SUPREME COURT OF QUEENSLAND

CITATION:	*Kelleher v J & A Accessories Pty Ltd* [2018] QSC 227
PARTIES:	**JASON MATTHEW KELLEHER** (Plaintiff) **v** **J & A ACCESSORIES PTY LTD** (Defendant)
FILE NO/S:	BS No 4358 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4, 5, 6, 7 and 11 June 2018
JUDGE:	Ryan J
ORDER:	**1. Judgment for the plaintiff in the sum of $320,865.79.** **2. As proposed by the parties, written submissions on costs within 14 days, if agreement cannot be reached sooner.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the plaintiff was employed by the defendant as a battery delivery driver – where the plaintiff injured his back while alighting from the cabin of his truck – where the plaintiff claimed that a failure to instruct in safe ways to exit the truck and the failure to train him in safe manual handling practices caused his injuries – where the plaintiff had a pre-existing degenerative back condition – whether the defendant breached its duty of care to the plaintiff – whether the risk of injury to the plaintiff was foreseeable – whether there was a failure to provide a safe system of work – whether the defendant's breach caused the injury to the plaintiff
COUNSEL:	J McClymont for the Plaintiff R Morton for the Defendant

SOLICITORS: The Personal Injury Lawyers for the Plaintiff
BTLawyers for the Defendant

Overview of claim and summary of decision

[1] Jason Kelleher is 45 years old. He was educated in New South Wales and worked there until 2011, at which time he moved to the Gold Coast. Not long after his move, back symptoms emerged. He had damaged his intervertebral disc at the L4/5 level. By the end of 2011, without the need for invasive treatment, the symptoms of his damaged disc resolved to such an extent that he felt able to seek employment.

[2] In January 2012, through a family connection, he obtained employment with the defendant, which traded as Century Batteries. The plaintiff's employment required him to deliver batteries to several customers a day, including batteries weighting over 20 kilograms. He received no manual handling training. He received no training or instruction, from the defendant, about the appropriate way to get into, or out of, his delivery truck.

[3] From January 2012 until August 2013, he suffered intermittent back, buttock and leg pain in the course of his employment which he was able to treat using an inversion table.

[4] On 21 August 2013, when he exited from the cabin of his truck in his routine way, he further injured his spine at the L4/5 level, resulting in left-sided sciatic pain of such severity that he required a discectomy to relieve it. The operation was funded by WorkCover.

[5] Within weeks after the discectomy, which successfully relieved his left-sided symptoms, he developed painful right-sided symptoms. His surgeon recommended a revision discectomy, and sought funding for it from WorkCover on the basis that the emergence of the right-sided symptoms were related to the surgery. WorkCover refused to fund revision surgery, on the basis that the right-sided symptoms were the product of a pre-existing condition.

[6] The plaintiff brought a claim in negligence against the defendant seeking damages for personal injury, including lower back injury and secondary psychiatric/psychological injury.

[7] For the reasons which follow, I found for the plaintiff but in an amount substantially less than he contended for, having regard to the complications of his pre-existing degenerative condition.

The plaintiff's work history until 21 August 2013

[8] The plaintiff has always worked. In October 1992, after a "gap" of nine months spent surfing at the end of Year 12, he obtained a merchandising traineeship at Kimbers Timbers. After two years there, he worked at CCA Timbers (12 months), Rock Wallabies Landscaping Centre (12 months), and "for a while" at Picture Land (picture framing). In March 1996, he obtained a position at QM Industries (later QM Technologies, then Computershare) as a trainee laser printer operator. He worked there for 15 years, as a senior operator for the last 11.

[9] The plaintiff moved to Queensland in 2011, where he had family. Not long after his arrival, he obtained work at Mobycom. He was required to meet sales targets for mobile phone plans, mostly via cold-calling businesses. He did not enjoy the pressure of sales targets. He left Mobycom in August 2011. For two weeks, he worked as a "gofer" for his cousin, who owned a company that re-fitted offices. By January 2012, he was employed with the defendant.

The condition of the plaintiff's back before he started work at J & A

[10] The plaintiff had an episode of "cramping" in his back in 2001 which came on while he was walking up a steep hill. He had not experienced the feeling before. He went to the doctor the next day. After taking anti-inflammatory medication for two to three days, his symptoms were relieved.

[11] In the course of his move from New South Wales to Queensland, in May 2011, the plaintiff moved his furniture and effects with the help of two friends. He drove 9 or 10 hours to Queensland. Not long after he arrived, he helped his brother with some "yard work" for half a day.

[12] In July/August 2011, while he was walking (in the course of his employment at Mobycom) he noticed a burning sensation in his left ankle. Later, he noticed pain in his left buttocks and a tightness in his hamstring. He attempted to address his pain with Nurofen and Voltaren. By the time he left Mobycom, in August 2011, he was suffering from occasional symptoms in his leg.

[13] In September 2011, when he was not working, and after his leg symptoms had persisted for about three weeks,[1] the plaintiff consulted a General Practitioner, Dr Coliat. He complained to her about an ache in his left buttock, with pain radiating down his left leg. He nominated, as potential causes of the pain, the drive from New South Wales to Queensland and the yard work which he had done with his brother, even though he did not consider it physically demanding.

[14] He was referred for a scan and informed that he had "a bulging disc" at the L4/5 level.

[15] The CT scan, performed on 14 September 2011, revealed no disc protrusion at L2/3 or L3/4. But there was a "[l]arge broad based left posterolateral L4/5 disc protrusion with caudal migration and marked compression of the L5 nerve roots".[2]

[16] Dr Coliat told the plaintiff that the injury was "quite serious". He was placed on a waiting list for "laser surgery", "to target the nerve" and referred for physiotherapy. Dr Coliat told the plaintiff to avoid activities which were likely to aggravate his back.[3]

[17] The plaintiff did not find physiotherapy effective, and it was expensive. He did his own research into treatment and purchased an inversion table on 9 November 2011, the use of which provided relief. Indeed, he said the inversion table brought him so much relief he thought he had "solved the problem". He resumed his search for work.

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1 Transcript 2 – 12, ll 30–33.
2 Exhibit 1, Medical records, p 1–2.
3 Transcript 2 – 21, ll 40–45.

Obtaining the job with J & A: information given to J & A by the plaintiff about the plaintiff's back

[18] In late 2011, the plaintiff's sister told him there was a job vacancy at J & A. He had already met Ian Bailey, the defendant's manager, through her.[4]

[19] On 19 November 2011, the plaintiff interviewed with Mr Bailey for a job as a delivery driver with the defendant delivering batteries for cars, four-wheel drives and marine vessels.

[20] At the interview, the plaintiff told Mr Bailey that he had a recent back injury. He told Mr Bailey that he had been treating the injury via the use of an inversion table which had resolved all of his symptoms.[5] The plaintiff did not think he would have any difficulty doing the job, but he wanted to be "completely upfront".[6]

[21] The 'resume' which the plaintiff created for the purposes of his interview with Mr Bailey listed as a key responsibility of one of his former roles, "Deliveries in a 3 ton truck". The plaintiff told Mr Bailey that he did not have a truck licence. Mr Bailey told him he would need a medium rigid truck licence. Mr Bailey did not ask the plaintiff about his previous truck driving experience.

Pre-employment training and instruction

Tours of the warehouse; 'trial' with Terry Marshall

[22] After the interview, Mr Bailey took the plaintiff around the defendant's warehouse. He showed him where the various batteries were stored.

[23] Mr Bailey did not give the plaintiff any information about "training". Mr Bailey said nothing to the plaintiff about manual handling techniques generally, or for the batteries in particular. Mr Bailey told the plaintiff to return to J & A for a half-day trial in mid-December, which he did. During that trial, the plaintiff worked with Terry Marshall, loading Mr Marshall's truck and accompanying him on deliveries. He also drove Mr Marshall's truck that day. Mr Marshall's truck (an Isuzu FRR) was larger than the truck ultimately assigned to the plaintiff.[7]

[24] The trial was successful and the plaintiff was offered the job. He was to obtain the relevant truck licence and start on 3 January 2012.

Driver instruction/assessment

[25] The plaintiff could afford one driving lesson before his scheduled driving test.

[26] The plaintiff took his lesson in a Nissan truck that was "considerably larger" than the truck he drove for the defendant. He stated that the size/height difference was "significant enough to actually sort of notice when [he] was actually looking at the cabin".[8] On my

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4 Transcript 1 – 42, ll 9 – 17.
5 Transcript 1 – 42, ll 35 – 45.
6 Transcript 1 – 43, ll 5 – 17.
7 Mr Marshall was not called as a witness.
8 Transcript 1 – 47, ll 16 – 21.

comparison of the specifications of the vehicles, the Nissan was 240 mm taller (cabin height measurements) than the truck the plaintiff drove for the defendant.[9]

[27] The plaintiff said he put pressure on himself to get everything right during the driving lesson, because he was only having one and his test was in three days' time. He said he was paying particular attention during the lesson. He did not recall the instructor showing him how to get into the truck.

[28] He said, in effect, that because of the height of the truck, as he entered it, he looked for hand holds. He remembered using one step and one hand hold to enter.[10] He said he was not told or shown how to get out of the truck at the end of the lesson – which was, he said, the only time he got out of the truck. He exited facing the cabin because of its "significant height": "if you didn't climb out of the truck, you know, there's a good chance you'd actually fall out and hurt yourself". The plaintiff "perceived" that the truck he took his lesson in was too high for him to jump or drop out of.[11]

[29] The plaintiff took his test in Terry Marshall's truck – the FFR – and passed, on 16 January 2012.

[30] During the test, the plaintiff "reversed" (to exit) out of the truck because its size and its handles prompted an inward facing exit.[12] It could have had two steps (up to the cabin) – the plaintiff could not be 100 per cent certain – but there was definitely one.[13] Copies of photographs of a truck that "looked like" Terry Marshall's truck were tendered.[14] One of those photographs showed the cabin handles. Neither showed (that I could see) a step or steps into the cabin. No evidence about its specifications (including its overall height) was tendered. Mr Marshall was not called as a witness.

Evidence of the driving instructor

[31] Mr Wetherill was called by the defendant. He has been driving trucks for 35 years. He holds licences for trucks up to heavy combination vehicles and is an experienced truck driver trainer. He gave the plaintiff the one lesson the plaintiff undertook (on 13 January 2012) before taking, and passing, his test for a medium rigid truck licence.

[32] Mr Wetherill had no memory of the plaintiff but at every lesson, the procedure was the same:[15]

> All the way through, the same. As it [the lesson plan/record of the lesson] says, we do the theory and the demo first, demo drive … Getting in and out … obviously the initial is showing them what to do and then getting them to do it … Show first all about the truck, the gears, steering, reversing, and then we go from there and do the getting in and out of the vehicle … I demonstrate

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9 Compare exhibit 43, specification sheet for a Nissan MKA 265 (lesson vehicle), the full height of which was 2480 mm with exhibit 1, "Liability Documents" pages 3-4, specification sheet for Isuzu NPR250/300 (work truck), the cabin height of which was 2240 mm cabin height – mislabelled as "OAH" ('over all height').

10 Transcript 1 – 48, , l 34 – Transcript 1 – 49, l 9.

11 Transcript 1- 49, ll 18 – 43. See also cross-examination at Transcript 2 – 24 – Transcript 2 – 25.

12 Transcript 1 – 50, ll 38 – Transcript 1 – 51,l 6.

13 Transcript 1–51, ll 30 – 46.

14 Exhibit 7.

15 Transcript 4 – 60 – Transcript 4 – 61.

> first … Three points of contact getting in … And getting out … We let – they hop in and drive, and then we do all the instructions from there.

[33] An exit which enabled a driver to maintain three points of contact during their descent required a driver to exit from the cabin in 'reverse' – facing into the cabin.

[34] In cross-examination, counsel for the plaintiff attempted to draw a distinction between a person coming to Mr Wetherill for a lesson and one coming to Mr Wetherill for an "assessment" – in other words, an evaluation of their readiness for a driving test or a "dry run"[16] of the test.

[35] Counsel suggested, in effect, that, to Mr Wetherill's knowledge, the plaintiff was there for a dry run and if he had entered and exited the truck correctly, then Mr Wetherill would not provide him with instruction about it. Mr Wetherill's response to that suggestion was to the effect that he would instruct in the first instance regardless, including by demonstrating how to get into and out of the truck.[17]

[36] Mr Wetherill was familiar with the Isuzu truck used by the plaintiff at J & A. He had driven one for about four years. He got into his Isuzu using three points of contact and out of it by doing "the reverse":[18]

> .. you put your foot – look for the step, foot, grab the grab handle … on the A-pillar and steeling wheel if possible or seat. As long as there's three points of contact.

[37] Under cross-examination he confirmed that he would instruct drivers of such a truck to enter and exit using three points of contact to prevent driver injury and for "[h]ealth and safety".[19] In re-examination, he said that there was no substantial difference between getting in and out of the Nissan (in which the plaintiff received instruction) and the Isuzu.[20]

[38] Mr Wetherill agreed, in effect, that the exit in reverse stopped people from jumping from a truck and that there was a risk of injury were a person to jump from a truck, including from the Isuzu.[21]

On the job instruction or training

[39] I find that the plaintiff received no on-the-job instruction or training about manual handling techniques and no on-the-job instruction or training about entering or exiting the delivery truck assigned to him. Nor was he cautioned about the risks associated with those activities.

[40] The defendant had its own Code of Practice which dealt with occupational health and safety including a requirement for formal training of "CSRs" – that is, customer services representatives, like the plaintiff. The existence of the Code of Practice was revealed in Mr Byard's report.

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16 Transcript 4 – 73, ll 1 – 4.
17 Transcript 4 – 73, ll 15 –30.
18 Transcript 4 – 59.
19 Transcript 4 – 62 ll 20 – 35; and Transcript 4 – 63, ll 20 – 30.
20 Transcript 4 – 75, ll 1 – 10.
21 Transcript 4 – 63.

[41] Even though the defendant's Code of Practice was likely to have been of great relevance to the plaintiff's case in all respects, the plaintiff did not tender it. I have therefore taken a cautious approach to the evidential status of the information revealed about it by Mr Byard.

[42] I have considered the decision of the Court of Appeal in *Beaven v Wagner Industrial Services Pty Ltd*.[22] I have treated the defendant's Code of Practice, to the extent to which its content was revealed, as a document of a kind which a reasonable employer, in the position of the defendant, ought to have consulted to ensure, among other things, a safe system of work for its employees.

No on-the-job manual handling instruction

[43] For the first three weeks on the job, the plaintiff travelled with Justin Hunter, the employee he would be replacing. He described that period as a three-week "meet and greet". He was introduced to customers and shown where to park; how to test batteries and how to complete relevant documents.[23]

[44] On his first day at J & A, the plaintiff and Mr Hunter grabbed a warehouse trolley and "picked" the orders to load onto the truck. The plaintiff received no manual handling instruction from Mr Hunter: he "just did what Justin did".[24]

[45] The plaintiff described how he retrieved batteries from the warehouse shelving to prepare for his daily deliveries. He explained that he could not reach some of the batteries and had to stand on pallets to do so.[25] There were trolleys in the warehouse which the plaintiff used to move the batteries to his truck. No one else at the warehouse helped him load his truck with batteries. There was, in fact, an "unwritten rule" that you did not touch another driver's truck (or load) in case a battery went missing.[26]

[46] The plaintiff had no idea of the weights of the batteries he had to lift. His attention was never drawn to stickers on the batteries which said: "Caution lift with care" or "Caution heavy – consider 2 person lift".[27] The plaintiff was given no instruction about moving the heavier batteries.

[47] Some of the batteries had handles. Copying Mr Hunter, the plaintiff carried one-handled batteries by their one handle; with one hand; and with one battery in each hand. For the larger batteries, with two handles, the plaintiff used two hands (one hand in each handle) and carried the battery close to his body.[28]

[48] He had never been told how to pick up a 50 or 60 kg battery, and no one had given him instruction about using "mechanical means" to lift the heavier batteries. He said it was "more so common sense really".[29] At the time, he was 75 kg, and he lifted the 65 kg batteries with a forklift (in the warehouse), raising the forklift platform to the level of the

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[22] [2017] QCA 246.
[23] Transcript 1 – 45 ll 29 – 35.
[24] Transcript 1 –4 6, l 21.
[25] See figure 12 of exhibit 2.
[26] Transcript 1 – 74, ll 32 – 41.
[27] See figures 24 and 25, exhibit 2.
[28] Transcript 1 – 63, ll 1 – 10.
[29] Transcript 1 – 63, l 17.

truck platform, and then "just sort of slid[ing] them off with [his] foot … to avoid lifting".[30]

[49] The pleaded defence asserted (among other things) that the plaintiff received assistance, from co-workers or at delivery premises, to lift and carry batteries, particularly those in excess of 20 kilograms; that he was instructed not to proceed with a delivery to a customer of batteries in excess of 20 kilograms if the customer provided no assistance (from an employee) or a trolley; that there was a collapsible trolley in the plaintiff's truck; and that Mr Bailey provided the plaintiff with "manual handling training and/or instruction upon the commencement of his employment to lift with his knees bent and to avoid twisting his body".

[50] I find that no such assistance or instruction or trolley (as pleaded) was provided. Nor did Mr Hunter give the plaintiff instructions about the correct way to handle the batteries. I find that the plaintiff was not told to ask customers for assistance when he delivered their batteries. He was not told to insist on customers having a trolley available for his use. He was not told what to do if no assistance or trolley was provided.

No on-the-job instruction or caution about exiting (or entering) the truck

[51] Once the plaintiff had his licence (16 January 2012), Mr Hunter permitted him to drive the truck with Mr Hunter as his passenger. Mr Hunter left J & A on 19 January 2012.

[52] Mr Hunter/the plaintiff's truck was an Isuzu NPR 300.[31] As noted above, it was 240 mm lower (in cabin height) than the truck the plaintiff used in his lesson. To get into the truck, the plaintiff stood on the step, facing inwards. He used upward momentum (pushing off the step with one foot) to reach the handle on the A Pillar with his right hand and swung into the driver's seat.

[53] To exit the truck, he did not reverse out of the cabin as he had done during his lesson and test. Instead the plaintiff –

(a) faced outwards;

(b) placed his right hand on the non-stick grip on the wheel arch;

(c) leant forward to put his left hand on the inside of the door,

(d) boosted himself out of the seat (lifting and turning his body); and

(e) "dropped" out of the truck.

[54] There was no oral evidence from the plaintiff about the distance between his feet and the ground when he dropped, but Mr Byard estimated the distance as 500 mm.

[55] The plaintiff said, in effect, that reversing out of the cabin would involve a "free falling pendulum swing sort of thing because you actually didn't have anything to hold on [to] with your left arm". He said he could not see the step from the driver's seat and he would have been "feeling around" in reverse.[32]

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[30] Transcript 1 – 63, ll 15 – 25.
[31] Exhibits 8 and 9.
[32] Transcript 1 – 53, ll 24 – 35.

[56] He added that one of the other reasons why he did not reverse out of the Isuzu was that "it wasn't really that high".[33] He likened it to "the little van" which was sometimes used at J & A when one of the trucks was being serviced.[34] He exited the truck in the same way as he exited the van because "both of the cabins weren't very high at all".[35] Although the plaintiff thought that his exiting the truck and exiting the van were equivalent, he thought the truck was "considerably higher than a passenger vehicle".[36]

[57] The plaintiff "dropped" out of the truck (facing out) several times in Mr Bailey's presence. He was not told by Mr Bailey, or anyone else from J & A, not to exit that way.

[58] The plaintiff said he took no notice of how Mr Hunter got out of the truck. He said that Mr Hunter did not tell him it was important to make sure he got out of the truck a certain way. Mr Hunter gave no evidence to the contrary.

[59] Mr Hunter's practice was, he assumed always, to "reverse" out of the truck's cabin. He had been told that it was a "critical fail" (for the purposes of his truck driving licence) to get out of the truck facing out so it was "a major thing to remember".[37]

The plaintiff's work at J & A

[60] The plaintiff gave evidence to the following effect.

[61] Once he was working on his own (that is, after Mr Hunter left), he was not provided with assistance to deliver and unload batteries at customers' premises. While one or two customers provided him with a trolley or their staff to assist him, and there was occasional assistance from others, mostly the plaintiff alone unloaded, carried and placed on shelves the batteries he delivered to customers.

[62] The plaintiff said it was no different for the heavier batteries, which had been loaded onto the truck with a forklift. There was no forklift available at any customer's premises and the plaintiff lifted them off the truck himself, just as Justin Hunter "showed" him.[38] He was also required to remove "expired" batteries (which had reached the end of their shelf life) from customers who held the defendant's batteries on consignment.[39]

[63] The plaintiff was not always able to park close to the entry to a customer's premises and there were various obstacles and difficulties associated with some of the deliveries which he reduced to a table.[40] That table also showed the customers he visited each day of the week – that is between 12 and 19 customers a day.

[64] About five weeks into his employment, the plaintiff asked Ian Bailey for a trolley. He was told to grab one from the warehouse. For a variety of reasons, the plaintiff did not think the warehouse trolleys would handle "the terrain". Nor could he store a trolley on his truck. The plaintiff did not ever use a warehouse trolley on his delivery run. He did not tell Mr Bailey that the warehouse trolleys were not suitable.

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[33] Transcript 1 – 53, ll 35 – 45.
[34] Transcript 1 – 54.
[35] Transcript 1 – 53, ll 35 – 45.
[36] Transcript 2 – 54 – Transcript 2 – 55.
[37] Transcript 4 – 24, ll 1 – 18.
[38] Transcript 1 – 63, ll 25 – 30.
[39] Transcript 1 – 77, ll 1 – 5.
[40] Exhibit 12.

[65] It was suggested to the plaintiff that Mr Hunter arranged for a trolley wherever he went or arranged for someone to assist with the batteries. It was suggested to the plaintiff that Mr Hunter told him that the customer was to make a trolley available to him and that he was to get help if he needed help. It was suggested to him that he was told that the policy was that if trolleys or assistance were not provided, the batteries stayed on the truck – and indeed, that if that were to occur, Mr Bailey would call the customer and "pull them back into line". All of those suggestions were denied by the plaintiff.[41]

[66] Mr Hunter did not remember the plaintiff by name but he remembered that someone went with him on his deliveries during his last few weeks at J & A. He agreed that "sometimes" he asked customers for assistance or for a trolley, but he was not asked whether he did so *while the plaintiff was with him*. He was not asked what instructions he gave the plaintiff about trolleys or assistance from customers. He said the only places he needed a trolley were Supercheap Auto and Batteryworld[42] – places which, on the plaintiff's evidence, provided trolleys. He said he would not unload a battery if he needed assistance to do it. He could not recall an occasion when he asked for assistance and it was not provided to him.

[67] Mr Bailey was not called as a witness.

[68] I find that while the plaintiff was 'training' with Mr Hunter, Mr Hunter did not ask for assistance or trolleys while at customers' premises. I find that Mr Hunter did not tell the plaintiff that the customer was to make a trolley available to him; nor was the plaintiff informed of a policy which required the batteries to stay on the truck if no assistance or trolley was provided – and in pursuance of which Mr Bailey would pull non-complying customers into line.

The plaintiff's back condition after starting work at J & A and before 21 August 2013

[69] It was only after Mr Hunter stopped working for the defendant, leaving the plaintiff to work alone, that the plaintiff appreciated the labour of a full workload. He began to develop pain again in his left buttock and he used his inversion table "a lot more".[43]

[70] On one or two occasions, before he asked Mr Bailey for a trolley, the plaintiff told him he could not come into work because of the pain.

[71] Between March and October 2012, there were "a few times" when the plaintiff came home from work and "jump[ed] on" his inversion table to "take the pressure off [his] spine".[44] Although "the paper work" indicated that the plaintiff told Mr Bailey about his episodes of back pain on six occasions, they were friends, and the plaintiff thought it was more than that.

[72] The plaintiff moved in with Mr Bailey in October 2012 – taking his inversion table with him. He stayed about six months, during which time he had episodes of pain associated with his work, which he told Mr Bailey about. He used the inversion table at Mr Bailey's house. The plaintiff did not see a doctor about these episodes of pain, nor did Mr Bailey

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41 Transcript 2 – 22 – Transcript 2 – 23.
42 Transcript 1 – 65; Transcript 1 – 67, ll 3 – 7.
43 Transcript 1- 75, l 31.
44 Transcript 1 – 76, ll 14 – 17.

tell him to do so. The episodes of pain were not as significant as the pain he had experienced in September 2011, which drove him to the doctor.

