DISTRICT COURT OF QUEENSLAND

CITATION:	*McKenzie v Heinrich Constructions Pty Ltd; McKenzie v J. Hutchinson Pty Ltd*
PARTIES:	**JASON VICTOR MCKENZIE** (Plaintiff) v. **HEINRICH CONSTRUCTIONS PTY. LTD.** **(ACN 080 897 605)** (Defendant) <u>CONSOLIDATED WITH</u> **JASON VICTOR MCKENZIE** (Plaintiff) v. **J. HUTCHINSON PTY. LTD.** **(ACN 009 778 330)** (Defendant)
FILE NO/S:	D182 of 2016 D43 of 2016
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	10 December 2020
DELIVERED AT:	Townsville
HEARING DATE:	30 March 2020; 31 March 2020; 1 April 2020 (trial) 13 May 2020 (oral submissions)
JUDGE:	Lynham DCJ
ORDERS:	**1. Judgment for the defendants**

2. **Any submission in respect of costs, or alternatively a proposed consent order if the parties are agreed, be filed by 18 January 2021**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – where plaintiff claims damages for injuries suffered in the course of his employment with Heinrich at a construction site for which Hutchinson was principal building contractor – where both liability and quantum are in issue.

TORTS – NEGLIGENCE – LIABILITY – where the defendants argue the incident did not occur – whether the alleged incident occurred.

LEGISLATION:
Civil Liability Act 2002 (NSW)
Civil Liability Act 2003 (Qld) ss 5, 9, 10, 11, 12
Civil Proceedings Act 2011 (Qld) s 58
Uniform Civil Procedure Rules 1999 r 78
Work Health and Safety Act 2011 (Qld) ss 19, 26, 267
Workers' Compensation and Rehabilitation Act 2003 (Qld) Ch 5, pt 9, s305B, s305C, s305D, s305E,
Workers' Compensation and Rehabilitation Regulation 2003 Sch 8, Sch 9, item 92, Sch 10, Sch 11, Sch 12

CASES:
Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420
Australian Securities Commission v Hellicar (2012) 286 ALR 501
Camden v McKenzie (2008) 1 Qd R 39
Cameron v Foster [2010] QSC 372
Cokery v Kingfisher Bay resort Village Pty Ltd & Anor [2010] QSC 161
Cootes v Concrete Panels & Ors [2019] QSC 146
Craig v Silverbrook [2013] NSWSC 1687
Czartyrko v Edith Cowan University (2005) 79 ALJR 839
Fox v Percy (2003) 214 CLR 118
Goodrich Aerospace Pty Ltd v Arsic [2006] NSWCA 187
Hayes v State of Queensland [2017] 1 Qd R 337
Hopkins v WorkCover [2004] QCA 155
Jones v Dunkel (1959) 101 CLR 298
Katsilis v Broken Hill Pty Co Ltd (1978) 52 ALJR 189
Kerle v BM Allaince Coal Operations Limited & Ors (2016) QSC 304
Klein v SBD Services Pty Ltd [2013] QSC 134
Kondis v State Transport Authority (1984) 154 CLR 672
Leighton Contractors v Fox (2009) 240 CLR 1
McClintock v Trojan Workforce No 4 Pty Ltd & Anor [2011] QSC 216
Mclean's Roylen Cruises Pty Ltd v McEwan (1984) 58 ALR 3
McMillan v Kissick [2006] QSC 202
Nicol v Allyacht Spars Pty Ltd (1987) 163 CLR 611

Nominal Defendant v Cordin [2017] NSWCA 6
Paskins v Hall Creek Coal Pty Ltd [2017] QSC 190
Payne v Parker [1976] 1 NSWLR 191
Philips v MCG Group Pty Ltd [2012] QSC 149
Pockock v Citi-Steel Pty Ltd [2018] QDC 81
Pollock v Thiess Pty Ltd (No.2) [2014] QSC 95
Rossi v Westbrook & Anor [2013] QCA 102
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Stokes v House with No Steps [2016] QSC 79
Turner v State of South Australia (1982) 42 ALR 669
Watson v Foreman (1995) 49 NSWLR 315
Woon v The Queen (1964) 109 CLR 529
Wyong Shire Council v Shirt (1980) 146 CLR 40

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B. F. Charrington for the defendant Heinrich
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SOLICITORS: Roati Legal for the plaintiff
DWF (Australia) for the defendant Heinrich
Barry Nilsson Lawyers for the defendant J Hutchinson

Introduction

[1] On 16 February 2013 the plaintiff suffered a back injury at a construction site in Townsville where he was employed as a carpenter by the defendant Heinrich Constructions Pty Ltd ("Heinrich"). The principal building contractor at the construction site, and therefore the occupier of the site, was the defendant J. Hutchinson Pty Ltd. ("Hutchinson"). Hutchinson had subcontracted Heinrich to carry out certain parts of the construction work at the site.[1]

[2] Separate proceedings were commenced by the plaintiff against each defendant. However, as the question whether either defendant was liable for the back injury suffered by the plaintiff involved substantially the same question, on 16 November 2018 an order was made by consent for the separate proceedings to be consolidated pursuant to r 78 *Uniform Civil Procedure Rules* 1999 ("the Rules").[2]

[3] The plaintiff's claim against each defendant is for damages for personal injuries caused by the negligence and/or breach of contract and/or breach of duty of Heinrich, its servants or agents and by the negligence of Hutchinson, its servants or agents. Both liability and quantum are in issue.

