in significantly increased expenses to his business.

[205] For the latter part of that period the plaintiff regularly attended upon medical practitioners, complaining of stress and anxiety and associated headaches. A review of those medical records suggests those conditions were occurring with increasing frequency in the lead up to the incident. There is no reason to believe that trend would not have continued in the future.

[206] In the 2013 financial year, the plaintiff's business income was $33,525. That was as a consequence of significant expenses associated with the use of subcontractors and paid drivers. In the 2014 financial year, the business income increased significantly to $70,856. That increase was as a consequence of the halving of the business' expenses. The gross income was in fact slightly less than in 2013.

[207] Having regard to those differences, I do not accept the plaintiff's assertion that the business income in the 2014 year properly reflects the plaintiff's ongoing loss. A consideration of the way in which the plaintiff has operated his business in 2012, 2013 and 2014 suggests the business expenses were likely to be higher than indicated in 2014.

[208] The plaintiff's future loss of income must also be discounted to allow for the fact that the increasing severity of the plaintiff's panic and anxiety associated with stress and his headaches may have led the plaintiff to be unable to continue in his trucking business to age 67. The plaintiff also had an unrelated cavernoma on his brain.[48] A second relevant factor is that the plaintiff, should his psychiatric condition improve, has a residual working capacity notwithstanding ongoing pain associated with his physical injuries which have healed well.

[209] Allowing for these factors, the plaintiff's future economic loss is properly to be awarded at $1000 per week for 19 years, discounted by 25 percent for the plaintiff's particular vicissitudes of life. I award $484,500 for future economic loss.

Future loss of superannuation

[210] It was accepted by the plaintiff that not all of the future income would have attracted superannuation. Approximately one third of that future income came from employment. Allowing a loss of superannuation calculated from one third of the future economic loss at 11 per cent, future loss of superannuation is $18,333.

Future medical expenses

[211] The plaintiff will require ongoing supervision by his general practitioner in respect of medication and ongoing counselling and support by a psychiatrist. His future medication expenses are submitted by the plaintiff to be $15,318, being $1,200 per year for a further 20 years. Having regard to the costs of attendances upon a general practitioner, this assessment is reasonable.

[212] The plaintiff also submits there will be ongoing psychiatric expenses. The plaintiff claims psychiatric expenses for a further two years, on the basis of fortnightly consultations. The total cost sought is $14,300. Having regard to the plaintiff's condition and the need for ongoing counselling, this is not unreasonable. The plaintiff also claims psychotherapy sessions for a further 12 months at $200 per session, totallying $10,400. Dr Garg has recommended psychotherapy. Accordingly, this claim is also reasonable.

[213] The plaintiff's future medical expenses are assessed at $40,018.

Future paid services

[48] Plaintiff's Outline of Submissions, [6.87].

[214] Whilst the plaintiff falsified invoices associated with the provision of lawn mowing services, I accept the plaintiff's ongoing disabilities mean the plaintiff will not be able to mow his own lawn for the rest of his life. He will need the provision of such services. The plaintiff claims $30 per week for the balance of the plaintiff's life expectancy. The plaintiff also claims a global sum for paid assistance in relation to heavier household and domestic tasks. Having regard to the plaintiff's ongoing difficulties, such a claim is not unreasonable. However, there is a need to discount for contingencies and for the possibility the plaintiff would have required such services in the future in any event, having regard to his worsening anxiety and headaches. In the circumstances, I assess the future paid services at $25,000.

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[215] It is agreed the payment to be refunded to WorkCover totals $15,577.

Summary

[216] The plaintiff's damages are assessed as follows:

Pain, suffering and loss of amenities	$ 32,010.00
Special damages	$ 23,614.00
Interest on past special damages	$ 330.70
Past economic loss	$232,435.00
Interest on past economic loss	$ 9,021.00
Past loss of superannuation	$ 9,408.00
Future economic loss	$484,500.00
Future superannuation loss	$ 18,333.00
Future medical expenses	$ 40,018.00
Future paid services	$ 25,000.00
	$874,669.70

[217] The WorkCover Queensland refund is $83,154.99.

Orders

[218] Judgment should be entered for the plaintiff in the sum of $791,514.71.

[219] I shall hear the parties as to the form of orders and costs.