[73] The plaintiff said that "there was always an underlying degree of pain"[45] but with the help of his inversion table he felt he could still do the job. There were –

- two occasions when he had to take time off work;
- another six occasions when he had pain in his back or leg, which resolved when he used his inversion table; and
- other occasions (between those six episodes) when he had symptoms[46] "but only mildly".[47]

[74] He occasionally lay down on the pallets at work to relieve his pain – when he had "flare up[s]" in his right buttock and the burning sensation in his ankle.[48] The incidents of pain corresponded with weeks which contained public holidays because of the reduced time in the working week to complete the deliveries and the resulting increased workload. The plaintiff's workload also increased if one of the other drivers was away from work.

[75] I note that the history upon which the doctors provided their opinions did not include all of these facts. Neither Dr Campbell nor Dr Labrom appear to have appreciated that the plaintiff suffered from "always an underlying degree of pain". Neither referred to his need to lie down at work occasionally.

[76] The plaintiff spoke of flare ups in his right buttock. His complaint to Dr Coliat in 2011 had been of pain in his left buttock. It may be that he was mistaken about pain in his right buttock rather than his left, and that what he intended to convey (by using the expression "flare up") was that the pain he had experienced in 2011 returned.

[77] On a Wednesday in June 2013, the plaintiff hurt his back while he was lifting stock from a trolley at Supercheap Auto Mermaid Beach, so that he could use the trolley to deliver the defendant's batteries. The stock on the trolley was Supercheap's stock. It was contained in boxes which were not very large and which were light. The plaintiff had to bend over to remove the boxes, because the space he was in was confined and he could not turn the trolley around. He felt a "click" in his back and dropped to the ground in pain. The pain was in his back and down his left leg. He went home. He used his inversion table on Thursday and Friday and was able to return to work the following Monday.[49]

[78] After that incident of pain, the plaintiff rang Mr Bailey and told him that he could not keep carrying the heavy batteries. He took a week off work to look for a mature-age apprenticeship as a locksmith. He had one favourable response which suggested an opportunity in 12 months' time.

[79] I note that while the plaintiff told Mr Bailey that he could not keep carrying the *heavy batteries* after the pain he experienced at Supercheap Auto at Mermaid Beach, his pain

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45 Transcript 1 – 79, l 10.
46 Transcript 1 – 79, ll 28 – 45.
47 Transcript 1 – 79 – Transcript 1 – 80.
48 Transcript 1 – 80, ll 1 – 10.
49 Transcript 2 – 56 – Transcript 2 – 57.

on that occasion was not brought on by his handling of heavy batteries. It occurred when he bent over to pick up light, not very large boxes.

Expert evidence

Preliminary observations

[80] To prove that the plaintiff's work tasks – that is, his manual handling and exiting from his truck – carried a foreseeable and not insignificant risk of injury, and to identify the ways in which the risk should have been addressed, the plaintiff relied primarily upon reports prepared by Phillip Byard and Brendan McDougall, engineering consultants from Intersafe.

[81] Mr Byard's report dealt mostly with the plaintiff's manual handling tasks. It also dealt with the plaintiff's exit from the truck, but Mr Byard's conclusions about the risks associated with the exit did not, on its face at least, assist the plaintiff.

[82] Mr Byard's report was supplemented by Mr McDougall's report, which dealt with the plaintiff's exit from the truck. Mr McDougall's conclusions did assist the plaintiff.

[83] The material available to Mr Byard included a report by G4S compliance and investigations. Annexure 9 to the G4S report was the Century Yuasa Code of Practice (the CYCOP).[50] The CYCOP was discussed by Mr Byard in his report, but not attached to it. Its content, as revealed by Mr Byard, suggested that it was a very relevant document – yet it was not tendered in evidence as I have noted.

[84] Mr Byard selected from the CYCOP those parts which were particularly relevant to the risks associated with manual handling in the course of the plaintiff's employment.

[85] He did not discuss the CYCOP in his consideration of the risks associated with the plaintiff's exit from his truck. However, Mr Byard discussed no guidance documents at all in the section of his report about the exit from the truck (*cf* the section of his report on manual handling). That may have been because that section was prepared as an addition to an earlier report,[51] was relatively brief and concentrated on ground forces.

[86] Mr McDougall did not refer to the CYCOP.

[87] The CYCOP explained that it was expected that employees such as the plaintiff (who were designated as "Customer Service Representatives" (CSR)) would receive a "comprehensive induction program". The "safety topics" to be covered included one called "*In the field with CSR"*.[52]

[88] The CYCOP included a section within the *Occupational Health and Safety* chapter entitled *Manual Handling/Ergonomics* which dealt with the way in which risks associated with manual handling were to be controlled.

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[50] Exhibit 2, page 10.

[51] Exhibit 2, page 1: "This report is identical in all respects to the first report dated 3 December 2015 except for the addition of an additional section titled 'Event of 21 August 2013'".

[52] Exhibit 2, page 14.

[89] The CYCOP contained a *Work Health and Safety Induction* handout, which, as put by Mr Byard, "highlights the significance of manual handling as a major contributor to workplace injuries".[53]

Expert evidence about manual handling and its risks

[90] After a site inspection and consideration of the plaintiff's "run sheet" and other information, Mr Byard calculated the distribution of the weights of the batteries delivered by the plaintiff for the two-week period 24 June 2013 to 5 July 2013. The plaintiff handled, on average, 1,286 kg of batteries each day. The average battery weight was 13.8 kilograms. Batteries were handled between two and four times. Between 23 and 46 batteries were handled per hour. The plaintiff estimated that he carried the batteries over distances ranging from zero metres (if a trolley was available or he was able to park close to a loading dock) to 30 metres.

[91] Mr Byard identified general risk management standards available in Australia, which provided guidance to organisations for avoiding risk via risk management processes, as well as standards specific to health and safety at work. The standards also provided guidance about the use of controls to eliminate hazards.

[92] Mr Byard concluded that the plaintiff's battery handling was a high-risk task for any person. He noted that the plaintiff had advised Mr Bailey that he had damaged his back previously and said, "This could have alerted J & A that Mr Kelleher may not be suitable for the work and at least conduct an assessment of the tasks and provide clear instructions on how tasks were to be performed".[54]

[93] In Mr Byard's opinion, the defendant could have (and should have) identified the risks associated with the plaintiff's manual handling tasks and put in place appropriate controls to manage those risks.[55] It did not. The risks included the risk of musculoskeletal injuries.

[94] Mr Byard said that batteries weighing more than 33 kilograms should not be handled manually – rather they should be handled "mechanically" or by "pushing/pulling", relying on height adjustable trolleys (photographs of which he included in his report). Mr Byers suggested that an "appropriately equipped truck" could be dedicated to the delivery of the heavier batteries. He suggested a trolley or a two-person lift (with the assistance of a swingle bar to guarantee equal distribution of the load) for batteries weighing between 20 and 33 kilograms. Batteries weighing between 10 and 20 kilograms should be lifted with two hands and kept close to the body. They should be lifted using two handles or with the assistance of a swingle bar designed for one-person use.[56]

[95] He recommended training for workers including about the risks associated with manual handling and safe strategies. In his opinion, a report of pain symptoms ought to have prompted the implementation of a risk management approach to manual handling tasks.[57]

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53 Exhibit 2, page 12.
54 Exhibit 2, page 56.
55 Exhibit 2, page 43.
56 Exhibit 2, pages 61 – 62.
57 Exhibit 2, page 67.

Expert evidence – exiting from the truck

Mr McDougall

[96] The plaintiff relied upon Mr McDougall's report to prove that there was a foreseeable and not insignificant risk of injury in the plaintiff's manner of exiting the Isuzu.

[97] In addition to his expertise in occupational health and safety, Mr McDougall's expertise included that which he had acquired as a fleet manager for the Shell Oil Company of Australia. In that role he was responsible for the training of 130 drivers, including training them in "rearwards access and egress techniques [from their vehicles] using 3 functional points of support" and "addressing driver resistance" to rearwards exits. His experience also included his work at InterSafe as an advisor to organisations about the "appropriate" way to get into and out of (or off) mobile machinery.[58]

[98] Mr McDougall said that his work experience with Shell and CSR involved "investigating vehicle access incidents which did occur, working with truck manufactures to improve the design of vehicle access systems and educating drivers with respect to behaviours required to minimise risk when accessing and egressing vehicles".[59] He relied upon that experience for the opinions contained in his report.

[99] Mr McDougall understood the plaintiff's exit from the Isuzu, on 21 August 2013, to involve a two footed landing:[60]

> … Using the handgrips to support his body weight, he then swung/slid both feet out of the tuck (sic) cabin and whilst facing out from the cabin, 'jumped'/dropped to the ground …

[100] Mr McDougall noted the space restrictions within the Isuzu, which "increased the difficulty for a driver to rise from a sitting position, stand and turn through 90° to face towards the cabin before descending.[61] He noted the non-slip pad on the wheel arch, which "promotes this [facing outwards] method of cabin egress (i.e. the right hand to be placed on this pad)". He pointed to the worn paint on the wheel arch, which he said indicated that it was "a methodology used by many drivers of this vehicle over many years".[62]

[101] There was no evidence about the duration of Mr Hunter's employment with the defendant, but I note his evidence about the way in which he exited the Isuzu – notwithstanding the location of the non-slip pad.

[102] In Mr McDougall's experience, the way in which the plaintiff exited his truck was the "common methodology used by most drivers of this design of truck (but also other vehicles such as forklifts, 4WD's, etc. with similar or slightly lower height cabins) who have not received specific training or instruction".[63]

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58 Exhibit 38.
59 Exhibit 3, page 1.
60 Exhibit 3, page 2, 4(e).
61 Exhibit 3, page 5.
62 Exhibit 3, page 7.
63 Exhibit 3, page 7.

[103] Mr McDougall said that injuries commonly occurred if a driver's hand slipped off the wheel arch (while exiting as the plaintiff described), or a foot slipped or landed on an uneven surface, causing a loss of balance and a fall.

[104] The plaintiff's method of exiting the truck by way of a jump or drop meant that his "body centre of mass" fell 500mm, with "significant potential for large compression loading in the spine or jarring, if landing with legs straight (as opposed to knees being flexed to cushion the impact)".[64]

[105] He referred to several documents which dealt with the "undesirability of workers jumping down from vehicles and the potential for impact injuries to the back, legs and arm joints when jumping down from vehicles".

[106] Those documents included the *Queensland Road Freight Transport, Health and Safety Guide* which made the point that one of the major injury mechanisms for the road freight transport industry was slipping and falling while getting into and out of trucks.[65] However, the resources to which Mr McDougall referred had their limitations, which are discussed below.

[107] After listing those documents, he stated that injuries were "common":[66]

> Essentially, injuries associated with exiting truck cabins or jumping down from truck body's (sic) are common. The injury outcomes range from disc lesion through to severely damaged knees, ankles, shoulders, etc.

[108] He listed common risk factors, including a worker being "not trained … in getting in and out of the cabin with minimal risk".[67]

[109] In his opinion, the dimensions and qualities of the Isuzu increased the risk of a "fall incident", which risk "could have been identified during audits and risk assessments of the vehicle or during observation of the driver delivery task as part of an appropriate occupational health and management system".[68]

[110] He explained – in effect – that an employer would find the framework of a typical occupational health and safety management system in documents including Australian Standards and that a risk management process was a basic element of those systems. There was a need for employers to systematically identify and control risks in the workplace.[69]

[111] He included, among potential control measures of the risk associated with exiting a vehicle's cabin, the selection of different delivery vehicles or retro-fitting handgrips or handrails. However, he acknowledged that one of the "readily accepted" administrative controls was the "training [of] workers to always maintain three-point support" when "using access systems or working at height", which would preclude drivers from jumping out of truck cabins and require them to reverse out of the cabin.[70]

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64 Exhibit 3, page 10.
65 Exhibit 3, page 10.
66 Exhibit 3, page 11.
67 Exhibit 3, page 12.
68 Exhibit 3, page 12.
69 Exhibit 3, page 12.
70 Exhibit 3, page 14.

[112] In Mr McDougall's opinion, had Mr Kelleher employed a "three points of support" technique, he would have been "better able to control his rate of descent" and the potential for injury "would have been significantly reduced".[71]

[113] Mr McDougall explained that for an administrative control to be effective, it was necessary (among other things) to enforce it by providing appropriate supervision. He said, "Significant practice is required before the recommended access technique becomes a learned repeatable behaviour."[72]

[114] In cross-examination, Mr McDougall confirmed his belief that "all injuries at workplaces can be prevented" and that his investigations were always done "with the benefit of hindsight".[73]

[115] Mr McDougall was taken to page 7 of his report, at which the following paragraph appeared (part of which was extracted above):

> In the author's experience, the method of cabin egress used by Mr Kelleher is the common methodology used by most drivers of this design of truck (but also other vehicles such as forklifts, 4WD's, etc, with similar or slightly lower height cabins [than the Isuzu]) who have not received specific training or instruction.

[116] Mr McDougall explained that the purpose of that statement was to make the point that it was "common that people will exit facing outwards and simply jump down".[74]

[117] I assume with an eye on the decision of the Court of Appeal in *Williams v Mt Isa Mines*,[75] counsel for the defendant asked Mr McDougall whether he intended to convey that getting out of counsel's Toyota Landcruiser was "much the same as getting out of … this Isuzu truck". Mr McDougall said:[76]

> Your four-wheel drive will probably be of the order of about 12 inches lower, so you – the seat in the Isuzu would be about 12 inches higher than your four-wheel drive seat, and hence when – when you're swinging out – I imagine when you're swinging your legs out of your four-wheel drive, your feet don't come in contact with the ground. You've still got to fall down … So, from – from the Isuzu, we're falling at least another 300 mill.

[118] Mr McDougall was taken to the statement in his report that injuries associated with exiting truck cabins or jumping down from truck cabins were common. He was asked whether he included in that statement "all the range of trucks or the like that people might drive".[77] Mr McDougall said that he had but confirmed that there has been no study about the frequency of injuries for people exiting a truck like the Isuzu. He referred to studies

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71 Exhibit 3, page 15.
72 Exhibit 3, page 17.
73 Transcript 4 – 29.
74 Transcript 4 – 39, ll 1 – 5.
75 [2001] QCA 101 in which McMurdo P, with whom Williams JA and Ambrose J agreed, said at [16] (citation omitted) "Alighting from the truck was an ordinary everyday event which involved some obvious risk; an employer could not reasonably be expected to warn of the potential danger of such a risk; any risk must have been obvious to the appellant who described the process as akin to alighting from his own Toyota Landcruiser. There were no circumstances here that made a specific warning or special training necessary.
76 Transcript 4 – 39, ll 15 – 24.
77 Transcript 4 – 49, ll 40 – 50.

into forklifts, which revealed that 30 per cent of injuries to drivers occurred when they got on and off the forklift and drew comparisons between their size and their drivers' method of getting out of them with the Isuzu and the plaintiff's method of getting out of it.[78]

[119] In response to Mr McDougall's observation that people who exit "mobile equipment … by facing away … and jumping down … are commonly injured", counsel for the defendant suggested, in effect, that the injury could not be called "common" because the plaintiff had exited his vehicle 7000 times without mishap. Mr McDougall replied that a one in 8000 (sic) chance of a serious accident was "a very high frequency".[79]

[120] An incident free history is not irrelevant, but it is not determinative: *Kuhl v Zurich Financial Services Australia Pty Ltd*.[80] In *Suncorp Staff Pty Ltd v Larkin*,[81] Muir JA said (footnotes omitted):

> [26] The fact that no previous injury may have been sustained as a result of a particular workplace practice or item in a workplace does not necessitate the conclusion that the risk of injury should be regarded as slight ...

[121] Mr McDougall agreed that there was still a risk of injury inherent in the three points of contact while reversing method of exiting a truck. He agreed that there was a risk of injury "in whatever we do in this world" and added "but we can minimise it". [82]

[122] I mentioned above the documents which Mr McDougall attached to his report which dealt with "the undesirability of workers jumping down from vehicles and the potential for impact injuries to the back, legs and arm joints when jumping down from vehicles".[83]

[123] While those documents did make that point, in my view, some were of very little relevance in this case.

[124] Taking them one by one:

- Queensland Government "*Road Freight Transport Health and Safety Guide*"

  Only two pages of this guide were provided.

  At page 10, it stated, "Getting into and out of a truck cabin, particularly larger trucks can be risky".

  On the same page, it identified as one of the "main risk factors" "too high a first step – more than 400mm". The Isuzu's first (and only) step was 500mm off the ground.

  On page 11 of the document, in a table which contained a column headed "Safe solutions for getting in and out of trucks", it referred to training in the correct technique (the three-point contact technique).

- "*Queensland health and safety hazard Identification checklist: Road freight transport industry*"

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78 Transcript 4 – 41.
79 Transcript 4 – 41.
80 (2011) 243 CLR 361 at [82].
81 [2013] QCA 281.
82 Transcript 4 – 42, ll 1 – 19.
83 Exhibit 3, page 10.

The checklist asked whether jumping down from the cabin or trailer was actively discouraged.

- "*Queensland Government, Department of Industrial Relations, Road Freight Transport Industry Access to cabins*"

  The first part of this document repeats the content of page 10 of the first document on this list (in a different font and style).

  The "guidelines" for creating less risk and strain for drivers include always maintaining three points of contact when entering or exiting the cabin; and "don't jump from the cabin".

- Victorian Governments "*Prevention of Falls – Trucks*"

  This document concerns drivers working at height on much larger trucks than the Isuzu. It focused on falls above and below two metres. The plaintiff was not "working at height".

  In terms of cabin access, the document focused on cabins of a height of over two metres – although I acknowledge the reference in it to the risks to drivers getting into or out of cabins lower than two metres.

  The document stated (for both cabin heights): "Drivers should always be facing the cabin when exiting and never jump down".

  In my view, this guidance document is of some, albeit limited, relevance.

- Work Safe Victoria "*Prevention of falls in the transport of roof trusses and wall frames*"

  This document has no relevance here – the plaintiff was not transporting roof trusses or wall frames or anything like those things.

  The whole of this document was attached to Mr McDougall's report. Its introduction stated "The information in this guide has been written specifically for the truss and frame industry …"

- South Australia Workcover "*Road Transport Falls Prevention Manual*".

  This document (which was also attached in its entirety) focuses on vehicles larger than the Isuzu.

  The photographs on the page headed "Risk control – prevention of falls" are of vehicles with two step entries to their cabins.

  I acknowledge that the solutions proposed to the hazards and risks include maintaining three points of contact when getting into and out of vehicles and facing the vehicle when getting on or "off" it, but I consider this document of limited relevance.

- "*National falls from heights in the heavy vehicle sector report*"

  As its title suggestions, this document applies to heavy vehicles. Its relevance is marginal.

- Queensland Government's "*Road freight transport industry – falls from trucks*"

  This document opened with this phrase "Where people are required to access high areas of transport vehicles, for example tankers, car carriers and livestock carriers,

there may be a risk of falling". For obvious reasons, nothing in this document was relevant to this matter.

- Attachments 9 and 10 were identical copies of the same document, dealing with Risk Management.

[125] Mr McDougall did not mention the defendant's Code of Practice document even though, according to Mr Byard's discussion of it, it included a chapter entitled: "Transportation of Dangerous Goods by Road" and, within the Occupational Health and Safety chapter, it included a part entitled: "Transport Safety".

Mr Byard

[126] At pages 56 – 60 of his report, Mr Byard addressed the forces which (in his opinion) could be transferred to the lumbar spine during the plaintiff's exit from the truck.

[127] He referred to the plaintiff's description of his method of exiting the truck (grammar corrected):[84]

> Mr Kelleher described facing forwards while exiting and placing one hand on the door and one hand on the mud guard and recalls that he jumped down a distance of 500 mm. This estimate is consistent with the author's experience at inspection of exiting the truck and the height at which a jump could be initiated … Mr Kelleher also stated that he did not experience a jolt on landing on the ground.

[128] The plaintiff was cross-examined about whether he had or had not experienced a jolt upon landing on 21 August 2013. He said that Mr Byard had worded the sentence incorrectly. There was definitely a sensation in his back. He also clarified that he had not stepped onto the ground: "there was a drop included".[85]

[129] Relying on research, Mr Byard concluded – in effect – that there was no risk of injury to a man the plaintiff's size who exited from the cabin of the Isuzu in the way the plaintiff described: the ground forces exerted upon such a man did not exceed the limit for spinal damage.[86]

[130] The plaintiff did not rely upon this aspect of Mr Byard's evidence. His counsel informed me that that was because that matter was to be dealt with by another engineer.[87]

[131] For obvious reasons, the defendant wished to rely upon it.

[132] However, in my view, Mr Byard's opinion was not – at least in the way in which it was presented to me – supported by the research upon which he relied. My reasons for that conclusion follow.

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[84] Exhibit 2, page 57.
[85] Transcript 2 – 79.
[86] Exhibit 3, page 58. Notwithstanding his conclusion, Mr Byard stated "That being said, jumping from vehicle cabs during exit has long been recognised as contributing to the incidence of ankle, knee and lumbar spine damage and is discouraged". Exhibit 2, page 59.
[87] Transcript 1 – 21, line 33.

[133] Mr Byard worked on a limit for spinal damage of 3400N, based on the biomechanical limit for spinal damage for manual handling, which I have assumed is a valid approach.

[134] Mr Byard stated in his report that research into the ground forces associated with exits from vehicle cabs showed that, for falls of about 0.5 metres, force plate measurements were about two to three times body weight.

[135] Taking into account the plaintiff's weight at the time, Mr Byard calculated the ground reaction force to be 2200N (three times the plaintiff's body weight x acceleration under gravity – that is 3 x 75 (kgs) x 9.81m/s$^{2)}$. That was less than the 3400N limit, even if all force were absorbed by the lumbar spine (and no force was attenuated through lower joint systems, for example).

[136] To reach his conclusion about the ground reaction force upon the plaintiff's spine upon his exit from the truck, Mr Byard relied on data from a research paper concerning exits from a "delivery van" (referred to as a "step van" in the research) because of its roughly comparable drop distance of 0.43 m compared to the drop distance from the Isuzu which was estimated by Mr Byard at 500 mm (or 0.50 m).[88]

[137] However, the several methods of exit from the step van which were measured were nothing like the method of exit described by the plaintiff, which involved a two footed landing.

[138] It is implicit from the content of the data that the exits from the step van which were examined involved a *step down* from 43 centimetres – one foot at a time –, in the following circumstances:[89]

- not using a rail, at a "normal" speed;
- using a rail, at a "normal" speed;
- not using a rail, at a "fast" speed;
- not using a rail, at a "normal" speed, while carrying a package; and
- using a rail, at a "normal" speed, while carrying a package.

[139] The plaintiff's method of exit involved no step or rail or package. It bore more similarity to the "squat jump forward" exit referred to under the results for COE Tractors and Conventional Tractors in the same data.

[140] The data implies that a stepping descent rapidly decreases the "multiple of body weight" variable.[90] Indeed, the research was entitled "Understanding and Preventing Falls"[91] and it is easy to see where it was likely heading.

[141] It seems to me very unlikely that the data based on exits from the step van relied upon by Mr Byard would be applicable to the plaintiff's very different exit from the Isuzu. I acknowledge, of course, that I am not an expert and my impression of the applicability of the data may be wrong. However, Mr Byard was not asked about the significance of the

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88 Exhibit 2, pages 58 – 59.
89 Exhibit 2, page 59.
90 Exhibit 2, page 59, Figure 47, which has been photocopied from the research.
91 Exhibit 2, page 58, footnote 32.

difference (if any) between the type of exits measured and the plaintiff's exit. In my view, the evidence, as presented, does not assist the defendant.

[142] I prefer Mr McDougall's opinion that there was the "significant potential for large compression loading in the spine or jarring, if landing with legs straight" inherent in the plaintiff's method of exit from the truck - a conclusion which, as Mr Byard admitted, has "long been recognised".

21 August 2013 – pain after "jumping" from the truck

[143] In the lead up to 21 August 2013, one of the delivery drivers, Terry Marshall, had been off work for one and a half weeks and the plaintiff's workload increased significantly.

[144] On 21 August 2013, a Wednesday, while Mr Marshall was still away, the plaintiff drove the work ute to deliver an order to Supercheap at Oxenford (an extra duty). He then returned to the warehouse and loaded his truck for his usual delivery run. He drove to Tyreright at Varsity Lakes. He pulled up in the car park. He opened the door of the truck and exited in his "normal" fashion. As his feet hit the ground, he felt a sensation in his back which he had not previously experienced.

[145] He was thereafter unable to straighten his back. He continued with his deliveries for a little while. But an hour later, his back pain was at "10 out of 10". As well as back pain, he was suffering pain in his left leg including in his buttock and ankle.

[146] He went home. He was unable to climb onto his inversion table. By Sunday evening, he was reduced to crawling on his hands and knees, because he could not stand upright.

[147] The plaintiff went to his general practitioner, Dr Phythian, on 26 August 2013. Dr Phythian provided the plaintiff with a WorkCover medical certificate; prescribed him Panadeine Forte; and referred him for a scan and to Dr McEntee, a specialist.

Assumptions made by experts about the way in which the plaintiff exited the truck on 21 August 2013

Preliminary points

[148] This content is included because of a submission made by the plaintiff's counsel which is dealt with below.

[149] The plaintiff called Dr Scott Campbell as his expert; the defendant called Dr Robert Labrom.

[150] It is useful to compare Dr Campbell's and Dr Labrom's understanding of the plaintiff's exit from the truck immediately after the plaintiff's description of it. All of the emphases in the quotes from the doctors under this heading are mine. As the following extracts demonstrate, there was no consistency in the language used by the doctors (and to the doctors) to describe the plaintiff's descent.

Dr Campbell

[151] It is not possible to be confident that Dr Campbell understood the plaintiff to have landed with both feet on 21 August 2013.

[152] Dr Campbell's understanding (as at 8 May 2015) was that the plaintiff "*stepped* out of the cab of the work truck and dropped 50 cm and struck the ground firmly and noticed immediate onset of lower back pain and left sciatica".[92]

[153] He described his understanding of the history differently in his report of 11 May 2018, but still referred to the plaintiff's stepping out of the truck:

> Whilst working at a brisk pace he *stepped* out of the cab of a work truck and unexpectedly *dropped* 50 cm and *jarred* his torso on the ground.

[154] At trial, Dr Campbell did not refer to the plaintiff "jumping" out of the truck. He referred to the plaintiff stepping out of the truck –

- T 3 – 9, ll 32 – 34: " … some of his current problems are … due to *stepping* out of the truck …";
- T 3 – 10, ll 23 – 25: " … that has made a contribution to his overall pathology, as has *stepping* out of a truck …";
- T 3 – 11, ll 30 – 33: Dr Campbell answered, without demurrer, a question asked in cross-examination which referred to the plaintiff having "landed on the ground, or *stepped* on the ground.

Dr Labrom

[155] As at 16 April 2015, Dr Labrom understood the plaintiff to have injured himself in the following way:

> He was *moving* from a truck which involved *dropping* a distance of around 1 – 2 feet (12 – 24 inches). Upon *impacting* the ground, he felt some pain in his back and he found it difficult to straighten up.

[156] Dr Labrom was likely to have based this estimate of height on the questionnaire completed by the plaintiff on 30 April 2015.[93] Twelve to 24 inches is equal to 30.48 to 60.96 centimetres.

[157] As at 24 January 2018, Dr Labrom's understanding of the history was the same – the plaintiff dropped 1 – 2 feet while moving from the truck.[94]

[158] In the questionnaire completed by the plaintiff on that occasion (16 January 2018) the plaintiff said "I exited my truck (Izusu NPR300) and when my feet landed on the concrete I felt a sensation in my lower back and was unable to stand upright".[95]

[159] In his diary note of 11 April 2018, Dr Labrom referred to the plaintiff having "jumped" from the truck.

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92 Exhibit 1, C2 and C5.
93 Exhibit 1, F9.
94 Exhibit 1, F35.
95 Exhibit 1, F24.

[160] At trial, Dr Labrom himself used the words "stepped" or "stepping" to describe the plaintiff's exit from the truck, although he did not demur when counsel used the words "jump" or "jumped" or "jumping" –

- T 3 – 44, ll 25 – 28: [Q] " … I think you accept in this case … that what brought Mr Kelleher to surgery in November 2013 was the significant pain that he suffered after he *jumped* out of a truck …" [A] "I accept that".

- T 3 – 44, ll 35 – 36: [Q] "That the *jumping* out of the truck would have been enough to produce symptomatology in this man?" [A] "Yes. I agree with that."

- T 3 – 47, ll 38 – 39: [Q] "And the *jump* out of the truck was responsible for 50% of his condition? – That's correct.

- T 3 – 47, ll 42 – 43: [Q] "And you were really only considering those two features of his presentation at that time, being degeneration of the pre-exiting disc protrusion and the *jump* out of a truck?" [A] "No, I was considering lifting batteries at the same time".

- T 3 – 49, ll 43 – 44: " … the fact remains that he *stepped* from a truck …"

- T 3 – 49, l 47 – T 3 – 50, l 5: " … and the contribution of that single moment in time had when he *stepped* from the truck … So the sciatic component of the complaint didn't occur seemingly until Mr Kelleher *stepped* from the truck."

- T 3 – 50, ll 25 – 26: [Q] "… activities preceding … 21 August 2013 and then the *jump* from the truck separately. Is that correct? – [A] That's correct.

- T 3 – 54, l 13: " … the fact remains that he *stepped* from a truck, said that he developed sciatica …"

- T 3 - 54, l 40: "… but to the point his neuralgic pain that led him to surgery was from *stepping* from a truck that was 12 or 24 inches high …"

- T 3 – 55, l 5: "As did Mr Kelleher, when he *stepped* from the truck."

- T 3 – 35, l 34 – 35: " … there was a causation and a moment for Mr Kelleher which related to his *stepping* from the truck …"

MRI scan 4 September 2013

[161] Returning to the injury suffered by the plaintiff after the event of 21 August 2013: An MRI scan of the plaintiff's lumbar spine on 4 September 2013 revealed a left foraminal disc protrusion at L3/4 and *a large left posterior disc protrusion at L4/5, likely compromising the left L5 nerve root*. There was desiccation of the disc at L3/4. There were no abnormalities detected at L1/2, L2/3 or L5/S1.

Medical evidence from the plaintiff's treating surgeon, Dr Laurence McEntee

Initial consultation, conservative treatment, surgery 11 November 2013

[162] Dr McEntee is an orthopaedic surgeon, specialising in spinal surgery. When the plaintiff first saw him, on 17 September 2013, his symptoms were "severe".[96] He was unable to stand upright because of severe muscle spasm and sciatic list to the left hand side.[97]

[163] On 19 September 2013, in correspondence with WorkCover, Dr McEntee diagnosed, as the work related condition, an L4/5 left *paracentral* disc protrusion compressing the L5 nerve root. He said that it was likely that the plaintiff had some underlying lumbar spondylosis, and likely that the L4/5 disc protrusion was an aggravation of an underlying degenerative disease at that level.

[164] Conservative treatments failed to provide the plaintiff with relief.

[165] On 11 November 2013, Dr McEntee performed a discectomy on the plaintiff during which he removed the "fairly large disc protrusion that *started centrally and extended more to the left-hand side*". (my emphasis)

[166] He also removed the lamina above and below the level of the L4/L5 disc.[98] WorkCover funded this surgery.

[167] In cross-examination, Dr McEntee confirmed that an intervertebral disc consists of a fibrous outer ring called the annulus fibrosus, surrounding "spongy liquidy sort of stuff in the middle called a nucleus pulposus". When the disc herniates, a tear or defect in the outer ring allows the nuclear material to "escape", either completely, or to the extent to which it causes a bulge, which may also be called a protrusion.[99] The material which escapes the annular ring "fill[s] up space" and puts pressure on adjacent nerves.

The operation and its immediate aftermath

[168] The plaintiff was in hospital for four days after surgery (on pain killers) and then he went home. He continued to take pain killers for his first week at home but did not need them in the second week. He thought the operation had been quite successful. All of his left-sided symptoms were gone.

[169] In a letter to WorkCover dated 28 November 2013, Dr McEntee described the surgery as "successful". There had been resolution of the plaintiff's left-sided sciatica. Dr McEntee thought then that, while the plaintiff should avoid prolonged sitting, heavy lifting, bending or twisting for six weeks post-surgery, at six weeks post-surgery, he could return to his normal duties at work. Dr McEntee was aware that the plaintiff's work involved "a lot of heavy lifting and twisting in the delivery of batteries".[100]

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[96] Exhibit 1, page A1.
[97] Exhibit 1, page A3.
[98] Transcript 2-39 – 2-40.
[99] Transcript 2-44. I note Dr Labrom's comments about the difference between a bulge and a protrusion.
[100] Exhibit 1, page A10.

Pain at about three/four weeks after surgery

[170] The plaintiff started physiotherapy in the third week after surgery. He began to notice pain at the top of his right buttock, which had not been there before surgery or in 2011.

[171] The plaintiff told Dr McEntee about his new symptoms. Dr McEntee told the plaintiff to wait three months for further review.

[172] Dr McEntee saw the plaintiff on 9 January 2014. The plaintiff had been experiencing pain and tightness in his right buttock and numbness on the outside of this right thigh for a few weeks.[101] In a letter to the plaintiff's general practitioner, Dr McEntee said, about this pain:

> Overall he is doing alright; however he has noticed, interestingly just over the last few weeks, some pain and tightness in the right buttock and numbness on the outside of the right thigh if he sits in a chair for any length of time. All his left-sided symptoms which are what he presented with pre-operatively have resolved and he doesn't have much in the way of back pain.
>
> It may be that Jason is getting some instability at the L4/5 disc post the discectomy and just irritating the right L4 nerve root which exits at that level and potentially some ongoing irritation at the right L5 nerve root *which was damaged on EMG testing prior to surgery despite him predominantly having left-sided symptoms.* (my emphasis)

[173] The reference to evidence of damage to the *right* L5 nerve root revealed during the nerve conduction study prior to surgery might have been of significance but it was not raised with any of the doctors. I sought written submissions from the parties about this evidence.

Repeat MRI 28 February 2014

[174] Dr McEntee arranged for an MRI on 28 February 2014.

[175] The report of the MRI[102] states that the "Indication" for it was –

> Post L4/5 discectomy on the left side for left-sided sciatica. Now increasing symptoms *in the L5 distribution*. Exclude recurrent disc herniation on the right. (my emphasis)

[176] In its "Findings" it states –

> At the L4/5 level there is loss of disc signal and disc height. There is a broadbased central and left central posterior disc protrusion and there is evidence of a previous left-sided laminectomy. There is some peri-dural fibrosis within the left subarticular recess and laminectomy defect and the left L5 nerve root is mildly posteriorly displaced and appears compressed. *The right L5 nerve root is also compressed within the right subarticular recess by the disc protrusion*. There is mild to moderate right L4/5 foraminal narrowing due to the broadbased disc protrusion and facet joint degenerative change and

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[101] Exhibit 16.
[102] Exhibit 17.

> loss of disc height. There is no significant left-sided L4/5 foraminal stenosis. (my emphasis)

[177] The report interprets the relevant part of the scan in this way:

> At the L4/5 level there has been a previous left-sided laminectomy and there is a residual/recurrent *central and left central posterior disc protrusion which is narrowing both subarticular recesses and displacing and compressing both L5 nerve root*s. There is also mild to moderate right L4/5 foraminal narrowing due to the disc protrusion, facet joint degenerative change and loss of disc height with potential irritation of the right L4 nerve root in the foramen. (my emphasis)

[178] Thus, the MRI revealed a broadbased and left central posterior disc protrusion as well as compression of the right L5 nerve root by the disc protrusion.

The plaintiff's ongoing symptoms and Dr McEntee's attempts to resolve them

[179] Dr McEntee wrote to WorkCover on 7 March 2014, informing it of the results of the MRI and seeking approval for a CT guided right L5 nerve root local anaesthetic and steroid injection to help reduce or resolve the plaintiff's right leg symptoms.

[180] Dr McEntee made a second request for approval for the injection in a letter to WorkCover dated 17 March 2014. In that letter, Dr McEntee referred to the recurrent disc protrusion at the L4/5 level, "with *ongoing progression of the left L5 nerve root* but *also* compression of both the right L4 and L5 nerve roots".[103] (my emphasis)

[181] A guided nerve block did not relieve the plaintiff's symptoms.

[182] On 29 May 2014, Dr McEntee sought approval from WorkCover for further surgery: a L4/5 laminectomy and a revision discectomy, to treat a "complication of his original surgery".[104]

[183] WorkCover would not fund the second operation on the basis that the symptoms it was intended to resolve related to the plaintiff's underlying condition.

[184] Dr McEntee did not agree that the plaintiff's incapacity, related to "an underlying condition".[105] He explained (in a letter dated 17 June 2014):[106]

> If Mr Kelleher develops a recurrent disc herniation many months to years after the initial operation it could be considered related to the underlying condition. However, an early *recurrent disc herniation* in the first few weeks to months after the surgery more probably than not relates to the initial surgery rather than to the underlying ongoing degeneration of the disc. The annulus was incised to remove the disc protrusion at the time of the index surgery and *it is well known that there is a rate of recurrent disc herniation post such a procedure which, in the literature, ranges anywhere between 5 and 15%*. (my emphasis)

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[103] Exhibit 1, page A12.
[104] Exhibit 1, page A15, also 2-41.
[105] Exhibit 1, page A16.
[106] Exhibit 1, page A16.

Cause of right-sided symptoms

[185] Under cross-examination, Dr McEntee agreed that the scan of 28 February 2014 showed foraminal stenosis at L4/5, bilateral but more on the right, that had been there since (at least) the CT scan of 14 September 2011.[107] However in Dr McEntee's opinion, the foraminal stenosis was not causing the plaintiff's right-sided symptoms.

[186] He agreed that the right-sided symptoms could have been caused by any of the following possibilities: [108]

- re-extrusion or continued extrusion of the nuclear material;
- the normal progression of degenerative change;
- surgery might have destabilised the right side of the disc and caused a pre-existing bulge to increase in pressure; or
- disc space collapse.

[187] Dr McEntee considered the plaintiff's right-sided pain to have been caused by the re-extrusion or continued extrusion of the nuclear material, which jammed and compressed the nerve root.[109]

[188] He disagreed with Dr Labrom's opinion that the right-sided symptoms were caused by the further collapse of the disc.

[189] Dr McEntee considered the plaintiff's right-sided pain to be a consequence of, or related to, surgery. He said:[110]:

> I disagree with Dr Labrom's opinion that the onset of Mr Kelleher's right-sided symptoms was unrelated to the surgery. As discussed above, the timing of the recurrent disc protrusion, very early after performance of discectomy, is an important consideration. I also consider that the nature of Mr Kelleher's initial disc protrusion, being a *central disc protrusion rather than a one-sided lateral protrusion, is more likely to produce right-sided sciatic symptoms following decompression of the left nerve root*.
>
> I have reviewed the repeat MRI that was performed subsequent to Mr Kelleher's discectomy. The MRI demonstrates that the disc protrusion *recurred over substantially the same area as the first protrusion, on both the left and right sides. In fact, it was again predominantly on the left side.* However the nerve root on the left was not compressed because space had been cleared around it during the discectomy. The nerve root on the right was "jammed" and compressed by the disc protrusion because there was no space on the right side. For that reason, Mr Kelleher experienced right-sided sciatic symptoms as a result of the recurrent disc protrusion, but not left-sided sciatic symptoms. (my emphasis)

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[107] Transcript 2-45.
[108] Transcript 2-47 – 2.48.
[109] Transcript 2-48 – 2-49.
[110] In a conversation with the plaintiff's counsel on 1 June 2018, which was reduced to a file note: Exhibit 18.

[190] Dr McEntee's file note of 4 June 2018 dealt further with Dr Labrom's opinion.[111] Dr McEntee said there was no doubt that there was a recurrent protrusion after surgery (as well as a degree of post-surgical collapse in disc height), which was causing nerve compression of the right-sided traversing nerve at L5. There was no definite compression of the exiting nerve at L4. A recurrent herniation was a known complication of the surgery. If it had caused left-sided symptoms, there would be no doubt about its relationship with the surgery. The disc bulge was across the midline of the disc and over to the right. Within weeks of surgery it had extended on the right and started to compress the right nerve. He concluded, "I am not saying that I operated on the right side, but I operated on the left side and towards the midline, and in my opinion, that contributed to the bulge re-herniating towards the right when it recurred".[112]

Expert medical evidence (plaintiff): Dr Scott Campbell

Report May 2015

[191] Dr Campbell, a neurosurgeon, was called by the plaintiff.

[192] He saw the plaintiff on 8 May 2015. The plaintiff was distressed at that time. His gait was slow and cautious and he walked with a limp. He sat awkwardly and in discomfort during the interview and had difficulty getting in and out of the examination chair.[113]

[193] The plaintiff's history as recorded by Dr Campbell in his report dated 8 May 2015[114] included that he –[115]

- lifted stock weighing 8 – 40 kilograms, without a trolley, repetitively bending, reaching, twisting and lifting throughout his shift;
- took on extra physical duties from August 2013; and
- on 21 August 2013, "he stepped out of [the] cab of the work truck and dropped 50 cm and struck the ground firmly and noted immediate onset of lower back pain and left sciatica".

[194] Obviously, the weight of any expert's opinion varies in accordance with the accuracy of the assumptions upon which it is based. Dr Campbell was provided with more detailed information at a later stage.

[195] Dr Campbell described the plaintiff's injury as having occurred "over a period of time from 03 January 2012 through to 21 August 2013"[116] including, therefore, as a contributor to the injury, the plaintiff's manual handling of batteries during that time. He said: "It is likely the repetitive manual handling tasks performed at work in the months prior contributed to the injury".[117]

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[111] Exhibit 19.
[112] Exhibit 19.
[113] Exhibit 1, C4.
[114] In his May 2015 report, Dr Campbell referred to the plaintiff's 2011 injury as having been sustained whilst moving furniture (under "Past Medical History"): Exhibit 1, page C3. More accurately, it emerged a short time after he moved from NSW to Qld, which involved his moving his furniture and effects and a 10 hour car trip.
[115] Exhibit 1, C2.
[116] Exhibit 1, C2.
[117] Exhibit 1, C5.

[196] Dr Campbell was of the view that the plaintiff was suffering a 13% whole person impairment: 60% of which was attributable to his pre-existing pathology (the large left L4/5 disc protrusion revealed by the CT scan in 2011) and 40% (5.2% whole person) to the "subject accident".[118]

[197] In a letter dated 15 February 2016, Dr Campbell replied to a question from the plaintiff's lawyers about whether the plaintiff would have "likely remained in his pre-accident medical condition indefinitely but for the work duties as described in the letter of instruction". The letter of instruction is not in evidence, but Dr Campbell replied:[119]

> Had the subject work injury not occurred it is likely that Mr Kelleher's previous lower back complaint would have resulted in intermittent ongoing lower back pain over the years resulting in the occasional day or week off work. It is likely, however, that he would have been able to continue working and performing his activities of daily living had the subject work injury not occurred and if he was *not further exposed to repetitive manual handling tasks*. (my emphasis).

[198] Dr Campbell clarified in re-examination that he meant that the plaintiff would be able to work with "safe" manual handling practices. He said that the plaintiff was likely to have had ongoing problems, but they would have been less severe. He might have required the occasional day or week off work, but it was unlikely that he would have been taken out of the workforce.[120]

Report May 2016

[199] In May 2016, the plaintiff's lawyers provided Dr Campbell with more information about the plaintiff's manual handling. It is of concern that the information provided to Dr Campbell overstated the difficulty of the plaintiff's manual handling tasks.

[200] Dr Campbell was told that the plaintiff lifted, on average 93 batteries a day, weighing between 10 and 65 kilograms.

[201] Mr Byard's analysis of a sample fortnight of the plaintiff's work established that the plaintiff indeed lifted 93 batteries a day (on average) but the weight range for that sample period was between 1 kilogram and 52 kilograms – not between 10 and 65 kilograms.

[202] Also, Dr Campbell should have been told that –[121]

- the average weight of the batteries was 13.8 kilograms;
- about 2% weighed between 28 and 52 kilograms;
- about 13.5% weighed more than 20 kilograms; and
- about 86.5% weighed 20 kilograms or less.

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[118] Exhibit 1, C6.
[119] Exhibit 1, C11.
[120] Transcript 3-19, ll 24 – 32. This explanation was in similar terms to the opinion expressed in his written report of May 2018.
[121] Exhibit 2, page 33. Several of the following calculations are mine. Also, the total number of batteries lifted in that fortnight was 926, not 929 (as calculated by Mr Byard).

[203] Dr Campbell was told that the batteries had to be carried "up to 30 metres up inclines, up/down stairs and lifted to above shoulder height or placed on low shelving". In my view, it was misleading to present the facts in that way to Dr Campbell, implying that 30 metre distances, inclines and stairs were commonplace.

[204] Mr Byard's report reveals that, of the plaintiff's 27 customers, delivery to only *one* involved a carrying distance of 30 metres (Hinterland Toyota Nerang).[122] Delivery to four customers involved no carrying distance; and the average carrying distance was (on my calculations) 15 metres.

[205] The plaintiff was required to negotiate "steps" for *one* customer only (Hinterland Toyota Nerang)[123] and those steps were a "curbed gutter to step up and then also another step into the workshop then walk 30 metres to deliver the batters to Craig in the parts department".[124]

[206] I acknowledge that for deliveries to a few customers, the plaintiff had to step up a gutter but I consider the suggestion that he was required to deliver batteries "up/down stairs" to be misleading.

[207] Also, there was only *one* "incline" down which the plaintiff was required to carry batteries (at Bob Jane Beenleigh).[125]

[208] I note also that Dr Campbell was told in 2015 that the plaintiff did not use a trolley to lift the batteries. That is not accurate. The plaintiff used a trolley (and forklift if required) as he 'picked' items from the warehouse to put on his truck for his deliveries.[126] Battery World Beenleigh, Battery World Southport, and Super Cheap had a trolley available for his use onto which he was able to unload his batteries.[127] A Coles' trolley was available at Sunshine Ford Southport.[128] I acknowledge that the majority of the plaintiff's lifting was done without a trolley (or any other assistance) but Dr Campbell's understanding of the plaintiff's use of a trolley to pick or deliver batteries should have been clarified.

[209] Also, there was no evidence about the mix of batteries delivered to those customers who did provide trolleys for the plaintiff's use. It may have been that trolleys were provided by customers who ordered the batteries weighing more than 20 kilograms but there was no evidence one way or another about that.

[210] Notwithstanding the overstatement in the detail provided to him, Dr Campbell remained of the opinion that 40% of the plaintiff's impairment was due to the nature of his work between 3 January 2012 and 21 August 2013. He said:[129]

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[122] Exhibit 2, page 34.
[123] Exhibit 20; Exhibit 2, page 34. Also the delivery destination at which the plaintiff was required to carry batteries 30 metres
[124] Exhibit 21.
[125] Exhibit 20.
[126] Transcript 1 – 61, ll 39 – 49; Transcript 1 – 63, ll 15 – 25.
[127] Transcript 1 – 65, ll 10 – 45; Transcript 1 – 67, although the effect of the plaintiff's evidence seems to be that Supercheap was not on his delivery run, although Supercheap Auto at Mermaid and Bundall appear on his run sheet (see page 32 of Exhibit 2).
[128] Exhibit 2, page 34, exhibit 20, exhibit 21.
[129] Exhibit 1, C13.

> [I]t would appear that the re-injury to the lumbar spine injury occurred throughout this period. There were specific aggravations occurring in June or July 2013 and on 21 August 2013. Also Mr Kelleher's workload increased between 24 June 2013 to 5 July 2013 which may suggest a higher proportion of the injury occurred during this period.

[211] There was no evidence that the plaintiff's workload increased between 24 June 2013 to 5 July 2013, although there was evidence that it increased when Mr Marshall was away, before 21 August 2013. That date range (24 June 2013 to 5 July 2013) is the period relied upon by Mr Byard as the sample period for his calculations about the labour of the plaintiff's manual handling.

Report May 2018

[212] Elements of haste and unexpectedness appear in Dr Campbell's description of the plaintiff's exit from the truck in his report to the plaintiff's lawyers dated 11 May 2018. He wrote:[130]

> *Whilst working at a brisk pace* he stepped out of the cab of a work truck and *unexpectedly* dropped 50 cm and jarred his torso on the ground. He noted immediate onset of lower back pain and left sciatica. The lower back pain was an aggravation of a pre-existing complaint. (my emphasis)

[213] Dr Campbell recorded the plaintiff's then current symptoms (this was after the Uplift program – see below) as persisting lower back pain and right buttock pain, with no true sciatica. His symptoms were aggravated by prolonged sitting and heavy lifting or bending.[131]

[214] The plaintiff told Dr Campbell that he was not then looking for work but was hopeful of finding suitable employment in the future. He was hopeful of working in an administrative position, 20 hours a week, if his lower back improved.[132]

[215] Dr Campbell thought the plaintiff was likely to have jarred his torso due to his "sudden and unexpected" drop while exiting the truck on 21 August 2013, causing his severe symptoms.[133] Dr Campbell was mistaken about the drop being "sudden and unexpected". The plaintiff's evidence was that his "drop" from the truck on 21 August 2013 was routine. Indeed, it was opened as his "usual method". No doctor was asked about the contribution of the plaintiff's repeated "drops" from the truck to his injury.

[216] As to the relevance of the plaintiff's manual handling tasks, in Dr Campbell's opinion, the plaintiff's – [134]

> … performing repetitive manual handling tasks at work has predisposed him to the onset of symptoms on 21 August 2013 when he developed sudden onset of lower back pain and left sciatica.

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[130] Exhibit 1, C17.
[131] Exhibit 1, C17.
[132] Exhibit 1, C17.
[133] Exhibit 1, C22.
[134] Exhibit 1, C18 – C19.

As stated in my previous reports, pre-existing pathology also played a significant role.

[217] A little later in that same report, Dr Campbell answered questions from the plaintiff's solicitor as follows:

> **2. Given your view that the earlier disc protrusion rendered Mr Kelleher vulnerable to re-injury, was he at particular risk if he was subjected to excessive manual handling demands or jarring forces[?];**
>
> Yes, for Mr Kelleher to reduce his chance of recurrent symptoms he would have been better suited to performing light duties or sedentary type work. The type of work he was performing at the time of re-injury was unsuitable and exposed him to much higher risk of injury than the general population.

[218] I understand by that answer that Dr Campbell was of the opinion that the plaintiff was less suited to delivery work than others within the general population – regardless of his exposure to "excessive manual handling demands or jarring forces". This is consistent with Dr Campbell's answer to a question under cross-examination, that having seen the CT scan of 14 September 2011, heavy manual work was contraindicated for the plaintiff.

[219] The questions continued:

> **3. In your view, is it probable that the symptoms Mr Kelleher describes of "flare-ups" in back pain, over the course of his employment with J & A Accessories, were caused by the excessive manual handling he says he was required to perform [?];**
>
> Yes, the excessive lifting and bending he was exposed to has pre-disposed him to injury.
>
> **4. In a work environment in which Mr Kelleher was not required to perform excessive manual handling (such as not lifting batteries weighing more than 20 kg without assistance) do you consider it likely that he would have been likely to be capable of continuing to work [?];**
>
> Yes this is likely *although with a past history of lower back pain* it is likely he would have suffered ongoing exacerbations of lower back pain in the future which may have resulted in the occasional day or week off work. Nonetheless, he should have been able to continue working within that vocation indefinitely *if not exposed to heavy lifting and bending*. (my emphasis)
>
> **5. What was the likely relationship between the excessive manual handling over the period of time (increasing during the month of August) and the episode on 21 August 2013 when Mr Kelleher alighted from his truck[?];**
>
> The excessive manual handling over a period of time pre-disposed Mr Kelleher to the incident when he exited the work truck on 21 August 2013. Both events have contributed to the recurrence of lower back symptoms.

[220] The weight and utility (to the plaintiff) of Dr Campbell's answers to questions 4 and 5 would have been increased had they been premised upon an accurate understanding of the evidence.

[221] For example, while it seems that Dr Campbell understood excessive manual handling to be manual handling that involved the unassisted lifting of weights of more than 20 kilograms and bending, he had no information about the percentage of the plaintiff's labour that involved his carrying weights of more than 20 kilograms without assistance. I note in this context that, in the sample order relied upon by Mr Byard, on 3 July 2013, five of the 16 batteries delivered to Battery World at Southport weighed over 20 kilograms, however – [135]

- Battery World made a trolley available to the plaintiff; and
- the manager of Battery World helped the plaintiff to unload "about 50 per cent of the time" (although not by way of a two-person lift).[136]

[222] It is, of course, important to interpret the evidence fairly and with reasonable expectations about its exactitude. It may be that more accurate detail would not have changed Dr Campbell's opinion. On the other hand, it is not unreasonable to assume that, for example, the proportion of the plaintiff's workload which involved his lifting, unassisted, weights of over 20 kilograms would have some bearing upon an expert's opinion about the relationship between his manual handling tasks and the injury.

[223] It is also not clear whether, even if the plaintiff handled all of the batteries 'safely', he would nonetheless have been predisposed to the injury he suffered on 21 August 2013 because of his pre-existing condition.

[224] Under cross-examination, Dr Campbell agreed that, having seen the CT scan of 14 September 2011, heavy manual work was contraindicated for the plaintiff (as noted above). He explained that while outcomes fell on a spectrum, the vast majority of workers with a back condition similar to the plaintiff's (as at September 2011), who returned to heavy manual work, were likely to fail. He advised his patients to exercise other options if they had them.[137] He agreed that there was a likelihood that the plaintiff would have experienced symptoms in the future were he to work in a *physically demanding job*. The re-emergence of symptoms was less likely were he to undertake "light duties".[138] One inference which might be drawn from this answer is that Dr Campbell meant heavy manual work (i.e. physically demanding work) however carried out.

[225] As had been his opinion in 2015, Dr Campbell considered the plaintiff to have suffered a 13% whole person impairment. Sixty percent of that 13% was attributable to his pre-existing pathology: and the "accident" caused a 5.2% whole person impairment (that is 40% of the 13%).[139]

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[135] Exhibit 2, page 10.
[136] Transcript 1 – 65, ll 25 – 45.
[137] Transcript 3-4.
[138] Transcript 3-7.
[139] Exhibit 1, C6.

[226] Dr Campbell agreed that Dr Labrom's view was "open" – namely, that while the plaintiff's delivery work/manual labour at J & A might have produced temporary symptoms, it did not affect the natural history of the plaintiff's long term condition.[140]

[227] Dr Campbell accepted that the plaintiff's "descent" from the truck was "of itself" enough to produce the onset of sciatica because of the compressive force on the "defective" L4/5 disc – adding that "with a pre-existing injury in 2011 … he would be potentially susceptible to further injury from that event".[141]

[228] As at May 2018, Dr Campbell considered that there was a "small chance" that the plaintiff's condition could deteriorate with time "but an equally small chance his condition could improve".[142]

Note June 2018

[229] In his diary note of 4 June 2018,[143] Dr Campbell said that, after the pain of the disc protrusion of 2011 resolved, the plaintiff was "likely to fall into the category of patients who have intermittent aggravations of pain from time to time, but provided he did not perform activities that put an excessive force on his spine, he had a good prognosis to work until normal retirement age".

Cause of the right-sided symptoms after surgery

[230] As to the cause of the plaintiff's right-sided symptoms after surgery, the effect of Dr Campbell's evidence was that there were several potential causes for it and he could not identify the actual cause. In his opinion though, the most likely cause was the surgery and the least likely, the progression of degenerative change.

[231] In his report of 11 May 2018, when commenting on Dr McEntee's opinion that the post-operative sciatica was caused by "a progression of the protrusion to involve the right nerve root, that being a known surgical complication", Dr Campbell said:

> From time to time patients undergoing discectomy surgery on one side will awake or develop sciatica on the other side for unspecified reasons. It is possible that the disc protrusion eventually irritated the right L5 nerve root but this would not be supported by the MR scan findings. Nonetheless it remains a possibility.

[232] That opinion, which conceded that a surgical connection to the plaintiff's symptoms was a "possibility", is less strongly expressed than Dr Campbell's opinion in his diary note of 4 June 2018: [144]

> I remain of the view that it is *much more likely* that Mr Kelleher's right-sided sciatica, first experienced approximately three weeks after discectomy, was a result of the surgery. Mr Kelleher may have had those right-sided symptoms earlier than that, but they may have been masked by post-operative painkillers and inactivity.

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[140] Transcript 3-7, ll 35 – 45.
[141] Transcript 3-11, ll 22 – 35.
[142] Exhibit 1, C20.
[143] Exhibit 24.
[144] Exhibit 24.

> The onset of opposite-side sciatica is a known occurrence after discectomy. It is not common but I would estimate the prevalence at about 2% to 5% of the patients I have encountered after my own and other's surgeries.
>
> The cause is not always known. There are a number of possibilities:
>
> > (a) nerve damage during surgery, perhaps if the nerve is bruised with the right jaw of an instrument;
> >
> > (b) the discectomy destabilises the right side of the disc and causes a pre-existing disc bulge to increase in pressure;
> >
> > (c) the disc space can collapse because surgery narrows the height of the exit foramina, causing the onset of sciatica;
> >
> > (d) normal progression of degenerative change;
> >
> > (e) another possibility is conversion disorder, which is a psychiatric condition rather than an organic cause.
>
> Of these possibilities, I consider the least likely in Mr Kelleher's case is the progression of degenerative change.

[233] He elaborated upon the reasons why he reached that conclusion by explaining that –

- the pre-operative MRI (4 September 2013) showed degenerative changes at several levels of the plaintiff's spine, with loss of disc height at L3/4, L4/5 and L5/S1; the post-operative MRI (28 February 2014) showed no significant loss of disc height at L3/4 and L5/S1 but marked loss of disc height at L4/5, which was consistent with the surgery;
- the rapid onset of the right-sided symptoms was not consistent with symptoms caused by degenerative change, which tended to have a more gradual onset;
- the timing of the onset – close to surgery, and before the plaintiff had resumed physical activities, suggested that the symptoms were not the product of degenerative change; and
- although the plaintiff had degeneration in his lumbar spine, that did not necessarily correlate with pain.

[234] It was put to Dr Campbell in cross-examination that his "theory" was that the extruded nuclear material pressed on the right L5 nerve root – causing the right-sided sciatica post operatively.[145] He replied:

> I didn't have a theory. I just had seven – eight options as to what the cause[s] were. So I don't know why he developed a right sciatica. So I just had several causes listed that appeared to be related to undergoing the operation.
>
> …
>
> All I know is that in my patients and in other patients I've seen, it is a finding that occurs where you operate on one side and get [indistinct] they complain of leg pain on the other side. So it does occur [indistinct] patients the cause is usually undetermined but it does, it is a finding in the post-operative period.

[145] Transcript 3 – 14, ll 33 – 45; 3-15.

[235] A little later in cross-examination, the following exchange occurred:

> … it's just a question of the various possibilities; is that right? – That's correct, yes.
>
> Yes? – There's no obvious right – new right-sided disc protrusion to support that theory but there was a bit of a bulge there and sometimes even a subtle change that won't show on MR may be enough to tip the nerve over the edge.
>
> When you say there was a bulge there, even a subtle bulge, that was back in 2011? – That's correct, yes. So, obviously the nerve – you could argue that the nerve was co-existing on the right side despite the bulge there. But surgery has just subtly tipped it over the edge. I'm not saying for one second that's what happened, but that is a possibility.

Expert medical evidence (defendant): Dr Robert Labrom

Introduction

[236] The defendant relied on Dr Labrom, a neurosurgeon whose qualifications included a Master of Science in Spine Biomechanics. Dr Labrom provided two reports: one dated 16 April 2015 and the other 24 January 2018.

Report 2015: preliminary points – factual errors

[237] There are factual errors in in Dr Labrom's first report of 16 April 2015.

[238] Under the heading "Summary of Other Opinions", Dr Labrom claimed that Dr McEntee stated in his report of 19 September 2013 that the plaintiff's "alleged injury", "on or around 21 August 2013" related to the plaintiff's "lifting furniture from a truck over a period of time, developing significant back pain".[146] Dr McEntee did not say that.[147] I acknowledge, however, that Dr Labrom took a history from the plaintiff and that this mistake, of itself, is of no consequence. However it is one of a number of instances of Dr Labrom's misinterpreting the history given to him in this case.

[239] Of particular significance is Dr Labrom's erroneous statement, under the heading "Treatment and Progress", that the plaintiff had "more recently" complained of right-sided buttock and lateral thigh pain.[148]

[240] The plaintiff's complaint of right-sided pain was first *recorded* on 9 January 2014 in a letter from Dr McEntee to the plaintiff's GP. This letter was not provided to Dr Labrom. However, he was provided with Dr McEntee's report of 7 March 2014, which referred to the plaintiff's complaints of right-sided pain. Obviously, that report was written more than a year before Dr Labrom saw the plaintiff. The plaintiff's complaints of right-sided pain referred to it in were not complaints "recent" to April 2015.

[241] Also, there is no reference in the 2015 report to the plaintiff's experience of back pain and leg pain at work prior to 21 August 2013.

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[146] Exhibit 1, F2.

[147] In his report of 19 September 2013, Dr McEntee referred to the plaintiff's "history of injuring his back two years ago moving furniture"; his symptoms settling and his beginning work in his "current job".

[148] Exhibit 1, F3.

Report April 2015

[242] In his report of 16 April 2015, Dr Labrom described the plaintiff's pre-existing condition as a "probable" left-sided L4/5 disc protrusion. He also referred to his longstanding degenerative change at L4/5 and multilevel spondylosis or degeneration, particularly at L3/4.[149]

[243] Of the injury sustained by the plaintiff in the course of his employment Dr Labrom said:[150]

> It is probable that Mr Kelleher has exacerbated his pre-existing L4/5 disc protrusion of the left side when compressing his lumbar spine when moving from a truck on or around 21 August 2013. After a period of non-surgical management, Mr Kelleher has undergone a left-sided L4/5 discectomy approach surgery to decompress the left L5 nerve root with relatively complete resolution of his left-sided leg symptoms that were suffered pre-surgery.
>
> However, he has ongoing back pain and pain on the right buttock region, right posterior thigh and lateral thigh on the right side. His symptoms now would more reflect his pre-existing spondylosis in the lumbar region, particularly with right-sided symptoms noted, quite different to the symptoms described pre-surgery, which included left-sided symptoms.

[244] In response to a question about the causes of the plaintiff's current symptoms, Dr Labrom said:

> … [H]is symptoms should now be seen as a combination of symptoms which relate to various pathologies and events. The surgically successful L4/5 left-sided decompression operation of the 11 (sic) November 2013 has resolved his referred left-sided leg symptoms. His ongoing back pain, in my opinion, now relates *in part* to his multilevel degenerate change at the L3/4 and L4/5 levels particularly and his *new* right-sided buttock pain and right-sided lower leg symptoms are in no way related to the event of *21 August 2013*. (my emphasis)

[245] Two things may be noted about the content of this opinion, namely –

- the distinction drawn by Dr Labrom between the plaintiff's *back* pain and his *leg/buttock* symptoms; and
- the erroneous reference to the plaintiff's "new" right-sided buttock pain and right-sided lower leg symptoms. Indeed, it is reasonable to infer that Dr Labrom referred to the date of the workplace event to emphasise the period of time between it and the "new" (as he incorrectly understood things) right-sided symptoms.

[246] He apportioned the cause of the plaintiff's symptoms as follows:[151]

> (a) Jumping from a truck on 21 August 2013 – 50%
>
> (b) Lifting batteries from January 2012 to August 2013 – 0%

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[149] Exhibit 1, F5.
[150] Exhibit 1, F5 – F6.
[151] Exhibit 1, F6.

(c) pre-existing condition – 50%

(d) any other matters – not applicable.

[247] Dr Labrom evaluated the plaintiff's whole person impairment at "no more than 10%". He was "best defined" using a DRE Lumbar Category III (10 – 13%), and at the lower end of that range. Dr Labrom nominated the same contributions to the plaintiff's whole person impairment.[152]

[248] Thus, while Dr Campbell and Dr Labrom had different opinions about the causes of the plaintiff's symptoms their apportionments (at this stage) were similar. Indeed, Dr Labrom's apportionment was more favourable to the plaintiff than Dr Campbell's 60% (pre-existing): 40% (nature of work).

[249] Dr Labrom considered the plaintiff's prognosis to be reasonable from a physical perspective were he to reduce his alcohol consumption and engage in physical therapies, muscular strengthening and aerobic activity.[153]

[250] In Dr Labrom's opinion, the plaintiff could return to work. Suitable activities would include those which involved sitting and standing. With appropriate work hardening and muscle strengthening, he could work as a driver. He would need to avoid excessive lifting and twisting and working in confined spaces. From a physical perspective, it was possible for the plaintiff to work until retirement age but his mental health and alcohol intake reduced his capacity to work on a "social, psychological and motivational level".

[251] Dr Labrom also said:[154]

> Importantly, the physical contribution of his workplace event and potential injury from 21 August 2013 has resolved well with complete resolution of his referred *left-sided L5 nerve root symptoms*. His *ongoing low grade back pain* and right-sided buttock and lateral thigh pain *remain separate* to his workplace event and *more relate* to his multilevel spondylosis.
>
> He does have some *low grade back pain clearly related to a surgical intervention* which would be fairly attributable to the likely worsening of his symptoms secondary to his left-sided L4/5 disc protrusion, which was pre-existing in relationship to the 21 August 2013 (sic), though apparently asymptomatic … (my emphasis)

Report January 2018: preliminary points – factual errors

[252] Before re-assessing the plaintiff in January 2018, Dr Labrom was provided with a letter of instruction, which asked him to respond to questions about the plaintiff's manual handling at work and the relationship between his injury and Dr McEntee's surgery.[155]

[253] In the letter of instruction, Dr Labrom was given more information about the plaintiff's lifting during his employment and his complaints to his employer about back pain.[156] However, the letter of instruction did not refer to the plaintiff's descriptions of buttock

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[152] Exhibit 1, F6 – F7.
[153] Exhibit 1, F7.
[154] Exhibit 1, F7 – F8.
[155] Exhibit 1, F18 – F22.
[156] Exhibit 1, F20 – F21.

and leg pain, associated with his complaints of back pain. Nor was the associated pain referred to in any of the other materials provided to Dr Labrom.[157] Dr Labrom confirmed in cross-examination that he (originally) did not understand there to have been leg pain associated with the back pain the plaintiff suffered at work before 21 August 2013.

[254] The letter of instruction informed Dr Labrom that the plaintiff saw Dr Coliat on 12 September 2012 and told her that "11 years ago he had muscle cramps in his lower back".[158]

[255] Dr Labrom misunderstood this aspect of the plaintiff's history. Under the heading "Summary of Other Opinions" he said:[159]

> *Very importantly*, records from 12 September 2011 have Mr Kelleher attending the general practice of Dr Maria Coliat. Records confirm that Mr Kelleher complained of a 10 hour drive from New South Wales to the Gold Coast for a holiday. It is also recorded that Mr Kelleher had performed some landscaping work for his brother-in-law. A 3 week history of left-sided buttock and leg pain on the left side was also described in the records and the records *also confirm 11 years of muscle cramping in the lower back as a significant pre-existing history, in my opinion.* (my emphasis)

[256] The plaintiff had not suffered muscle cramping for 11 years.

[257] Later in his report, under the heading "Past History with respect to Claim", Dr Labrom repeated this mistake. It is apparent from the following statement that his error influenced his understanding of the extent of the plaintiff's pre-existing condition :[160]

> I would suggest that this fellow has had a very significant history of low back pain. Reports from 2011 suggest episodes of back pain, buttock pain, and *muscular cramping in the back over many years*.

[258] In cross-examination, Dr Labrom reinforced the significance of (his misunderstanding of) the 11-year history of cramping to his opinion.[161]

[259] He said, in effect, that his understanding of the 11-year history of muscle cramping was reflected in his poor prognosis for the plaintiff from September 2011[162] and it was one of a number of factors, though a very important one, which led to the "readjustment" of his apportionment from 50/50 (pre-existing/jumping from truck) to one of 80/20,[163] which is discussed below.

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[157] For completeness, I note that, on the face of Dr Campbell's reports, he also did not seem to have been aware of the plaintiff's complaints of back pain and associated leg pain at work before 21 August 2013, although he was aware, from the time of his first report, that the plaintiff's work involved bending, reaching, twisting and lifting throughout the course of his shift (exhibit 1, C2) and he had been provided with some information at that time about the weights involved.

[158] Exhibit 1, F20.

[159] Exhibit 1, F34.

[160] Exhibit 1, F36.

[161] Transcript 3 – 51; 3 – 52, ll 12 – 13.

[162] Transcript 3 – 52, ll 30 – 35; and 3 – 46, ll 22 – 31.

[163] Transcript 3 – 52, ll 35 – 43.

[260] Also, while I acknowledge its minor significance, it was not quite correct for Dr Labrom to state:[164]

> The reports and records also confirm landscaping activity performed which increased his pain levels …

[261] Dr Labrom repeated the error he made in his 2015 report about the timing of the plaintiff's complaints of right-sided buttock and lateral thigh pain. Under the heading "Treatment and Progress" he said:[165]

> Mr Kelleher made good progress after his decompression surgery with complete resolution of his left-sided referred leg pain. He continues to have back pain and *more recently*, complains of right-sided buttock and lateral thigh pain. (my emphasis)

Report January 2018

[262] Dr Labrom was provided with the plaintiff's CT scan of 14 September 2011.

[263] Dr Labrom was informed that 90% of the batteries delivered by the plaintiff weighed between 650 grams and 20 kilograms; the average battery weight was 13.8 kilograms; and the plaintiff delivered 60 to 70 batteries a day.[166]

[264] Dr Labrom described that regime as "lifting batteries at such an excessive amount".

[265] Dr Labrom was asked whether there was any correlation between the plaintiff's "lifting duties" and the severe symptoms he experienced on 21 August 2013. Dr Labrom said, after repeating the weights and numbers referred to above:[167]

> … lifting batteries at such an amount and weight *would have either* further aggravated his very clearly and degenerate and bulging L4/5 disc prolapse or *conversely* one could suggest that Mr Kelleher had a very excellent capacity to perform very physical tasks and therefore stepping out of a truck onto the ground over a distance of 12 – 24 inches is *unlikely to have had a significant impact* upon his permanent aggravation of his pre-existent L4/5 protrusion. (my emphasis)

[266] Dr Labrom's statement that the plaintiff's 'step' from the cabin of the truck was unlikely to have had a significant impact on his pre-existing protrusion at L4/5 cannot be reconciled with the fact that that event caused such sciatic pain that the plaintiff required surgery to relieve it. It may be that the event did not change the anatomy of the disc protrusion ina significant way, but it produced a profound change in its symptoms.

[267] Under cross-examination, a heavier regime of lifting was suggested to Dr Labrom, in which 10% of the batteries lifted weighed between 20 and 65 kilograms and each of the

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[164] Exhibit 1, F36. In her referral of the plaintiff to the Neurosurgery Clinic at the Gold Coast Hospital on 15 September 2011, Dr Coliat said, "1/12 Pt went on a 10 hour drive from NSW to GC for a holiday. Pt has also done some landscaping work for his brother in law but claims it was nothing physically demanding". Her original records were virtually identical. (Exhibit 1, Medical Records, p 8)

[165] Exhibit 1, F35.

[166] Mr Byard calculated 93 batteries on average per day – not between 60 and 70.

[167] Exhibit 1, F39.

60 – 70 batteries were lifted at least twice. He agreed that that was "more excessive" than the regime he considered.[168]

[268] Then followed this question and answer:[169]

> And when you referred to that lifting regime that you were informed of as excessive, what you meant by that was that amount of manual handling exceeds safe lifting practices, is that correct? – No, I didn't mean that. I don't know how the batteries were expressly lifted. A 65 kilogram battery – I think a strong man could lift that. But I certainly wouldn't want to lift a 65 kilogram battery myself, let alone place that anywhere close to the right position in a car. So I'm only imagining through my understanding of biomechanics that appropriately some lifting device or a two-lift (sic) lift at minimum would be required. So I don't – I think what you're extrapolating there is I can't agree with. I think the numbers that you've quoted quantitatively are greater, but I don't know what that means exactly from a physical requirement for Mr Kelleher.

[269] He was immediately thereafter asked to assume that the plaintiff lifted the batteries "on his own". He replied that the plaintiff's efforts were "probably more impressive than excessive".[170]

[270] Dr Labrom elaborated further, after being referred to the information about the plaintiff complaining about back pain on occasions while he was working for the defendant, and prior to 21 August 2013:

> … There are lots of people who are required to perform manual handling who come home with a sore back or a sore something … But what is the important message is that Mr Kelleher was functioning at a particular level and the fact remains that he stepped from a truck and that was expressly described by Mr Kelleher to me … that would help explain why initially I was looking at trying to share apportionment between [Mr] Kelleher's very clearly defined pre-existent left-sided L4/5 disc herniation, his degeneration at L4/5 and the contribution that that single moment in time had when he stepped from the truck *… and the occasions of back pain prior to that single event – [21] August 2013 – don't include referred neuralgia. So the sciatica component of the complaint didn't occur seemingly until Mr Kelleher stepped from the truck.* (my emphasis)

[271] The part of the response which I have italicised reflects Dr Labrom's misunderstanding of the extent of the plaintiff's complaints during his manual handling activities. The plaintiff's complaints did include complaints of sciatica.

[272] In evidence, Dr Labrom said that the *absence* of complaints of sciatica was an "extremely important consideration" and a "strong part" of his "decision" that he was uncertain about the contribution of lifting batteries to the plaintiff's symptoms.[171]

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[168] Transcript 3 – 49, ll 1 – 17.
[169] Transcript 3 – 49, ll 19 – 31.
[170] Transcript 3 – 49, l 33.
[171] Transcript 3 – 50, ll 34 – 39.

[273] In the light of the new information about the plaintiff's lifting, and having considered the reports of Dr Campbell, Dr Labrom remained of the view that the plaintiff had suffered a 10% whole person impairment. However, he reconsidered "the split". He said:[172]

> … the 50% impairment split that I have suggested might be better weighed more heavily to his pre-existing condition *considering the profound evidence provided with reference to the CT scan of 14 September 2011*, the extensive medical records of the General Practitioner at that time, providing a history of buttock pain, left leg pain, and back pain *as well as muscle spasming*, as well as the *important history provided with reference to lifting batteries at such an excessive amount over a period of time preceding [21] August 2013*, with a very well and most likely understood potential for aggravation of his condition during this time. Accordingly, I would suggest that Mr Kelleher's symptomatology set and impairment calculation would be better apportioned at 80% with reference to his pre-existing condition *and activities preceding [21] August 2013* and perhaps 20% in relation to his post-surgical condition which required cutting of the skin, muscular approach, and the potential for surgical scarring and the like at the L4/5 level on the left side, though noting complete resolution of his left-sided referred neuralgia that was suffered pre-surgery. (my emphasis)

[274] Later in his report he said:

> Since carefully considering the CT scan study of 2011, the general practice records of Dr Coliat of 2011, and considering the amount of physical work that Mr Kelleher was performing when lifting batteries over a period of time before the event of [21]August 2013, I would care to adjust my impairment calculation apportionment accordingly:
>
> (a) Incident on 21 August 2013 – 20%
>
> (b) Lifting batteries from January 2012 to August 2013 – Uncertain
>
> (c) pre-existing condition – 80%
>
> (d) any other matters – not applicable.

[275] Dr Labrom was asked to "clarify" whether there was any relationship between the plaintiff's right-sided symptoms and the L4/5 discectomy performed by Dr McEntee.[173] He replied that the plaintiff's ongoing right-sided symptoms clearly related to pre-existing degeneration at the L4/5 level and "in no way" were they related to "any workplace activity". More likely than not, the right-sided symptoms "in no way" related to the "very successful left-sided only approach" L4/5 discectomy performed by Dr McEntee.[174]

Note April 2018

[276] In addition to his two reports, Dr Labrom provided diary notes dated 11 April 2018[175] and 4 June 2018.[176]

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[172] Exhibit 1, F40.
[173] Exhibit 1, F 21 (question 5).
[174] Exhibit 1, F41.
[175] Exhibit 1, F44.
[176] Exhibit 32.

[277] In his note of 11 April 2018, he repeated his view that the Plaintiff's right-sided symptoms were not related to the Plaintiff's work activities at all.

[278] He stated (in paragraph 2) that the plaintiff's right-sided symptomatology could well be explained by "a right piriformis syndrome" (which was not related to work activity), based on a report by a Dr Navin, which is not in evidence. Nor was any doctor questioned about this syndrome.

[279] He made, as he acknowledged in his June note, an irrelevant reference to symptomatology usually surfacing in patients with L4/5 (and L5/S1) discal anomalies when those patients became deconditioned, overweight, and with loss of muscle strength and fitness – which was not the case with the Plaintiff.

[280] At paragraph 8, Dr Labrom said that jumping from the truck was, of itself, enough to have produced the plaintiff's symptomatology and that the lifting of batteries was "irrelevant". He added, "Conversely, someone who did not have the Plaintiff's pre-existing condition would have been untroubled by jumping from a truck".

Note June 2018

[281] Dr Labrom's second diary note, dated 4 June 2018, dealt with his opinion of the link between surgery and the plaintiff's current condition.

[282] By this point in time, Dr Labrom appreciated that the right-sided symptoms onset about a month after the surgery[177] but he did not consider them to be related to the work activity or the surgery. Rather, Dr Labrom was of the view that they related to "the natural progression of the Plaintiff's degenerate L4/5 disc with *further segmental collapse of the disc space* and the *associated further foraminal stenosis*, particularly on the right side". (my emphasis)

[283] He said, on the strength of his opinion that the pathology revealed by the CT scan of 14 September 2011 was the same as the pathology revealed by the MRI on 4 September 2013 (that is, before the discectomy):

> 7. Neither the battery delivering work, nor the exiting of the truck changed the course of the Plaintiff's very significant multiple level degenerative, segmentally unstable, pre-existing spinal condition. The onset of right-sided symptoms about a month after the surgery undertaken by Dr McEntee was not related to the work activity nor the surgery, but rather it reflects the natural progression of the plaintiff's degenerative L4/5 disc with further segmental collapse of the disc space and then associated further foraminal stenosis, particularly on the right side.
>
> …
>
> 9. Careful examination [of] the MRI scan post-surgery (28 February 2014) shows that the nuclear disc material has not re-herniated, rather the disc is undergoing a process of "segmental collapse". This is a process well known to spinal specialists where the disc continues to degenerate and in effect collapses and disc height is therefore lost and then associated nerve root compression at the exit foramen can be experienced resulting in further lower

[177] Exhibit 32, paragraph 7.

> limb neuralgia (sciatica), as was the case on the claimant's right side. This process reflects a "degenerative cascade" that the claimant had begun as far back as 2011, and is shown on the CT scan images of 14 September 2011.
>
> 10. What Dr McEntee's surgery did was to address the left-sided neuralgia so as to cure the left-sided symptoms the Plaintiff was complaining of. The surgery was successful in doing this.
>
> 11. What Dr McEntee's surgery did not address was the overall bilateral foraminal stenosis, the generalised long standing disc bulge, the facet joint hypertrophy (enlargement secondary to arthritic change) and the instability related to the collapsing disc height at the L4/5 level. That left the disc in a condition where it continued to collapse (degenerative cascade) so as to cause the symptoms on the right side. That would have happened irrespective of the surgery.

[284] For convenience, I will note here Dr McEntee's response.[178] Dr McEntee was of the opinion that the surgery had accelerated the process of collapse of the disc and that, over time, it could have collapsed "more" and started to compress on the exiting nerve. But that was not the cause of the plaintiff's right-sided symptoms. They were caused by the recurrent protrusion, which appeared on the MRI scan. It was the recurrent protrusion which was causing nerve compression of the right-sided traversing nerve at L5 and surgery contributed to the recurrent "herniation" of the disc. Indeed it was a known complication of surgery, and the site of the surgery undertaken – on the left side and towards the middle – contributed to the bulge re-herniating towards the right when it recurred.

[285] Thus, the defendant's expert and the plaintiff's treating surgeon disagreed about what was shown on the post-surgery MRI. According to Dr Labrom, the disc had not re-herniated. According to Dr McEntee it had (the "recurrent protrusion").

[286] It is also convenient to refer back to the "Interpretation" part of the MRI report, which stated:

> At the L4/5 level there has been a previous left-sided laminectomy and there is a *residual/recurrent* central and left central posterior disc protrusion which is narrowing both subarticular recesses and displacing and compressing both L5 nerve roots …

Cross-examination about Dr Labrom's incorrect understanding of the plaintiff's history

[287] Dr Labrom was cross-examined in a fashion designed to establish that the factual matters about which he was, or might have been, mistaken were significant or important to his opinion. So much was established. Then the errors were pointed out to him and attempts were made to have him revise his opinion. Notwithstanding his factual errors, Dr Labrom's views did not change. In particular, he remained strongly of the opinion that the plaintiff's right-sided symptoms were not caused by his surgery.

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[178] Exhibit 19.

MRIs in January and November 2016

[288] MRIs of the plaintiff's lumbar spine were conducted in January and November 2016.[179] They were provided to Dr Labrom and Dr Campbell. Only Dr Labrom made express reference to them (having been asked about them):[180]

> The MRIs scan studies undertaken in January 2016 and December 2016 [actually November 2016] confirm clear evidence of successful left-sided L4/5 disc decompression. Degeneration at the L4/5 level continues and degeneration at L3/4 and L5/S1 at the adjacent segments remains also obvious suggesting this fellow's underlying pre-existence multi-segment lumbar spondylosis condition identified.

[289] Under the "Conclusion" heading of the MRI conducted on 4 January 2016, the following is stated about the L4/5 disc:[181]

> … Degenerative changes present in the L4/L5 disc with narrowing of the disc space and modic type 1 degenerative change – oedema beneath the L4/L5 end-plates. The apparent left L4/L5 posterocentral disc protrusion appears to be due to a combination of moderate residual disc protrusion and granulation tissue. The above results in narrowing of the left lateral recess and together with the thickening of the ligamentum flavum results in prominent spinal stenosis at this level. Previous MRI of the lumbar spine would be helpful for comparison.

[290] An x-ray conducted on the same day, 4 January 2016, found "degenerative disk (sic) features".[182]

[291] Under the "Conclusion" heading of the MRI conducted on 11 November 2016 (by the same radiologist who conducted the MRI in January), the following is stated about the L4/5 disc:[183]

> … Prominent Modic type 1 degenerative change is noted with prominent oedema beneath the L4/5 vertebral body end plates. There is also mild linear T2 signal in the L4/5 disc which also shows moderate linear enhancement post IV Gadolinium. The moderate posterior disc bulge at L4/5, approximately 3mm in AP diameter, more prominent on the left with mild adjacent enhancing granulation tissue remains similar.

The cause of the right-sided symptoms

[292] Under cross-examination, Dr Labrom confirmed that he performed discectomies in his practice, upon adults and children. He would advise his patients of the risk, after surgery, of a recurrent disc prolapse, which was a known complication of surgery (somewhere between four and 11 per cent). He explained that the reason for the risk was that the disc remained unstable "to a point where some of the soft nuclear material of the disc can

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[179] Exhibit 42, Pages 97 – 98; and 95 – 96.
[180] Exhibit 1, F41.
[181] Exhibit 42, page 97.
[182] Exhibit 42, page 99.
[183] Exhibit 42, page 95.

extrude further through an annular end … *on the same side* as the disc protrusion was in the first place".[184] (my emphasis)

[293] He had never seen an extrusion or herniation on the opposite side.[185]

[294] Protrusions re-occurred after surgery because "you've surgically opened a potential space by taking off some lamina or performing a laminotomy, the patient will potentially puncture their lumbar spine, and more disc material … can bulge out through the same area".

[295] At this point, it is valuable to set out again the findings of the scans in brief:

> The 2011 CT scan:
>
> There is a *broad based left posterolateral disc protrusion present in the L4/5 level* with caudal migration. Compression of the thecal sac associated and there is also significant compression of the L5 nerve root.
>
> The 2013 MRI pre-surgery:
>
> Loss of disc height, desiccation and endplate Modic change consistent with degeneration *complicated by a left posterior disc protrusion* displacing theca and compromising the left lateral recess. (Left L5 nerve root origin). The L4 nerve roots appear to exit the neural foramina without compromise.
>
> The post-surgery MRI:
>
> At the L4/5 level there has been a previous left-sided laminectomy and there is a *residual/recurrent central and left central* posterior disc protrusion which is narrowing both subarticular recesses and displacing and compressing both L5 nerve roots …

[296] Dr McEntee considered the fact that the original protrusion was broadbased to be significant. He explained that he operated on the left side, and towards the midline, which, in his opinion, contributed to the bulge re-herniating to the right when it recurred.

[297] Dr Labrom did not see the recurrent disc prolapse as a complication of surgery. Rather it was "a natural history progression of a disc that is failing or has become incompetent".[186] His evidence, in cross-examination, continued:[187]

> Perhaps it's semantics doctor, but if it happens immediately after you perform a discectomy, then the reason it happens at that time is because of the performance of the discectomy, correct? – Yes, if it's radiologically proven at the *same side* and the same level as the surgeon has performed the microdiscectomy, that is, by definition, a clinical resequestration of disc at the operative annular end and surgical access point.
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> …

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[184] Transcript 3 – 57.
[185] Transcript 3-57.
[186] Transcript 3-57, ll 32 – 41.
[187] Transcript 3-57 l 43 – 3-58 l

> Well, indeed, you expressed the view in your report that there had been a resequestration of the bulge, as shown on the post-operative radiography … – No, I agree with that … The radiology does show a small further bulge of the L4/5 disc on the left side, and it was reported, appropriately, that that reflects *further bulging or herniation of the left L4/5 disc*. And I agree with that, and the gadolinium contrast scan of the 28th of February 2014 shows that very clearly.
>
> Well, Doctor, it also showed it on the right side, did it not? – As it did in the – of the CT scan of 2011.
>
> … It shows a bulging of the disc on the right side. And I think we started with that, your Honour, at the beginning of defining a bulge versus a discrete protrusion or extrusion and there is no discrete extrusion or protrusion on the right side. *What exists on the right side is the same generalised bulge that extended from the right side to the midline and then very prominently to become a very discreet extrusion of the disc material on the left side that had been present since 2011*. (my emphasis)

[298] Dr Labrom stated his "strong opinion" that the cause of the right-sided neuralgia was not surgery, but it related to the way the nerve tunnel on the right had been compromised for "a long time". He acknowledged that opposite side sciatica was a "recognised" but "very rare" outcome following the performance of a discectomy".

[299] He did not accept that, if opposite sided sciatica occurred "immediately" after surgery, then the surgery was a precipitant for the symptoms at that time. He said there was an "association" but the "pathoanatomy" was better put in the way he described. He could not agree that the left-sided surgery, technically performed, had offered right-sided neuralgia.

[300] He was not aware that Dr McEntee referred to many patients of his who experienced opposite side sciatica "get[ting] out of their hospital bed". He had not seen that in his practice and said, again, that pain on the opposite side, after surgery, was "a very unusual and rare outcome".[188]

[301] Later in evidence, he said, "I can't for a minute, your Honour, believe that the surgery has brought on right-sided neuralgia at the L4/5 level".[189]

[302] When asked about the need to consider timing before excluding surgery as causative of opposite sided pain, Dr Labrom said:[190]

> … I can see the temporal association, but my experience, my biomechanical experience, the understanding of the post-operative MRI and the understanding of the multisegmental nature of this condition would have me believe more likely than not that the left-sided sciatica surgery performed very well by Dr McEntee in no way has offered right-sided neurological symptoms to Mr Kelleher.

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[188] Transcript 3-60 – 3-61.
[189] Transcript 3-62, ll 3 – 5.
[190] Transcript 3.61 ll 39.

[303] When the plaintiff's counsel asked Dr Labrom whether his view was that a process of wear and tear, that had been slowly developing for years, "simultaneously" or "coincidentally" caused problems in the same disc that was operated on, to cause symptoms for the first time in the plaintiff's life on the right side, Dr Labrom said, "That's exactly what I mean".[191]

[304] He maintained that it had nothing to do with the surgery and added – for the first time – that "the most important things" were the plaintiff's clinical descriptions of the location of the pain, which were associated with the S1 and L2 nerves – not the L5 nerve.

[305] He said that the plaintiff's clinical descriptions of the site of his pain "made up very much" his opinion that the right-sided symptoms were not directly related to the surgery. He said:[192]

> … I don't think its coincidence … but I think it's just bad luck. I think Mr Kelleher does have multiple segment degenerate pathology that during his rehabilitation process was irritated, aggravated, exacerbated, whatever you want to call it, such that he had right-sided symptoms that didn't match L5 neuralgia. So I don't think his right-sided lower limb symptoms were a direct consequence of the left-sided microdiscectomy.

Re-examination

[306] In re-examination, Dr Labrom was asked why it was that his opinion did not change upon his understanding correctly the plaintiff's history of muscle cramping. He said it was:[193]

> … *because of the ... more recent evidence provided to me with this radiology in front of me*, and the history provided to me around those events of 2011, and then more recently in 2013 …

[307] That inaccurate part of the history was previously described by Dr Labrom, including in the course of his cross-examination, as –

- "very important";
- "very significant to his opinion" and
- an important factor in his increasing the contribution of the plaintiff's pre-existing condition to his current symptoms from 50% to 80%.

[308] Dr Labrom was asked why it was that his opinion did not change upon his understanding correctly that the plaintiff did complain of sciatica before 21 August 2013 and he said, in effect, that he *assumed* that Mr Kelleher was "having backache, muscle spasms and/or sciatica in that time".[194] That answer is hard to reconcile with his earlier response that the *absence* of complaints of sciatica was an "extremely important"[195] consideration in forming his opinion as to contributions.[196]

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[191] Transcript 3-65, ll 38 – 42.
[192] Transcript 3-66, ll 20 – 25.
[193] Transcript 3 – 73, ll 35 – 40.
[194] Transcript 3 – 73, l 43 – 3 – 74, l 6.
[195] Transcript 3 – 50, l 11.
[196] Transcript 3 – 50, ll 5 – 20.

[309] Dr Labrom repeated that there had been no re-herniation of disc material on the right side after surgery nor had there been a significant nuclear re-sequestration of material on the left side. There had been generalised bulging of the disc, which irritated the right side and the potential for right-sided L5 neuralgia. But buttock pain and lateral thigh pain did not, he said, correlate cleanly to an L5 nerve root compression.

Whether the plaintiff's complaints of buttock and lateral thigh pain correlated to a L5 nerve root compression

[310] The evidence from Dr Labrom that the plaintiff's complaints of buttock and lateral thigh pain did not "correlate cleanly" to an L5 nerve root compression was new in the sense that it was not contained in any of Dr Labrom's reports or diary notes. The plaintiff did not object to it. Nor did the plaintiff's counsel seek leave to re-call Dr McEntee and Dr Campbell so that the new evidence could be put to them. In my view, that left this aspect of the evidence in an unsatisfactory state.

[311] Although evidence about the plaintiff's pain not cleanly correlating to an L5 nerve compression was new from Dr Labrom, something similar had been mentioned in the Gold Coast Hospital records, which were tendered by consent.[197]

[312] Those records include an entry dated 3 June 2016, by "Bruce Rawson NSC [Neurosurgical Screening Clinic] Clinical Leader", under the heading "Opinion":[198]

> R L5 disc? doesn't fit upper thigh weakness ?

[313] An MRI with contrast was requested by a Dr Schwindack and conducted in November 2016 (it has been referred to above).[199]

[314] That MRI stated, under the heading "Clinical Details":

> Previous left L4/5 discectomy. No ? L5 pain. ? New disc ? Scar Tissue.

[315] The "Findings" and "Conclusions" of the MRI did not refer to any impingement of the right-sided nerve at L4/5. That was confirmed by the entry on 2 December 2016. On that date, Mr Dearness, a physiotherapist, reviewed the results of the MRI with Dr Schwindack. His notes included:[200]

> no structural explanation visualised for R sided low back/Right Buttock pain
>
> Reviewed the films with Dr Schwindack.
>
> For MDT, Back program, hydro, PGAP.

Observation about plaintiff's progress

[316] Under the heading "Treatment and Progress", Dr Labrom said:[201]

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[197] Exhibit 42.
[198] Exhibit 42, page 61.
[199] Exhibit 42, page 96.
[200] Exhibit 42, pages 61 – 62.
[201] Exhibit 1, F 35.

> Mr Kelleher has required no further surgical intervention and attention had at the Gold Coast University Hospital more recently suggests that Mr Kelleher has made an excellent recovery with reports of reduced back pain, reduced leg pain, and completely normal neurological examinations in both lower extremities, as per the report of Dr Dearness (4 October 2017).

[317] The "report" to which Dr Labrom referred seems to be progress notes made by Jonathan Dearness (BHMS BPhty) on that date which included the following (errors in original):

> Pt has responded very well to back program and uplift
>
> has been able to cease panadeine Forte
>
> is looking for work
>
> regular Tai Chi
>
> no llonger believes he needs surgery
>
> OE no longer using single stick
>
> still quite stiff legged in gait
>
> full lumbar flexion
>
> SLRS are 70 deg +
>
> neurologically intact in every way
>
> continue self conditioning, gain employment
>
> R/V 6/12.

The plaintiff's complaints about pain

[318] After his operation, the plaintiff reported to Dr McEntee "pain and tightness in the right buttock" and "numbness on the outside of his right thigh if he sits in a chair for any length of time".[202]

[319] On 7 March 2014, Dr McEntee described the plaintiff's post-surgery pain as "increasing, now right-sided, leg pain".[203] On 17 March 2014, Dr McEntee referred to the plaintiff's pain as "increasingly right-sided sciatica in a similar distribution to his left-sided symptoms'.[204]

[320] On each occasion that the plaintiff was asked to see Dr Labrom he filled in a questionnaire which asked him, among other things, to list his current symptoms and to mark a diagram of a man's body where his pain was located.

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[202] Exhibit 16.
[203] Exhibit 1, A11.
[204] Exhibit 1, A12.

[321] In the questionnaire completed by the plaintiff on 30 April 2015, the plaintiff said that he had –[205]

> pain at top of right butt cheek, pain in right hip, aches behind knees in both legs.

[322] On the diagram of the man facing forwards, he marked his right hip and above his right knee – not his right thigh. On the diagram of the man facing backwards, he marked his upmost part of his right buttock and behind both knees – nothing on his thighs.[206]

[323] In the questionnaire he completed on 16 January 2018, he said that he had –[207]

> lower back pain, pain in top left of the right gluteus maximus adjacent to the tailbone, twitches/spasms in both calf muscles.

[324] In the diagram, he shaded in an area on the thigh of the man facing forward and wrote "right thigh goes numb when lying down on my back".[208]

Treating psychiatric opinion: Dr Sandeep Chand

[325] Dr Phythian, the plaintiff's general practitioner, noted anxiety and "likely depression creeping in" on 1 March 2014. By June 2014, Dr Phythian noted "lots of anxiety". He referred the plaintiff to Dr Chand, a psychiatrist.

[326] Dr Chand's letter of 7 July 2014 described the plaintiff as presenting with significant symptoms of depression and anxiety. He had a sense of loss of his personal identity. His sleep was impaired and he suffered panic attacks. Dr Chand diagnosed a major depressive disorder with comorbid anxiety symptoms, secondary to his physical condition.

[327] In February of 2015, Dr Chand described the plaintiff as having "ongoing pain issues and also negative thoughts".

Psychological treatment

[328] The medical records indicated that the plaintiff was also treated by a clinical psychologist for his depression in 2015 and 2016. As at 23 May 2017, the psychologist recorded his score on the depression and stress scale as "severe" and on the anxiety scale as "extremely severe".

Expert psychiatric opinion: Dr Malcolm Foxcroft (plaintiff's psychiatrist)

[329] Dr Foxcroft saw the plaintiff on 20 February 2015 and 9 January 2018.

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[205] Exhibit 1, F11.
[206] Ibid.
[207] Exhibit 1, F26.
[208] Exhibit 1, F 28.

[330] In February 2015, the plaintiff reported his pain as "constant", "never interrupted" and "at least 4/10".[209] He was somewhat dishevelled, walked with a pronounced limp and was in evident discomfort.[210]

[331] In Dr Foxcroft's opinion, the plaintiff had a clinically significant Major Depressive Disorder which had arisen out of a chronic Adjustment Disorder with Depressed Mood after his work injury on 21 August 2013. He was functioning well before then and there was no evidence of any psychiatric impairment. There was no evidence of any predisposing factors or other vulnerability factors and no evidence of any past history of significant mood disorder or depression.[211] The driving force behind his Depressive Disorder was his ongoing pain and loss of function, which he experienced as a severe psychosocial stressor. Because his physical injuries had been rated as stable and permanent, his psychological difficulties were likely to continue indefinitely.[212] He was likely to be incapacitated for work into the foreseeable future based on his ongoing symptoms of depression and the ongoing stimulus for his depression, namely his back pain and loss of function.[213]

[332] Dr Foxcroft assessment the plaintiff, on the PIRS scale, as having a whole person impairment of 15%, with no PIRS rating for any pre-existing condition.[214] His prognosis was poor. The outcome of his psychological injuries was likely to correlate to the outcome of his physical injuries. Further treatment was recommended.[215]

[333] Dr Foxcroft re-examined the plaintiff in January 2018.[216] The plaintiff reported a reduction in his pain from (on average) six out of ten to three to four out of ten. His only recreational activity was swimming a few short laps. He was significantly restricted in physical activities and still had active symptoms of his depressive disorder – although he was perhaps a little more accepting of his physical condition. He was irritable. He was struggling to concentrate while studying for a Certificate III in Business. His was anxious and worried about his future. He had no motivation for social interactions. He had been unsuccessful in job applications. His energy was low.

[334] In Dr Foxcroft's opinion, the plaintiff continued to exhibit symptoms of a chronic mood disorder arising out of the 21 August 2013 injury. Dr Foxcroft offered his opinion about the plaintiff's suitability for certain occupations, concluding, in effect, that he was either not suited (because of his depressive illness or his emotional state), or not adequately trained, for the several occupations he was asked to consider.[217] In Dr Foxcroft's opinion, the plaintiff was commercially unemployable.[218]

[335] His PIRS rating in January 2018 was a 13% whole person impairment. In his conclusion, Dr Foxcroft described the plaintiff as having "a partial incapacity for work".[219]

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[209] Exhibit 1, B4.
[210] Exhibit 1, B9.
[211] Exhibit 1, B10.
[212] Exhibit 1, B12.
[213] Exhibit 1, B13.
[214] Exhibit 1, B15.
[215] Exhibit 1, B16.
[216] Exhibit 1,B18.
[217] Exhibit 1, B27 – B28.
[218] Exhibit 1, B29.
[219] Exhibit 1, B32.

[336] When asked whether a return by the plaintiff to work – even part time work – would be beneficial to his psychiatric state, Dr Foxcroft said:[220]

> It can do. I mean, when one has a – and I believe he has such a chronic adjustment disorder that he [indistinct] and has features of impaired concentration and anhedonia led me to conclude that his condition is a likely major depressive disorder. And major depressive disorders don't necessarily respond and react so quickly to changes in circumstances...

[337] Dr Foxcroft was "a bit of a cynic" about the assumption that the cessation of litigation would improve things for the plaintiff: "If someone has depression because they've got pain, then whether or not they're in litigation, they still have to wake up every morning in pain, and that's the primary driver for their depression".[221] He doubted that it was probable that, upon the cessation of the litigation, the plaintiff would have some, "difficult to quantify" improvement but he 'guess[ed] you have to say that it's possible".[222]

Psychiatric opinion: Dr Chalk (defendant's psychiatrist)

[338] Dr Chalk saw the plaintiff on 8 April 2015 and 17 January 2018.

[339] In 2015, Dr Chalk noted his "marked pain behaviour", irritability and lability at interview. There was a degree of agitation and marked hyper-arousal. His affect was restricted and characterised by sadness and some enduring anger.[223]

[340] Dr Chalk diagnosed the symptoms of a chronic adjustment disorder with depressed and anxious mood in the setting of chronic pain. Those symptoms arose as a consequence of his back injury, and his perception of his treatment thereafter. He scored the plaintiff on the PIRS scale with a median class score of 2, with a percentage impairment of 5%.

[341] Dr Chalk arranged for the plaintiff to have certain tests which revealed substantial alcohol use and cannabis use. The plaintiff had denied current illicit substance use to Dr Chalk. Dr Chalk considered that the plaintiff's substance abuse was likely to be having a significant and deleterious effect on him. He suggested that if the plaintiff were to control his use of alcohol and cannabis, there might be a substantial decline in his level of impairment.[224]

[342] In 2018, the plaintiff told Dr Chalk that he felt his life was on hold. He was worried about his employability. He admitted his heavy cannabis use, but told Dr Chalk he had not used since New Year's Eve/Day (2018). Dr Chalk described the plaintiff as "somewhat apprehensive". There was a degree of reactivity in his affect. He was mildly anxious, but not hypervigilant. His thought content reflected a degree of anxiety about the future. He had mild depressive symptoms but not marked lability. In Dr Chalk's opinion, the plaintiff's mood "at best" was one of very mild depression.[225] In Dr Chalk's opinion, the plaintiff was displaying residual symptoms of a chronic adjustment disorder with anxious and depressed mood in a setting of chronic pain. He noted the plaintiff's improvement

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[220] Transcript 3-24, ll 40 – 48.
[221] Transcript 3 – 25, ll 22 – 25.
[222] Transcript 3-25.
[223] Exhibit 1, E9 – E10.
[224] Exhibit 1, E16.
[225] Exhibit 1, E34 – E35.

since 2015. He thought the plaintiff was capable of undertaking at least part time work. He scored him at median class 2 on the PIRS assessment, with a 4% impairment.

[343] One part of plaintiff's explanation for not telling the truth about his cannabis use at his first appointment with Dr Chalk was – in effect – that he felt he was being bullied by WorkCover and did not trust it. He feared that if he told Dr Chalk that he had been using cannabis, he would be "kicked off" WorkCover.

[344] The plaintiff was cross-examined to the effect that he already knew (from correspondence) that WorkCover was going to end his benefits *before* he saw Dr Chalk – and that therefore his explanation for lying about his cannabis use was not plausible: he'd made it up, "to get around the fact that [he] didn't not tell Dr Chalk the truth".[226]

[345] Whatever the plaintiff's reason for concealing his cannabis use from Dr Chalk – it invites caution around the plaintiff's testimony generally.

[346] I note that Dr Foxcroft stated in 2015 that the plaintiff had no history of "illicit substance use".[227]

[347] Tests done of the plaintiff, at Dr Chalk's request, showed that he was using cannabis in April 2018.

The pre-accident plaintiff

[348] As revealed by his work history before the accident, the plaintiff was a worker. He demonstrated a willingness to try all sorts of employment and an ability to retain employment he was suited to, and liked, long term. As a younger man, he was poached by CCA Timbers while he was working for Kimbers Timbers.

[349] His attempt to secure a mature aged apprenticeship as a locksmith, not long before his accident, reflects his resourcefulness.

[350] The plaintiff had always been active. He was a surfer and a mountain biker and he enjoyed more challenging or "thrilling" activities like snowboarding or paragliding.

[351] At 17, he started using cannabis, and at 19, he began to use "a bit" of "speed". He stopped using speed at 27. He has continued to use cannabis. Until his back injury in 2013, he used about 1 gram a day of cannabis. After his injury, and during a difficult time with his housemate, he consumed as much as "14 grams in four days", which he had never done before. It seems that by the time of trial, he used cannabis intermittently to sleep.

The post-accident plaintiff

[352] After the right-sided symptoms developed post-surgery, and during the three months he was required to wait for a review by Dr McEntee, the plaintiff felt depressed. He felt that no one was taking any notice of him – he had right-sided pain and no one was listening: not Daniel Michael from WorkCover, or Tara Opland from Advantage Management Services, who arranged for the plaintiff to perform light duties at Bunnings (as part of a graduated return to work plan).

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[226] Transcript 2 – 16, l 42 – 2 – 19, l 5.
[227] Exhibit 1, B8.

[353] He began those light duties at Bunnings at three days a week for a few hours a day. He found it difficult to cope, physically. He was on his feet, the store was large, and there was lots of walking. In addition to his right-sided pain (from his right buttock (at the top – about 6 – 8 centimetres below the waistband of his trousers), radiating down his right leg), his legs were weak and he was fatigued. On occasions, he suffered dizziness. After four episodes of dizziness, his employment at Bunnings ended.

[354] Learning that WorkCover would not fund the surgery that Dr McEntee recommended "destroyed" him.[228] He was depressed, irritable and less tolerant. He had difficulty in friendships and relationships. At the time of his injury, he lived with a woman called Jenny. They had been good friends. Their relationship deteriorated. He took out his depressed mood on her. As the plaintiff saw it, she was not prepared to look after him (after his injury) so he moved out. He did not have a good relationship with his next housemate (Paul). It deteriorated to the point where the plaintiff threatened to kill Paul. He tried to be polite, but there were "definitely … some major clashes".[229]

[355] The plaintiff moved from Paul's place to live with "Ken and Jessica". They were Thai with limited English. He got on "okay" with them.

[356] He was referred for psychological and psychiatric treatment by Dr Lauren Ising and Dr Chand respectively. Dr Chand prescribed antidepressants for him. He was using Panadeine Forte for pain.

[357] He could not fund the surgery recommended by Dr McEntee and he felt he had few options. Seven and a half months of physiotherapy with PhysioMax had not relieved his pain, nor did sessions at another physiotherapy clinic, or acupuncture. Eventually, he was referred to the Gold Coast University Hospital (GCUH). He was not optimistic.

[358] In late 2016, GCUH offered the plaintiff a combination of physiotherapy and a "wellness" program called "Uplift".

[359] When he began that treatment, he relied on a walking stick for distances other than short distances. He was in despair. His pain was still radiating from his right buttock down his leg and into his hip and he had pain behind his knees.

[360] He did well in the GCUH programs, which he gave his "best shot". He was introduced to tai chi, which he continues to practice. During the summer, he swims up to 500 metres a day.

[361] He felt there had been improvement of his back condition in the second half of 2017. He no longer needs his walking stick – although he still limps. His level of pain has improved. The Uplift program improved his mood to a degree, but also, he found "quite a sympathetic housemate" and he felt "a little more at peace" at home. He considered himself in a better frame of mind, but he deals daily with the reality that he is not working and does not have independence.

[362] His application to the Gold Coast University Hospital Uplift program and his continued use of the techniques he learnt during that program reflect his determination.[230] He

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[228] Transcript 1 – 87, ll 1 – 15.
[229] Transcript 2 – 87, ll 32 – 35.
[230] Transcript, 1 – 95.

revealed, during his testimony, a willingness to be re-trained. As recently as October 2017, his general practitioner recognised his "appetite to work hard".[231]

[363] The plaintiff was more encouraged about his work options after the GCUH treatment. Having given it some thought, he decided that office work might suitably accommodate his physical limitations. Although he is engaged with Nortec (presumably a job agency of some sort, connected to Centrelink) he has received little assistance from it.

[364] He is currently studying for a Certificate III in business, organised through Centrelink. He is not particularly impressed by the course. He was hoping for some instruction in software. His concentration has not been great.

[365] He is concerned about the gap in his work history between 2013 and continuing but he has been applying for work from about August/September 2017; responding to job advertisements on "Seek". He has also attempted 'cold-calling'.

[366] His pain flares when he stands for long periods. He considers office work the best option – but he needs to be able to stand as well as sit. He does not consider himself suited to work in sales – particularly if his wage depended on it. He considers himself now too irritable, with a preference for being left alone, to work in a role that involves interacting with members of the public. He is tired of listening to the advice of others. He has not had the opportunity to develop a social network, although he has his brother and his brother's wife, and a sister whom he sees occasionally. Because of these proceedings, he has lost Mr Bailey as a friend. Mr Bailey knew a lot of people, and the plaintiff has lost the opportunity to become friends with them.

The post-accident plaintiff: work prospects: evidence of Nancy Stephenson

[367] Ms Stephenson is an occupational therapist.

[368] She prepared two assessments of the plaintiff – one based on his appointment with her on 28 May 2015; the other based on his appointment on 15 February 2018.[232]

[369] In Ms Stephenson's opinion, the plaintiff was not likely to manage in a high pressure environment like a sales environment – deferring to Dr Foxcroft's opinion about his poor psychological status in this regard.[233] Ms Stephenson did not consider the plaintiff to be suited to working as a locksmith, because that work involved lifting, bending, climbing a ladder and working at low heights.[234] She did not consider him "realistically" a suitable candidate for office or administrative work "when compared to other candidates who have recent work experience, better skills, industry experience and [who did not have] … cognitive difficulties or physical injuries.[235] His obvious limp and slow walk were likely to be off-putting for potential employers (when observed by them at interview). Also, the

[231] On 23 October 2017, Dr Phythian wrote a "medical certificate" for the plaintiff in which he stated that the plaintiff's "medical condition" had improved to the degree that he would be able to work in a job which did not put excessive strain on his back. He also noted that work would be beneficial to the plaintiff and also that "he would be a good addition to the workforce given his appetite to work hard".

[232] Exhibit 1, section D.
[233] Exhibit 1, D61.
[234] Exhibit 1, D 62.
[235] Exhibit 1, D63.

fact of his injury and absence from the workforce because of it was likely to make employers "very reluctant" to employ him.[236] Ms Stephenson considered the plaintiff to be commercially unemployable.[237]

The post-accident plaintiff: work prospects: evidence of Wayne Johanson

[370] Wayne Johanson, whose experience lies in job placement and recruitment, including of those with disability, completed a Labour Market and Reumeration Assessment of the plaintiff.[238] Mr Johanson was of the opinion that the plaintiff would find it difficult to secure employment having regard to his physical limitations, his skills, the market and other relevant matters. In his opinion, the plaintiff was commercially unemployable unless he were able to find employment with someone he knew, or through a contact, who was aware of his impairment.

More recent developments

[371] On 31 January 2017, Dr Pythian, the plaintiff's general practitioner, noted what looked like an improvement in the plaintiff's posture. The plaintiff was "coping reasonably well".[239]

[372] On 9 October 2017, the plaintiff complained to Dr Pythian of pins and needles in his left arm and shoulder, which had been present for 10 weeks. The sensation was worse when he was sitting at a desk on a computer.[240] He was referred for an MRI of his cervical spine. The MRI (on 18 October 2017) showed degenerative disease at the C5/6 and C6/7 discs "impinging bilateral exiting C6 and left exiting C7 roots".[241] He was then referred to the Gold Coast University Hospital. He had, on 23 October 2017, "intermittent tingling, daily". With conservative treatment, his symptoms resolved.

The plaintiff's credit

[373] The defendant submitted that the plaintiff's evidence ought to be viewed with caution.

[374] While my assessment of the plaintiff is not as harsh as the defendant's counsel's assessment, I had some concerns about his evidence.

[375] It seemed to me that much of the plaintiff's testimony was given with an eye on this claim and what he understood (not always correctly) might help it. For example, in explaining why he did not reverse out of the Isuzu, his answer was framed in terms of the physical limitations of the truck, when it is much more likely that he did not reverse out of it because jumping out of it was easier.

[376] I have treated the plaintiff's evidence with caution for that reason and for the reasons mentioned below. However, the answer to the critical question in this case (the cause of the plaintiff's right-sided symptoms) did not depend on the plaintiff's credibility.

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[236] Exhibit 1, D64.
[237] Exhibit 1, D64.
[238] Exhibit 4.
[239] Exhibit 1, medical records, page 30.
[240] Exhibit 1, medical records, page 32.
[241] Exhibit 1, medical records, page 36.

[377] I have dealt with the plaintiff's lies about his cannabis use above.[242]

[378] In its written submissions, the defendant listed other aspects of the plaintiff's testimony which, it submitted, called his credibility into question. The defendant submitted that the defendant was a person who "would be dishonest if it suited him"; was evasive under cross-examination if he thought his answers would harm him; was quick to deny matters and gave improbable testimony.

[379] The defendant suggested that the plaintiff was disingenuous and that exhibits 20 and 21 had "an air of unreality about them consistent with the Plaintiff just dreaming up anything he could think of to support his case". The defendant submitted that the plaintiff "invented a false story about a faulty seat in his truck".

[380] The defendant submitted that it was unlikely that the plaintiff "forgot" Mr Wetherill's instruction about entering and exiting the truck (a reference to his evidence in chief). Indeed, in cross-examination, the plaintiff went so far as to deny that Mr Wetherill demonstrated for him the safe way to exit the truck.[243]

[381] With respect to the evidence about Mr Wetherill's demonstrating to the plaintiff how to get into and out of the truck, I prefer the evidence of Mr Wetherill and am not prepared to accept that the plaintiff simply forgot that he received that training.

[382] I consider there to have been overstatement in the plaintiff's evidence about the difficulties he had in accessing delivery sites and the labour of his workload. However, insofar as the plaintiff's workload is concerned, there is some independent evidence of it.

[383] Without question, the plaintiff was frustrated with WorkCover, their handling of his host employment and their refusal to fund the second surgery recommended by Mr McEntee. His frustration was apparent during some of his evidence. He was careful or guarded in some of his responses to questions in cross-examination. I note his irrelevant reference to Mr Bailey's sharing cannabis with him.[244]

[384] The defendant also referred to the "clearly false" allegation in the Statement of Claim that there were no handholds or steps in the truck. The defendant continued: "The pedantic exercise in asserting that the allegation was about 3 points of contact is a smokescreen designed to avoid the fact that the Plaintiff intended to allege that there were no handholds or steps when there clearly were".

[385] The plaintiff was cross-examined on his Statement of Claim.[245] I consider the paragraph to which the plaintiff was referred to be ambiguously expressed and do not find that the plaintiff was being deliberately false in this respect.[246]

Issues

[386] Liability and quantum are in issue.

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[242] I have noted also Dr Foxcroft's opinion about this issue at Exhibit 1, B31.
[243] Transcript 2 – 25 – 2 – 27.
[244] Transcript 2 – 24 ll 1 – 20.
[245] Transcript 2 – 35.
[246] I note that the defendant's defence contained many assertions that it did not prove, or even attempt to prove, but that the defendant called no witness who might have been cross-examined by the plaintiff about those assertions.

Did the defendant owe a duty of care to the plaintiff?

[387] The plaintiff relied upon the defendant's duty to him at common law or contractually, as expanded upon by the *Work Health and Safety Act* 2011 (Qld) (WHSA) and associated Regulations and Codes of Practice.

[388] The defendant made the point that no provision of the WHSA conferred a civil right of action upon the plaintiff, but otherwise admitted to a duty of care owed to him (at common law) or as an implied term of his contract of employment.

[389] J & A had a duty to take reasonable care for the safety of the plaintiff.

[390] The plaintiff relied on the following expression of the duty in *Cratyrko v Edith Cowan University*:[247]

> if there is a real risk of an injury to the employee in the performance of a task in the workplace, the employer must take reasonable care to avoid the risk be devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards.

[391] An employer is not obliged to safeguard an employee completely from all harm. As was explained by Windeyer J in *Vozza v Tooth & Co Ltd*:[248]

> For a plaintiff to succeed, it must appear, by direct evidence or by reasonable inference from the evidence, that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment.

[392] The duty is non-delegable. An employer is obliged to have regard to the prospect of inadvertence or inattention by an employee, or the prospect of an employee taking shortcuts.[249] The method of operation/system of work (designed to address risk) must be established, maintained and enforced by the employer, not just devised. The obligation includes a duty to guard against risks that may be described as obvious as well as those which are unusual or unexpected.

Was that duty breached?

[393] The duty imposes an obligation to take reasonable care which, at common law, is breached by a defendant if a person in the defendant's position would have foreseen a risk of harm and taken precautions against it which the defendant, unreasonably, did not take. As explained by Mason J in *Wyong Shire Council v Shirt*:[250]

> A risk of injury which is quite unlikely to occur … may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the

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[247] (2005) ALR 349 [12].
[248] (1964) 112 CLR 316 at 318.
[249] *Smith v Broken Hill Pty Ltd Co Ltd* (1957) 97 CLR 337 at 342. Von Doussa J in *Perkovic v McDonnell Industries Pty Ltd* (1987) 45 SASR 544 at 554. Both cases cited in *Brisbane Youth Service v Beven* [2017] QCA 211.
[250] (1980) 146 CLR 40, at 47 – 48.

> risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But … the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.

[394] Whether there has been a breach of the duty of care in this case is to be considered by reference to section 305B and section 305C of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) (WCRA), which set out the general principles of the general standard of care. Those sections operate against the background of the common law principles, but modify them to an extent:[251]

> **305B General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless –
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things) –
>
> (a) the probability that the injury would occur if care were not taken;

[251] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CL 420 at [11], [15], [27], [39] and [41].

(b) the likely seriousness of the injury;

(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty –

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

[395] The expression "not insignificant" in section 305B(1)(b) was intended to change the effect of the equivalent element in the *Shirt* formula – the "not far-fetched or fanciful" element. As Fraser JA explained in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd*,[252] (referring to similar provisions in the *Civil Liability Act* 2003):

> [26] … the provision was designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable. I think that it did produce some slight increase in the necessary degree of probability. A far-fetched or fanciful risk is necessarily so glaringly improbable as to be insignificant, but the obverse proposition may not necessarily be true. The generality of these descriptions makes it difficult to be dogmatic about this, but the statutory language does seem to convey a different shade of meaning. The difference is a subtle one. The increase in the necessary degree of probability is not quantifiable and it might be so minor as to make no difference to the result in most cases. Nevertheless, in deciding claims to which the Act applies the "not insignificant" test must be applied instead of the somewhat less demanding test of "not far-fetched or fanciful".

[396] Each of the elements of section 305B(1)(a) to (c) are to be judged from the point of view of the defendant, in the circumstances which were known, or ought to have been known, to the defendant at the time of the plaintiff's injury, considered prospectively, and not with the wisdom of hindsight.

[397] The plaintiff also relied on parts of section 19(1) of the WHSA as relevant to the content of the defendant's duty of care:

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person, and

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[252] [2013] 1 Qd R 319.

(b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a work environment without risks to health and safety, and

(b) the provision and maintenance of safe plant and structures, and

(c) the provision and maintenance of safe systems of work, and

(d) the safe use, handling, and storage of plant, structures and substances, and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities, and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking, and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

…

Risks associated with the manual handling of batteries – defendant's concessions – breach of duty

[398] During the trial, the defendant made concessions, in the terms of exhibit 41, which reflected the requirements of section 305B, that –

> the work tasks involving the handling of some of the batteries involved a risk of injury that the defendant ought reasonably to have known of; the risk of injury was not insignificant; [and] a reasonable person in the position of the defendant would have taken precautions against that risk of injury.

[399] The concession did not extend to nominating the nature of the injury the plaintiff risked sustaining while handling some of the heavier batteries.

[400] The defendant's concessions were made against the backdrop of an argument that "any symptoms that the plaintiff did experience in the course of the delivery work were minor and transitory, such as to be expected given the pre-existing protrusion at L4/5, and not

such as to indicate any long lasting injury to the plaintiff (and are thus essentially irrelevant)".

[401] On the strength of the concession – which is consistent with the state of the evidence – I find that there was a risk of injury inherent in the task of manually handling the batteries, particularly those weighing over 20 kilograms. The risk of injury was to a handler's spine as well as to a handler's elbows, shoulders, neck and upper back.

[402] I find that the plaintiff received no manual handling training at all. None was provided by Mr Bailey. None was provided by Mr Hunter. He received no instruction or guidance about the way in which he was to load or unload his truck or to carry (or not to carry) batteries. He was given no instruction or guidance about the circumstances in which he should use a trolley or other aid or the circumstances in which he was to ask for assistance, or what to do if he did not get it.

[403] The defendant took no precautions at all against the risk of injury inherent in the handling of at least some of the batteries. The defendant therefore breached its duty of care to the plaintiff.

Risks associated with the plaintiff exiting the Isuzu truck

Was there a foreseeable risk of injury in the performance of plaintiff's task in exiting the truck?

[404] The plaintiff submitted that I would find a foreseeable risk of injury inherent in the plaintiff's exit from the cabin of the Isuzu.

[405] The defendant submitted that there was no foreseeable risk of injury.

[406] Referring to *Erickson v Bagley,* the plaintiff submitted that it was enough if the defendant should have foreseen "the nature of the particular harm that ensued, or more relevantly, the nature of the circumstances in which that harm was incurred." [253]

[407] The plaintiff in *Erickson* had placed his foot into an accumulation of water in a depression on the defendant's driveway (it had been raining), moved his foot out of the water, stepped onto a slippery wooden sleeper and fell and injured himself.

[408] The primary judge defined the relevant risk in the following way:

> After a period of rain there may be an accumulation of water in a depression such as a wheel mark from a motor car or even a water-caused erosion, which although not creating a slipping hazard per se, may result in an entrant to the premises placing his or her foot in a water-filled depression and then stepping sideways onto a sleeper which marked the boundary of the driveway, and which may be, itself, slippery when wet, in circumstances where the entrant has chosen not to utilise any artificial light source.

[409] On appeal, the Court of Appeal of Victoria found that the risk had been described too narrowly. After referring to High Court authority, Kyrou and Kaye JJA said that the first

[253] (2015) VSCA 220 at paragraphs 33 and 40.

step in defining the content of the duty of care required the appropriate identification of the risk against which it is alleged that a particular defendant failed to exercise reasonable care: [254]

> Commonly, the proper identification of the risk can be difficult, if not problematic. Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. … It is well established that, in order that a defendant be held to be negligent, it is not necessary that that defendant should have reasonably foreseen that the particular circumstances, in which the plaintiff was injured, might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred.

[410] At paragraph 40, their Honours identified the problems with the primary judge's approach to defining the relevant risk:

> The risk, as defined by the judge, was confined to the specific concatenation of circumstances in which the plaintiff was injured. However, as we have stated, what must be reasonably foreseeable is not the precise set of circumstances in which the harm occurred, but, rather, the type or nature of the event, or harm, that eventuated. Consistent with that principle, insofar as the case made on behalf of the applicant focused on the state of the lighting at the point at which he fell, the relevant risk was that a person might fall due to an unseen hazard or irregularity in the surface of the driveway.

[411] Thus, the risk must be defined by *taking into account* the particular harm that occurred, and the circumstances in which it occurred but it is *not confined* to the particular circumstances in which the plaintiff was injured.

[412] The defendant relied on the effect of Mr Byard's report at page 58 that the ground force exerted upon jumping (or perhaps dropping) half a metre from the cabin of the truck was less than the biomechanical limit for spinal damage. He submitted (footnotes omitted):

> 8. Firstly, the initial report by Mr Byard concluded that there was no foreseeable risk. Consistently with Dr Labrom Mr Byard concluded that the forces involved in descending from this vehicle were not such as to give rise to a foreseeable risk of injury. That the position might be different with other vehicles is irrelevant.

[413] I have dealt with Mr Byard's opinion above. I am not persuaded that it assists the defendant.

[414] The defendant relied on the following evidence from Dr Labrom in support of this submission:

> 8. If the Plaintiff had not been performing the battery delivery work but:

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[254] At paragraph 33.

(a) Had the pre-existing condition of his spine that was evidence in 2011; and

(b) Jumped from a vehicle in the fashion he claims to have done on 21 August 2013;

then in those circumstances, even without the lifting of the batteries, the Plaintiff would have developed the symptomatology that he did develop in August 2013. Essentially the lifting of the batteries is irrelevant because the jumping from the truck would have been enough to have produced that symptomatology in this man.

9. Conversely, someone who did not have the Plaintiff's pre-existing condition would have been untroubled by jumping from a truck.

[415] Dr Labrom's opinions do not assist the defendant.

[416] Dr Labrom was not purporting to give an opinion about the *foreseeability* of the risk of injury involved in a person's exit from the cabin of the Isuzu. He made the statement in paragraph 9 – emphasising the significance of the contribution of the plaintiff's pre-existing condition to his injury – to support his statement in paragraph 8.

[417] Also, the question whether there was a foreseeable risk of injury involved in a person's exit from the cabin of the Isuzu truck is not answered by Dr Labrom's statement in paragraph 9. Dr Labrom was focused on the consequences of the plaintiff's exit from the Isuzu – not his method more broadly. It may well be that a person without the plaintiff's pre-existing condition would suffer no injury jumping from the Isuzu if their landing was sure footed and on an even surface (as, it seems, it was in the plaintiff's case). But that same person may suffer an injury jumping from the Isuzu were they to stumble or slip upon landing.

[418] The relevant risk is not the risk of injury were a person to jump from the Isuzu, dropping about 500 mm, onto the ground surface at Tyreright at Varsity Lakes. The risk is, to use the defendant's wording in paragraph 150 of its submissions the "risk of harm from descending" from the Isuzu. Indeed, defining the risk in that way is in accordance with *Erickson*.

[419] The plaintiff did not respond to the defendant's submissions about Mr Byard's opinion.

[420] The plaintiff responded to the defendant's submissions to the extent to which they relied upon Dr Labrom. The plaintiff's response focused on the fact that it was not possible to know the mechanism Dr Labrom had in mind when making the statement in paragraph 9 including whether the plaintiff stepped or jumped from the Isuzu.

[421] Although I dealt with Dr Labrom's opinion on another basis, I will respond to the plaintiff's submission.

[422] I set out above the language used by Dr Campbell and Dr Labrom to describe the plaintiff's exit from the truck. Neither was consistent in their use of language.

[423] However, bearing in mind Dr Labrom's reference to the plaintiff's jump in his diary note of 11 April 2018, I am not prepared to accept that he did not understand the plaintiff's method of exit from the Isuzu.

[424] The plaintiff also submitted that the defendant was not entitled to assume that the plaintiff had no pre-existing problem in his back.

[425] I note that the defendant did not call Mr Bailey and there was, therefore, no challenge to the plaintiff's evidence that he told Mr Bailey about his 2011 injury and about the problems with his back that he experienced during the course of his employment. Those problems included the incident in June 2013, after which the plaintiff told Mr Bailey that he could not continue with the heavy lifting of the job. I accept the plaintiff's evidence about the defendant's awareness of his pre-existing vulnerability. However I do not understand the plaintiff to be suggesting that the plaintiff was owed any special duty accordingly.

[426] The defendant also submitted that the risk was not foreseeable because –

> If an employer in the position of the Defendant had gone looking and turned up all of the documents attached to Mr McDougall's report … such an employer would not have discovered that there was any risk in descending from the cabin of a vehicle of this type. There is no reference in that material to descending from a similar vehicle … The identified risks were all associated with larger trucks such as prime movers.

[427] As my earlier analysis of the 'guidance' documents attached to Mr McDougall's report reveals, I considered only a few of those documents to be relevant in the present circumstances. Nevertheless, taking the defendant's 'test', a reasonable employer in the position of the defendant who "turned up" Mr McDougall's documents *would* have discovered a risk in descending from the Isuzu's cabin on the basis of the information in the first three of Mr McDougall's documents at least. These documents were –

- the *Queensland Government Workplace Health and Safety Road Freight Transport Health and Safety Guide July 2000;*
- the *Queensland Government Department of Industrial Relations Workplace health and safety hazard Identification checklist: Road freight transport industry;* and
- the *Queensland Government Department of Industrial Relations Workplace health and safety Road freight transport industry Access to cabins.*

[428] The third document seems to be an updated version of the first. Had the defendant consulted the first and third documents, it would have read –

> (old) Getting in and out of a truck cabin, particularly larger trucks can be risky. Trips and slips can easily occur in wet weather or if hurrying …
>
> (newer) Getting in and out of cabins can be risky. Trips and slips can easily occur in wet weather or if in a hurry …
>
> (old) Main risk factors associated with getting in and out of a truck include … too high a first step – more than 400 mm

> (newer) Main risk factors associated with getting in and out of cabins include … first step too high – more than 400 mm
>
> (old) [In the column of a table headed "Safe solutions for getting in and out of trucks"] training in correct technique for getting in and out of a cabin safely The three-point contact technique involves contact with at least three parts of a person's four limbs with the vehicle at any one time.
>
> (newer) [Under the heading *Drivers are at less risk and under less strain when access is designed according to the following guidelines:*] … always maintain at least three points of contact when entering or exiting the cab; don't jump from the cabin.

[429] In my view, a reasonable person in the defendant's position, having consulted those documents –

- would not have taken those statements to be applicable only to trucks larger than the Isuzu;
- would have known the Isuzu's step was 500 mm off the ground – thereby creating a risk factor "getting in and out of" it; and
- would have appreciated that there was a risk of injury inherent in the plaintiff's manner of exiting the truck.

[430] Also, a reasonable employer would have appreciated that there was nothing which limited the applicability of the checklist document to trucks larger than the plaintiff's truck.

[431] Had the defendant consulted the checklist, it would have been able to "identify potential health and safety problems in its workplace" and become aware that it might "need to make changes" because it would have answered "no" to the following questions:

- Are workers instructed to maintain three points of contact when climbing in or out of a vehicle and to not jump from a cabin and/or trailer?
- Is jumping down from either the cabin or the trailer actively discouraged?

[432] The defendant argued that any risk was insignificant relying on the uniqueness of the plaintiff's injury:

> Mr Kelleher had done it about 7000 times over the relevant period. Absent his pre-existing disc protrusion, he would no doubt have continued to do so without difficulty. Dr Labrom pointed out that it was the Plaintiff's particular vulnerability that was the problem and a person without that would have been untroubled by the descent."

[433] As discussed above, Dr Labrom's opinion is not to the point. Nor is it determinative that the plaintiff had no previous difficulty with his method of exiting the truck (this is discussed below).[255]

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[255] I note that while the evidence did not suggest that the plaintiff had suffered any previous difficulty in exiting his truck, there was no evidence led, or questions asked, about the impact on the plaintiff's spine (if any) of the plaintiff's repeated jumps/drops from the truck.

[434] I am not persuaded by the defendant's submission that there was no foreseeable risk of injury or harm to the plaintiff in his exit from the truck.

[435] Of course, the onus is on the plaintiff to prove the foreseeable risk of injury.

[436] In *Benic v New South Wales*, Garling J (referring to an identically worded provision in the *Civil Liability Act* 2002 (NSW)), referred to the potential sources of a defendant's knowledge:

> … the plaintiff must satisfy the Court that the defendant, at the date of the alleged negligence, knew of the alleged risk of harm, or else, by reference to other facts, matters and circumstances ought to have known it. Those other matters will vary from case to case but may include such things as the common knowledge and experience of others in the similar position of the defendant, public notoriety of a particular risk of harm, publications and academic knowledge which might be expected to be read by people in the defendant's position and the obviousness or the likelihood of the event happening when using common sense.

[437] The plaintiff relied upon Mr McDougall's report,[256] which I have already discussed.

[438] In his report, Mr McDougall referred to various guidance documents and stated:[257]

> Essentially, injuries associated with exiting truck cabins or jumping down from truck bodies are common. The injury outcomes range from disc lesion through to severely damaged knees, ankles, shoulders, etc.

[439] On the evidence, I find that it was more probable than not that a reasonable employer in the defendant's position – that is a reasonable employer of delivery drivers using vehicles of the size of the Isuzu and larger – would have known, based on its review of relevant guidelines, and what it ought to have known of industry practice (as reflected in the evidence of Mr Wetherill and Mr Hunter) and to a degree, common sense, that getting into and out of the Isuzu's cabin carried a not insignificant risk of injury to the plaintiff's spine, ankle, knee or shoulder.

[440] I find that there was a not insignificant foreseeable risk of injury to the plaintiff inherent in his work task of exiting the cabin of the Isuzu.

Would a reasonable person in the defendant's position have taken precautions to guard against that risk?

[441] The defendant submitted, in effect, that the exit from the Isuzu was an everyday activity in respect of which the defendant was not required to give the plaintiff a warning. The risks inherent in exiting were obvious ones and the defendant could not reasonably be expected to take any steps to reduce them.

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[256] Exhibit 3.
[257] Exhibit 3, page 11.

[442] The defendant submitted that the case of *Williams* was "instructive". In that case, the plaintiff had been injured as he alighted from a Toyota Dyna two-tonne truck. The Dyna truck had one step – as did the Isuzu. It seems that the drop involved in a forward facing exit from the Dyna truck was 10 inches (254 mm).[258]

[443] In *Williams*, the plaintiff gave evidence that he *believed* the *safest* way of alighting the vehicle was to face forward and use the step (as he had done when he was injured). He argued at trial that his employer should have trained him in a safer method.

[444] The primary judge found that the particular method of safely exiting that vehicle was a matter of common sense, which could be reasonably left to an individual employee. The employer was therefore not negligent in failing to address the risk. The decision of the primary judge was upheld on appeal. McMurdo P, with whom Williams JA and Ambrose J agreed, said (footnotes omitted):

> [16] Alighting from the truck was an ordinary everyday event which involved some obvious risk; an employer could not reasonably be expected to warn of the potential danger of such a risk; any risk must have been obvious to the appellant who described the process as akin to alighting from his own Toyota Landcruiser. There were no circumstances here that made a specific warning or special training necessary: see *Mclean's Roylen Cruises Pty Ltd v McEwan.*
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> [17] A consideration of all relevant factors justifies the primary judge's conclusion that the respondent did not breach its duty of care by failing to specifically instruct the appellant not to exit from the vehicle in the manner chosen by him; there was nothing unsafe in the method of exiting the vehicle adopted by the appellant. His Honour was entitled to conclude on the evidence that the appellant slipped and was injured through misadventure, not through a breach of duty.

[445] In my view, the facts in *Williams* are sufficiently different from the facts of the present case so as to limit the extent to which it provides guidance.

[446] First, the Dyna could be lawfully driven by anyone with a passenger car licence. In the present case, although there was no direct evidence about it, it may be inferred that the plaintiff could not drive the Isuzu with a passenger car licence (on the basis of the plaintiff's evidence that Mr Hunter would not let him drive the Isuzu until he had a truck licence).

[447] Secondly, the drop involved was about half of the distance involved in the present case.

[448] Thirdly, while the plaintiff likened his exit from the Isuzu to his exit from a delivery van which was also in use for deliveries, it is impossible to know whether that comparison was valid. The 'best' evidence about the van was a photocopy of a photograph of a van that looked like the delivery van to which the plaintiff referred.[259] There was no evidence

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[258] [2001] QCA 101 at [11].
[259] Exhibit 37.

about whether a truck licence was required to drive the van. Nor was there evidence about its dimensions.

[449] Even if the plaintiff thought he was exiting the Isuzu van safely, in the sense that it was a matter of common sense, he was wrong about that, as the guidance documents referred to by Mr McDougall show. His fellow employee Mr Hunter's implicit understanding that there were risks inherent in a forward facing exit was the correct one.

[450] The fact that this was the first time in about 7000 exits from the Isuzu that the plaintiff had been injured is not determinative. In *Reck v Queensland Rail*,[260] the plaintiff train driver was injured by a fall in the course of exiting a locomotive. He tripped over a raised lip on the floor at the doorway and fell out the door. At first instance, the plaintiff's employer was found to have failed to provide the plaintiff with a safe system of work. Contributory negligence was assessed at 25%. The employer appealed and the plaintiff cross-appealed. The employer argued that there was no duty to train the train driver in egressing the locomotive because the danger was obvious and the plaintiff/respondent was aware of it. The employer relied upon the fact that this was the only incident of a driver falling forwards out of the locomotive after tripping on the door sill despite "some 700 use years for this class of locomotive" and that the plaintiff/respondent entered and exited it hundreds if not thousands of times in the three and a half years prior to the accident.

[451] Fryberg J dismissed the employer's appeal and, in dissent, allowed the plaintiff's cross-appeal. In so far as the appeal was concerned, McPherson JA and Holmes J agreed with his Honour who said, of the fact that this was the first instance of an injury, and in the context of an argument that the risk was obvious:

> … that history does not demonstrate that either the respondent or other drivers had the skills to devise a proper method of egress. It does not even demonstrate that they were using such a method.

[452] I find that as part of its duty of care, the defendant was required to establish, maintain and enforce a safe system of work. The defendant was required to undertake an appropriate risk assessment; devise proper work methods; train employees in those methods; instruct employees to use those methods and ensure those methods were implemented.

[453] Had those things been done, the defendant would have appreciated the risk of injury inherent in exiting the cab of the Isuzu, which could have been addressed, in the least costly way (indeed, in accordance with the practice of at least one other employee (Mr Hunter)), by -

- training the plaintiff to reverse out of the cab, ensuring three points of contact and in reverse (or reminding the plaintiff of his instruction from Mr Wetherill);
- instructing him to use that method and taking reasonable steps to ensure he did so;

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[260] [2005] QCA 228.

- monitoring the plaintiff's exits from the truck upon his return to the defendant's premises and, if the plaintiff were not exiting in the proper manner, that is, if he took "shortcuts", reminding him to do so.

[454] I note the defendant's assertion that the plaintiff would not have followed instructions to exit the truck in reverse. I find no evidence to support that assertion. While he may have had no appreciation of the risks inherent in his method of exit, there is nothing to suggest that he would not follow an instruction given to him. Indeed, on the evidence, he demonstrated a commitment to his employment and it is reasonable to infer that he would not jeopardise it by not following an instruction given to him by his employer.

[455] I find that the defendant was negligent in failing to take to take the precautions discussed above.

Causation – manual handling

[456] Section 305E of the WCRA is relevant.

> **305E Onus of proof**
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> In deciding liability for a breach of duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

[457] I find, for the reasons which follow, that the plaintiff has not established that the defendant's negligence, in failing to provide the plaintiff with manual handling training, caused the plaintiff's injury. The plaintiff did not lead any evidence to prove that, had the defendant taken a certain manual handling precaution, the plaintiff's injury would not have occurred.

[458] I note the authoritative guidance provided by *Woolworths Ltd v Perrins*.[261]

[459] In that case, McMeekin J, with whom Fraser and Gotterson JJA agreed, made the point that a finding that events at a place of employment led to an injury was not the same as demonstrating that the employer caused the injury by a breach of their duty of care. His Honour said (citations omitted):[262]

> In order to establish the necessary causal link between any arguable negligence on the part of the employer and the injury suffered by the employee, it is necessary to show that the measures that it is said the employer failed to adopt *would* protect the employee from injury, not "*could*' or "*might*": *Queensland Corrective Services Commission v Gallagher …* citing *Vozza v Tooth & Co Ltd …; Turner v South Australia …* In that latter case Gibbs CJ said:
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> "When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury *would probably have been averted*, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd* …"

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[261] [2016] 2 Qd R 276; [2015] QCA 207.
[262] [2016] 2 Qd R 276; [2015] QCA 207 at [173].

[460] In the present case, the defendant submitted that the plaintiff could not prove that – whatever the breach of duty when it came to manual handling – the position would have been different for the plaintiff had there been no breach of duty. The defendant pointed out that there was no evidence that, had a certain precaution been taken, the plaintiff would not have suffered the injury.

[461] As I understand the plaintiff's contentions, he intended only to rely upon the defendant's alleged breach of duty in failing to provide him with any manual handling training if he failed on liability for the 21 August 2013 event. For the reasons which follow, I do not find that the plaintiff has established a causative link between any negligence on the part of the defendant in failing to take precautions to guard against the risks inherent in the plaintiff's manual handling tasks and his injury.

[462] The plaintiff relied upon Dr Campbell's opinion that (as the plaintiff's counsel expressed it) the plaintiff's "excessive manual handling duties" caused the onset of symptoms between January 2012 and August 2013 and contributed to the severity of the plaintiff's condition when he jumped from the truck. I do not accept that as an accurate representation of Dr Campbell's opinion but for the purposes of this part of my decision, I will proceed on the basis that it was.

[463] The plaintiff referred me to *Berhane v Woolworths*[263] and encouraged me to apply the reasoning in that case to find liability here.

[464] The defendant referred me to *Prasad v Ingham's Enterprises Pty Ltd*[264] and encouraged me to find to the contrary.

[465] The plaintiff in *Berhane* was employed as an order selector in a Woolworths' warehouse. He was required to lift and stack cartons of varying weights and sizes, up to shoulder height and beyond. He was required, in the course of that activity, to reach away from his body while holding cartons of various weights. He made those movements over 1600 times a working day.

[466] The plaintiff had a pre-existing shoulder condition which was aggravated by his work activities, which produced a form of bursitis in his rotator cuff.

[467] The primary judge found that causation in fact had not been established. That finding was contradicted on appeal: "The evidence plainly permitted the conclusion that over his employment period Mr Berhane was required to perform *many* of the movements that were those *which caused the aggravation of acceleration of the condition*".[265] (my emphasis)

[468] The medical experts in *Berhane* were given details about the plaintiff's work duties. Against that information, the medical evidence established that it was "the repetitive heavy lifting away from the body or repetitive overhead activities that were the cause of the acceleration of the condition".[266]

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[263] [2017] QCA 166.
[264] [2016] QCA 147.
[265] [2017] QCA 166 at [70].
[266] [2017] QCA 166 at [65].

[469] The evidence was presented in such a way as to allow the medical experts to identify the features of the defendant's negligently implemented work system which caused the aggravation or acceleration of the condition suffered by Mr Berhane. The court was then able to conclude that, had certain measures been taken, the acceleration that was suffered could have been prevented. [267]

[470] The same cannot be said of the evidence as presented in this case.

[471] Dr Campbell, the plaintiff's expert, was only ever asked to comment upon the defendant's work system in a very broad way. He was not asked to identify the *features* of the defendant's negligently implemented work system which *caused* the aggravation of the plaintiff's condition. He was not asked to comment about whether the aggravation would have happened had particular measures been taken other than in too general a way (e.g. "was he at particular risk if he was subjected to excessive manual handling demands or jarring forces"). The evidence as presented in this case does not allow me to apply the reasoning in *Behane*.

[472] The plaintiff in *Prasad* was employed at the defendant's food processing plant. She worked there for 10 years and then developed pain in her feet which she claimed was caused by the plaintiff's negligence. She alleged negligence in many ways.

[473] The primary judge concluded that it was more likely that not that the plaintiff's work conditions caused her foot condition. The primary judge made findings about the defendant's negligence in certain aspects of the plaintiff's work conditions but concluded that, even if negligence had been proven, the plaintiff had not established that any particular change in the workplace conditions would probably have led to her avoiding her injury. In other words, the plaintiff had not established causation.

[474] The plaintiff appealed.

[475] One of the arguments made on appeal concerned the primary judge's finding on causation. That argument ran as follows:

> [61] Finally, the appellant submitted the primary Judge erred in finding the medical evidence did not establish that any particular change in workplace conditions would probably have produced a different outcome. The primary Judge found that it was more likely than not that the work conditions were a cause of the appellant's plantar fasciitis. Against that background, it was irreconcilable to find the appellant had failed to show any relevant causation. The evidence supported the proposition that particular changes in the workplace activities would probably have reduced the risk of the appellant developing plantar fasciitis …

[476] The respondent submitted that the primary judge's findings were open, and that –

> [62] … In order to succeed the appellant had to establish that the measures it was said the respondent failed to adopt would, not 'could' or 'might' protect the appellant from injury.

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[267] [2017] QCA 166 at [66].

[477] In dismissing the appeal, Boddice J, with whom McMurdo JA substantially agreed and Fraser JA agreed (also agreeing with McMurdo JA), emphasised the need to establish a causal connection between the conduct and the injury (footnotes omitted):

> [90] To succeed, the appellant had to establish more than the mere existence of an association between the respondent's breach of duty and the occurrence of her condition … What must be established is a causal connection between the conduct and the injury, even if it be that other causative factors may be in play. In that event, the question is not what was the most probable cause but whether the respondent's negligence was a cause of the appellant's condition.
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> [91] The primary Judge's ultimate conclusion was that "the appropriate conclusion in the light of all the evidence is that, more likely than not, the conditions under which the plaintiff was working were a cause of the plantar fasciitis from which she suffered". In reaching this conclusion the primary Judge noted that there was an absence of any significant explanation for the condition other than the plaintiff's work.
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> [92] That the appellant developed the very condition which was foreseeable as a consequence of her duties of employment, in circumstances where the respondent had breached its duty of care to the [appellant], is strongly suggestive that the appellant's personal injuries were caused by the respondent's breach of duty in failing to undertake the risk assessment, which would have supported the use of anti-fatigue matting in the workplace.
>
> [93] However, to succeed, the [appellant] had to establish on the balance of probabilities, that the measures the respondent failed to adopt would have prevented or minimised her injuries. The necessary satisfaction of this element of causation was described in *Kuhl*:
>
> "To satisfy the element of causation … it would be necessary to identify the action which, on the available evidence, the trial judge could conclude ought to have been taken; that action, if failure to take it is to be accounted negligent, must be such that the foreseeable risk of injury would require it to be taken, having regard to the nature of that risk and the extent of injury should the risk mature into actuality; and it would be necessary that the trial judge could conclude as a matter of evidence and inference that, more probably than not, the taking of that action … would have prevented or minimised the injuries the plaintiff sustained."
>
> …
>
> [96] … the primary Judge's finding that the appellant had not established that her condition was caused by the respondent's breach of duty, as there was no evidence any measure taken by the respondent would *probably* have made a difference (in that the appellant would not have developed that condition), was supported by the evidence.

[478] In the present case, it is not possible for me to find, as a matter of direct evidence or of inference, that had a certain precaution been taken, the plaintiff's injuries would have been prevented or minimised.

[479] The difficulties in the evidence (from the plaintiff's perspective) may be illustrated by way of example. The plaintiff's lawyers' questions of Dr Campbell suggested that the plaintiff should not have been lifting batteries over 20 kilograms without assistance. That suggestion was consistent with Mr Byard's evidence that, "provided a battery can remain close to the body during handling", the maximum recommended weight for a two handed lift was between 10 and 20 kilograms.[268]

[480] Mr Byard's report set out the proportions of the plaintiff's labour which included loads over 20 kilograms.[269] And the plaintiff gave some evidence (albeit not sufficiently detailed) about how he lifted some of the batteries and the circumstances in which a trolley or a forklift or human assistance were available. Yet none of that information was provided to Dr Campbell so as to provide him with a sufficient factual basis upon which to offer an opinion about the features of the plaintiff's manual handling which caused his injury or the precautions which might have been taken to reduce the risk of it.

[481] As in *Prasad* there was no *evidence* that any measure taken by the defendant would probably have made a difference.

Causation – exiting the truck

[482] The plaintiff contended that, had the defendant implemented and enforced a proper system of training and instruction about exiting the Isuzu maintaining three points of contact and in reverse, then the plaintiff would have exited backwards, lowering himself to the ground with his right foot on the right step.

[483] The plaintiff's counsel did not ask the plaintiff directly whether he would have exited the truck in this way had he been instructed to do so.

[484] I note the plaintiff's own comments about the difficulty for him in exiting that way. They incorporated a complaint about the design of the truck:[270]

> … to reverse out, it'd almost be like a – a free falling type pendulum swing sort of thing because you actually didn't have anything to hold on with your left arm. So you're basically – your body's hanging by your right arm which can actually sort of [lead] to a pendulum type effect. And not only that, I couldn't actually see the – the step from the – from the driver's seat. So I would have been feeling around while in reverse to try and climb out of the – of the truck.

[485] He said that, for those reasons, he did not reverse out of the truck. He also explained that he likened the truck to the defendant's van "both of the cabins weren't very high at all" [271] – implying that he saw no need for a reversing exit.

[486] One inference that may be drawn from the plaintiff's testimony is that he would have been resistant to such an exit (as were many drivers, as Mr McDougall explained).

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[268] Exhibit 2, page 56.
[269] Exhibit 2, page 56.
[270] Transcript 1 – 53, ll 25 – 35.
[271] Transcript 1- 53, ll 40 – 44.

[487] Against the background of those answers, the plaintiff's counsel should have asked the relevant question. It is, in my view, unsatisfactory that I am left to draw inferences about it.

[488] I was urged by the defendant to conclude that the plaintiff would not have followed training or instruction about exiting the Isuzu in reverse. The defendant submitted that there was no reason to think that the plaintiff would have paid any more attention to his employer's instructions than to Mr Wetherill's.

[489] I have found that Mr Wetherill did instruct the plaintiff in a reversing exit from the Nissan truck in which he was instructed. I am, however, prepared to accept that the plaintiff might not have understood the requirement of a reversing exit to apply to the Isuzu, which was a smaller truck. I am not prepared to find that he would have deliberately 'disobeyed' Mr Wetherill. I have reached that conclusion bearing in mind my finding about the plaintiff's credit.

[490] The plaintiff's previous work history was good. It included long periods of employment. Overall the evidence demonstrated that the plaintiff valued employment. I infer that he would do nothing to deliberately put his employment in jeopardy.

[491] I note the plaintiff's desire to be "upfront" with Mr Bailey about his back condition.[272] I infer that the plaintiff was aware that he had some vulnerability in his employment because of his back. I infer that if he had been told of the risk of injury inherent in his method of exiting the truck he would not have used that method. I find that the plaintiff received no safety induction in any aspect of his work from the defendant.

[492] I find that the plaintiff would probably have followed a work instruction given to him.

[493] I find that if the plaintiff had used the three points of contact, reversing method of exiting the truck, he would not have dropped 500mm to the ground and been exposed to large compression forces upon his spine. I find it more probable that not that he would not have jarred his torso and suffered the pain symptoms he did on 21 August 2013.

Causation - the right-sided symptoms which emerged after surgery

[494] There is no question that the plaintiff's exit from the truck on 21 August 2013 aggravated his degenerative condition to the point where he suffered such sciatic pain that he required a discectomy to relieve it.

[495] As explained above, that surgery was successful in relieving the plaintiff's left-sided pain, but within weeks of it, painful right-sided symptoms emerged.

[496] The plaintiff contended that those right-sided symptoms were a result of his surgery and a foreseeable consequence of the original injury, for which the defendant was liable.

[497] The defendant submitted that the right-sided symptoms were not compensable, essentially because they were the product of degeneration of the disc, which was to be expected having regard to the plaintiff's pre-existing pathology.

[498] I found this aspect of the case very difficult.

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[272] Transcript 1 – 43, l 15.

[499] There were problems with the state of the evidence. Neither Dr Campbell nor Dr Labrom were provided with a complete account of the relevant facts. For example, neither was told that the plaintiff had – as he said – "always" an underlying degree of pain, nor that he needed to lie down at work on occasions to deal with the pain.[273]

[500] There were problems with Dr Labrom's understanding of the plaintiff's history and other essential facts as discussed above.

[501] There were problems involving Dr Labrom's evidence, emerging late in the piece, about the L5 nerve distribution.

[502] There were notes in the medical records querying whether the plaintiff's thigh pain was related to the L5 disc and observing that an MRI in November 2016 did not reveal a "structural explanation" for the plaintiff's right-sided symptoms, yet neither counsel dealt with those matters.

[503] The plaintiff's expert, Dr Campbell, was not asked to explain the plaintiff's current symptoms, which do not include "true sciatica", by reference to the injury caused when the plaintiff jumped from the truck, or the surgery.

[504] While Dr Labrom appeared to be the most academically qualified of the experts, he did not have the first-hand experience of the emergence of opposite side symptoms after discectomy that Dr McEntee and Dr Campbell had.

[505] Dr Labrom was dogmatic in his opinions. Dr Campbell and Dr McEntee were not. Nevertheless, I took care not to overvalue Dr Labrom's inflexibility having regard to his expertise.

[506] In submissions, the defendant referred to Dr Labrom's evidence that the symptoms were not typical of L5 nerve pain and suggested that I ought to conclude that the reason why the plaintiff chose not to re-call Dr McEntee or Dr Campbell to respond to that proposition was that "they could not answer that point". However, it was revealed during oral submissions that the plaintiff's counsel (incorrectly) did not understand it to be her responsibility to re-call her doctors.[274] In those circumstances I am not prepared to draw the inference that the defendant invited me to draw.

[507] The lateness of this aspect of Dr Labrom's opinion detracts from it. If it was as telling as Dr Labrom suggested, it was reasonable to expect it to be made as one of his first points – not one of his last. This is particularly so having regard to the documentary evidence of Dr McEntee and Dr Campbell, of which Dr Labrom was aware, which plainly linked the plaintiff's right-sided symptoms with the L5 nerve distribution.[275]

[508] However, health professionals, with no interest one way or another in this litigation, queried the source of the plaintiff's right-sided symptoms at the end of 2016 and could find no structural explanation for them.

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[273] Transcript 1 – 79, ll 1 – 10.

[274] Transcript 5 – 29, ll 1 – 5.

[275] For example, the stated "indication" for an MRI post-surgery (requested by Dr McEntee) was: "Post L4/5 discectomy on the left side for left-sided sciatica. Now increasing symptoms in the *L5 distribution*. Exclude recurrent disc herniation on the right." (my emphasis)

[509] Also relevant to this issue was Dr Campbell's observation, in his May 2018 report, that although one of the reasons why the plaintiff may have experienced right-sided sciatica after his surgery was that the disc protrusion had eventually irritated the right L5 nerve root, that was not supported by the MRI findings. Under cross-examination he said there was no obvious new right-sided protrusion to support that theory. He added that there was "a bit of a bulge there", and surgery might have "subtly tipped it over the edge".[276]

[510] The plaintiff suggested that Dr Labrom's evidence was "problematic", as I understood the submissions, in its entirety.

[511] The plaintiff submitted that Dr Labrom had an incorrect understanding of the event of 21 August 2013 (thereby detracting from his opinion). I do not accept that submission. As demonstrated, while Dr Labrom's language varied – so did Dr Campbell's. Importantly, Dr Labrom's diary note from April 2018 referred, accurately, to the plaintiff's jump from the Isuzu.

[512] I agree with the plaintiff that several aspects of Dr Labrom's opinion reflected his misunderstanding or misinterpretation of relevant facts and the plaintiff's history – detracting from the weight of his evidence overall. I have discussed Dr Labrom's misunderstandings above. While he stated, with confidence, that his opinion, based on the corrected facts, did not change, his misunderstanding was corrected during his testimony, and he reconsidered his opinion 'on the run' during his cross-examination.[277]

[513] I agree with the plaintiff's submission that Dr Labrom introduced irrelevant facts into his evidence about the plaintiff's manual handling duties which detracted from the weight of his evidence.

[514] I also agree with the plaintiff's submission that there were inconsistencies in Dr Labrom's evidence about whether the L4/5 disc had or had not re-herniated.

[515] The post-surgery MRI found that –

> … The right L5 nerve root is also compressed within the right subarticular recess by the disc protrusion. There is mild to moderate right L4/5 foraminal narrowing due to the broadbased disc protrusion and facet joint degenerative change and loss of disc height. There is no significant left-sided L4/5 foraminal stenosis

[516] Dr McEntee said that the cause of the right-sided symptoms was a recurrent disc herniation. I will not repeat the detail of his explanation for that opinion but he was, in my view, in the advantageous position of being the plaintiff's surgeon.

[517] In Dr Labrom's opinion, the plaintiff's right-sided symptoms were caused by foraminal stenosis on the right side at L4/5 caused by reduction in the height of the disc – as part of a degenerative cascade.

[518] I found Dr Campbell's explanations for his opinion that it was likely that the plaintiff's right-sided symptoms were the result of surgery persuasive. For convenience, I will repeat them here. They included that –

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[276] Transcript 3 – 17, ll 30 – 40.

[277] He gave his evidence by telephone as all the doctors did.

- the pre-operative MRI (4 September 2013) showed degenerative changes at several levels of the plaintiff's spine, with loss of disc height at L3/4, L4/5 and L5/S1; the post-operative MRI (28 February 2014) showed no significant loss of disc height at L3/4 and L5/S1 but marked loss of disc height at L4/5, which was consistent with the surgery;

- the rapid onset of the right-sided symptoms was not consistent with symptoms caused by degenerative change, which tended to have a more gradual onset;

- the timing of the onset – close to surgery, and before the plaintiff had resumed physical activities, suggested that the symptoms were not the product of degenerative change; and

- although the plaintiff had degeneration in his lumbar spine, that did not necessary correlate with pain.

[519] I have considered Dr Labrom's opinion that coincidence explained the timing of the onset of right-sided symptoms, so soon after the discectomy.

[520] On the question of coincidence, I prefer the evidence of Dr Campbell and Dr McEntee to the evidence of Dr Labrom.

[521] I find that it is more probable than not that the plaintiff's right-sided symptoms within weeks of surgery were a result of his surgery.

[522] However, I find that it is more probable than not that the plaintiff's pre-existing degenerative condition, which no doctor suggested was insignificant, continued to deteriorate over time in the manner described by Dr Labrom (the degenerative cascade), causing pain, including right-sided pain, and other symptoms.

[523] I find, on the balance of probabilities, that –

- the right-sided symptoms experienced by the plaintiff after surgery were a consequence of the surgery – but it cannot be overlooked that they occurred in a man with a pre-existing degenerative condition which may have caused pain on the right side independently of surgery;

- the plaintiff's spine continued to degenerate over time, and

- the plaintiff's pre-existing degenerative condition has contributed, in a significant way, to the plaintiff's ongoing right-sided and other pain symptoms.

Damage to right L5 nerve root revealed upon EMG testing

[524] As noted above, I asked for further submissions in response to my observation that Dr McEntee's evidence included a reference to damage to the right L5 nerve root revealed upon EMG testing. Having considered those submissions (for which I am grateful) I have determined to take a cautious approach. In the absence of evidence from the experts about it, I have drawn no inference one way or the other from that note of damage.

Assessment of damage

[525] In assessing damages, I have taken into account the principles in *Watts v Rake*[278] and *Malec v JC Hutton Pty Ltd*,[279] to which I was referred.

[526] The plaintiff submitted that a majority of the plaintiff's current symptoms did not relate to the plaintiff's pre-existing condition, even though the plaintiff's doctor was of the opinion that 60 per cent of the plaintiff's current impairment related to his pre-existing condition.

[527] The plaintiff referred to Dr Campbell's opinion that he "had a good prognosis though was likely to experience intermittent exacerbations, and was likely to be able to continue working if he was not exposed to excessive manual handling requirements, with an occasional day or week off". The plaintiff continued, in submissions, "That prognosis stands in stark contrast to the position the plaintiff is now in, as a result of the defendant's negligence".[280]

[528] Dr Campbell's opinion, as summarised by the plaintiff in submissions, is drawn from the answers he gave to questions asked of him in his report of 11 May 2018. It does not take into account his answer in cross-examination that, having seen the CT scan of 14 September 2011, heavy manual work was contraindicated for the plaintiff. Dr Campbell said that the vast majority of workers, with a back condition similar to the plaintiff's (as at September 2011), who returned to heavy manual work were likely to fail. He advised his patients to exercise other options if they had them.

[529] Nor was Dr Campbell referred to the MRIs from 2016 and 2017 and asked to explain them in light of that answer.

[530] I find that the plaintiff was himself aware that he was not well-suited to battery delivery work, which is why he was "up front" with Mr Bailey about his back condition. He showed a remarkable capacity to do that work from January 2012 until August 2013, but recognised himself, in June 2013, that he had limited longevity in the job.

[531] I appreciate that the position is complicated by the notion that the manual handling that the plaintiff was required to do was "excessive". However, the plaintiff's case was not presented in a way which allowed me to determine whether or not it was because of the "excessive" manual handling tasks that the plaintiff was unable to continue in the work.

[532] In the assessment of damages, I have proceeded on the following basis:

- The plaintiff's pre-existing condition was not static – it continued to worsen over time;

- While he worked for the defendant, the plaintiff showed a remarkable capacity to deal with the labour of his workload and to put up with his pain and left-sided sciatica – relieving it with the use of his inversion table as required from time to time;

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[278] (1960) 108 CLR 158.
[279] (1990) 169 CLR 638.
[280] Plaintiff's submissions, paragraph 137.

- Until 21 August 2013, his pain and left-sided sciatica were symptoms of his pre-existing degenerative condition, which emerged in the context of his doing manual work which was contraindicated for him;

- By June 2013, the plaintiff realised that he had limited longevity in his employment with the defendant and that he was not suited, because of his back condition, to heavy physical work;

- On 21 August 2013, the plaintiff's jump from the truck aggravated his pre-existing condition at L4/5, resulting in left-sided pain which was so severe as to require surgery to relieve it;

- The surgery, which was conducted on 11 November 2013, successfully relieved the plaintiff's left sided symptoms;

- Three or four weeks after surgery, right sided symptoms emerged;

- Those symptoms were related to the surgery but the matter is complicated by the plaintiff's pre-existing condition;

- The plaintiff's pre-existing degenerative condition has also contributed to his pain symptoms over the years since his surgery;

- The plaintiff's physical condition has caused him to suffer mentally and the symptoms of his mental illness, including irritability around people and a reduced ability to concentrate, have affected his earning capacity;

- His commendable dedication to the Uplift program has relieved some of his symptoms. He no longer has true sciatica and he no longer feels that he requires surgery.

General damages

[533] General damages are to be assessed by reference to the *Workers' Compensation and Rehabilitation Act* 2003 and *Workers' Compensation and Rehabilitation Regulation* 2003.

[534] I have taken into account the provisions of schedule 8 of the Regulation including those which concern multiple injuries and a pre-existing condition, in particular regulations 3(2), 7 and 9 –

> **3 Multiple injuries**
>
> (2) To reflect the level of adverse impact of multiple injuries on an injured worker, a court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only.
>
> *Note* –
>
> This section acknowledges that –

- the effects of multiple injuries commonly overlap, with each injury contributing to the overall level of adverse impact on the injured worker; and
- if each of the multiple injuries were assigned an individual ISV and these ISVs were added together, the total ISV would generally be too high.

7 Aggravation of pre-existing condition

(1) This section applies if an injured worker has a pre-existing condition that is aggravated by an injury for which a court is assessing an ISV.

(2) In considering the impact of the aggravation of the pre-existing condition, the court may have regard only to the extent to which the pre-existing condition has been made worse by the injury.

9 Court may have regard to other matters

In assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case.

Examples of other matters –

- the injured worker's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life
- the effects of a pre-existing condition of the injured worker
- difficulties in life likely to have emerged for the injured worker whether or not the injury happened
- in assessing an ISV for multiple injuries, the range for, and other provisions of schedule 9 in relation to, an injury other than the dominant injury of the multiple injuries

[535] In this case there is a physical and a mental injury. The plaintiff's physical injuries and loss of function were the stimulus for his mental disorder. The physical injury aggravated the symptoms of his pre-existing condition to somewhat more than a "slight" extent (which was the defendant's contention).

[536] The event of 21 August 2013 and the discectomy aggravated the plaintiff's pre-existing disc protrusion at L4/5 to the extent to which it produced pain, including sciatic pain, and restricted the plaintiff's mobility. However, his pre-existing condition has also contributed to his pain and other symptoms over the years.

[537] After his participation in the Uplift program in 2017, the plaintiff was able to cease Panadeine Forte for his pain. He no longer required a stick to walk, but his gait was stiff legged. The plaintiff has persisting back pain and right buttock pain. His symptoms are aggravated by prolonged sitting and heavy lifting or bending. Dr Campbell noted that there was (now) no true sciatica. The plaintiff's physical activities were limited to Tai Chi and swimming.

[538] Depression and anxiety were present by at least June 2014. The plaintiff's general practitioner referred him to a psychologist and a psychiatrist. His treating psychiatrist diagnosed him with a major depressive disorder, with comorbid anxiety symptoms, secondary to his physical condition.

[539] Dr Foxcroft diagnosed a major depressive disorder, consequent upon a chronic adjustment disorder with depressed mood. In February 2015, he assessed the plaintiff (applying PIRS) as having a whole person impairment of 15%. Upon re-examination in January 2018, he found the plaintiff to be a little more accepting of his physical condition, but with active symptoms of his depressive disorder: irritability; difficulty concentrating; and anxiety about his future. Dr Foxcroft assessed his whole person impairment at 13%.

[540] Dr Chalk assessed the plaintiff's impairment in 2015 and in 2018 at 5% and 4%, respectively.

[541] The plaintiff's mental state was compromised by his alcohol and cannabis use – which seemed to have tapered by 2018.

[542] I consider the plaintiff to have suffered a "moderate thoracic or lumbar spine injury – soft tissue injury" (ISV range 5 to 10) and a "moderate mental disorder" (ISV 2 to 10).

[543] Taking into account the contribution of the plaintiff's pre-existing injury to his current disability, and the adverse effect of both (overlapping) injuries on him, I assess the ISV at 10, which produces an assessment of $14,450 for general damages.

Past economic loss

[544] The plaintiff's calculation of past economic loss assumes the plaintiff was in full employment from August 2013 until the present. It fails to take into account that the plaintiff was not well suited at all to the work he was undertaking, as he recognised himself. It also fails to take into account that the plaintiff had obtained his work with the defendant through a family connection.

[545] The full extent of the plaintiff's condition while he was working for the defendant was not disclosed to the doctors. They were not told that the plaintiff had an ever present underlying degree of pain and that he lay down on pallets at work from time to time. Dr Campbell was not asked to comment on the plaintiff's 2016 and 2017 MRIs.

[546] The plaintiff's pre-existing condition has contributed to his current symptoms, including prior to this trial.

[547] It is likely that the plaintiff would have remained with the defendant, were it not for his injury, until about the end of June 2014. Thereafter, though, there was no guarantee of a place for him as an apprentice locksmith (indeed, only very limited evidence was led about this option) and no guarantee of continuous employment.

[548] On the other hand, he had a good work history, held onto jobs he enjoyed and demonstrated a willingness to try any work and to be re-trained.

[549] I consider it appropriate to award past economic loss on the basis that the plaintiff was likely to have been able to earn about the same amount per week as he earned with the defendant from 1 July 2015 until October 2018, but that he was not likely to have been in continuous employment, either because of the job market, (an "employers' market", with overqualified job seekers),[281] his age, his limited skills, time off for retraining or his pre-existing condition.

[281] Exhibit 4, page 10.

[550] I have also taken into account the other vicissitudes of life. Accordingly, I award past economic loss on the basis that the plaintiff was likely to have been in work 70% of the time (or a period of 250 weeks, including with the defendant to 30 June 2014), less 10% for vicissitudes – $126,000.

Past loss of superannuation

[551] At the agreed rate of 9.25% – $11,655.

Interest on past economic loss

[552] Past economic loss ($126,000) exceeds the WorkCover payments ($52,748.35) and CentreLink benefits ($38,880) by $34,371.65. Interest on that sum at 2.66% per annum for 4.8 years is $4388.57.

Future economic loss

[553] The focus under this head is upon the loss of the plaintiff's earning capacity.

[554] The defendant did not challenge the plaintiff's methodology. It simply submitted that no allowance should be made for the plaintiff's future economic loss.

[555] The plaintiff was born on 9 May 1973. In May of 2018, he turned 45. MRIs conducted in 2016 show the, not unexpected, continuing degeneration of his spine. In October 2017, he reported pins and needles in his shoulder and arm, also reflecting vulnerability of the cervical spine – although I acknowledge that those symptoms resolved with treatment.

[556] An assumption of a net income of $800 per week, with the plaintiff in continuous employment for another 19 years, discounted on the 5% tables and discounted by 12% for contingencies, leads to $454,784.

[557] Mr Johanson described the job market as an employers' marker with overqualified job seekers competing for available jobs.[282] The plaintiff's prospects lay in the closed job market, rather than in the open market.

[558] It is reasonable to assume that, into the future, the plaintiff's pre-existing condition will impact adversely upon his work prospects. I have already made the point about the inadequate basis for Dr Campbell's opinion that the plaintiff would have been able to work in suitable (manual) employment until retirement age. Also, Dr Campbell was not referred to the MRIs of 2016 and asked for his opinion about the state of the plaintiff's pre-existing condition having regard to them.

[559] However, I acknowledge the plaintiff's previous good work history, the value he places upon employment, his willingness to try anything and his willingness to train.

[560] The plaintiff's residual earning capacity is limited. He is not suited, or trained, for occupations which might accommodate his physical limitations. Ms Stephenson was of the opinion that his time out of the workforce, the fact of his injury and its severity, his limp and his slow gait would be off-putting to potential employers. Other barriers to his

[282] Exhibit 4.

employment were his other physical and movement limitations, irritability and a poor concentration span. Her opinion was not challenged. [283]

[561] I consider it appropriate to discount the plaintiff's damages for future economic loss by a further 60%, to take account of the challenging labour market and the plaintiff's not insignificant pre-existing condition and contingencies associated with it.

[562] I award $181,913.60 for future economic loss.

Future loss of superannuation

[563] At the agree rate of 11.2% – $20,374.

Special damages

[564] The following special damages are agreed:

- Workcover expenditure: $33,881.56;
- *Fox v Wood*: $6,587.00.[284]

[565] The parties disagree about the Medicare refund, but there is no evidential basis upon which I am able to evaluate the defendant's challenge. I therefore award it in full ($6,677.15).

[566] For the same reason, I award the amount claimed by the plaintiff for travel, pharmacy and other expenses ($3,437.11).

Future expenses

[567] There was disagreement about future expenses. Dr Chalk did not consider there to be much benefit in the plaintiff continuing to see a psychologist "beyond the life of his claim" and thought the plaintiff's anti-depressant medication could be tempered within six to nine months of the resolution of the litigation.[285]

[568] Dr Foxcroft thought the plaintiff would require another 20 sessions of counselling and anti-depressant medication indefinitely. I note that when Dr Foxcroft offered this opinion (in January 2018) the plaintiff was receiving psychological treatment under a Mental Health Care Plan.

[569] On the evidence, this litigation has taken its toll on the plaintiff, who described himself to Dr Chalk in January of this year as a "battered soccer ball".[286]

[570] It is reasonable to expect that the resolution of this litigation will relieve some of the plaintiff's emotional strain and reasonable to expect there to be some improvement in mood. I will award future expenses to cover future psychological treatment and medication and other future expenses in the sum of $5,000.

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[283] Transcript 3 – 34, ll 10 – 15.
[284] Based on the defendant's submissions and the amended statement of claim: the plaintiff's submissions claim it at $6,509.
[285] Exhibit 1, E37.
[286] Exhibit 1, E36.

Summary of assessments

[571] In summary –

General damages	14,450
Past economic loss	126,000
Past loss of superannuation	11,655
Interest on past economic loss	4,388.57
Future economic loss	181,913.60
Future loss of superannuation	20,374
Special damages	50,582.82
Future expenses	5,000
Sub total	414,363.99
Less WorkCover Queensland Refund	93,498.20
TOTAL	**$320, 865.79**

Orders

[572] Judgment for the plaintiff in the sum of $320,865.79.

[573] As proposed by the parties, written submissions on costs within 14 days, if agreement cannot be reached sooner.