<u>Overview of the evidence</u>

[4] There are some facts not in contest. On 16 February 2013 Hutchinson was the principal contractor for the construction of the Ergon Office Building at a site on the corner of Stanley and Flinders Street, Townsville ("the construction site"). The construction work

[1] Exhibit 25
[2] Document 8

by that stage had reached level 9. Heinrich had been subcontracted to carry out certain construction works at the site and the plaintiff was one of a number of formwork carpenters employed by Heinrich at the site. The plaintiff's duties included the erection of formwork. There is no dispute that the plaintiff attended the construction site on the morning of Saturday 16 February 2016 for purposes of working that day nor is it in dispute that whilst at the construction site the plaintiff suffered an injury to his back. With respect to liability, the issue in dispute between the parties relates to how the plaintiff injured his back. Having regard to the issues in dispute it is necessary to undertake a comprehensive summary of the evidence.

Plaintiff's lay witnesses

The plaintiff

[5] The plaintiff was born on 8 July 1968 and was therefore aged 44 when he suffered the back injury the subject of these proceedings. He had worked as a form set carpenter for approximately 20 years prior to commencing his employment with Heinrich on or about 12 November 2012. By 16 February 2013 he had been working at the construction site for about four months. There were a large number of tradesman working at the construction site which included carpenters, steel fixers and concreters. The plaintiff's foreman at the construction site was Louis Baros and two other Heinrich employees, Graeme Somerville and Jason Vi, also supervised him.

[6] On 16 February 2013 the plaintiff was involved in erecting formwork necessary to build the slab for level 9 of the building. Some of the materials, including the formwork required to build the suspended slab, were lifted to the required level using the crane situated on site. The crane was operated by a crane driver assisted by a dogman. The form work consisted of a "H-frame" scaffolding assembly system which when erected allowed timber bearers (also called headers) to be placed into a "U-head" fitted at the top of the vertical upright of each H-frame.[3] On top of the timber bearers would be laid timber joists and on top of the joists form ply would be laid which formed the base upon which the reinforcing and ultimately the concrete slab would be laid. The assembled H-frame had adjustable legs which enabled some degree of adjustment in the height of each frame. Once the formwork was assembled steel fixers would then lay steel reinforcing followed by other trades installing electrical wiring and plumbing, and when that was completed the concrete floor would be poured. The plaintiff said that the H-frames were delivered to each completed floor unassembled and that his duties at the construction site included assisting in the assembly of the frames. The frames could be placed on top of each other to increase the height of the next floor.

[7] The plaintiff was asked to describe what occurred in the week leading up to 16 February 2013. He said that he was doing "a bit of everything" that was involved in constructing the top deck but that he had been mainly involved with beam sites, explaining:[4]

> "… you've got to go and put all these frames together, and then once you do the frames we usually get a couple of planks, lean all the headers up, which is the six by fours. You lean them up onto the frames, and you push them up on top.

[3] Exhibit 10 (page 93)

[4] T 1-26 ll. 35-39

Then you climb through the frame, stand on a plank and then place those on top of the U heads – the timbers – headers"

[8] On Friday 15 February 2013 the plaintiff had been "framing up and placing headers awaiting for more materials to come up from downstairs."[5] As part of that he was using wooden planks positioned horizontally in between the H-frames which acted as a platform on which to stand in order to be high enough to reach up and position U-heads at the top of the frame. He was working mainly with another Heinrich employee, Phillip Hammond. As to any pain in his body he may have then been suffering, the plaintiff said that his back felt a bit tender for which he was using deep heat but nothing else. He attributed his back pain to having been working hard all week.[6]

[9] The plaintiff commenced work at the construction site at around 6am on 16 February 2013. He said that the previous evening there had been "a big storm" which caused the construction site to become waterlogged and as a result he and other workers had to wait in the smoko hut for about half an hour until the site had been "de-watered."[7] He and some of the other workers then used the Alimak (a lift on the side of the building) to make their way to the top level to pick up from where they had left off the afternoon before. When he walked over to where he had been working the afternoon before he observed a pack of U-heads and base plates for the frames had been placed roughly and not where they should have been positioned and that the straps which held a pack of bearers together were broken. These would have been lifted into position by the crane operator. As a consequence the bearers had "half-spewed all over the place" and were lying in the area where they wanted to work.[8] He then noticed a bearer which he recalled had been positioned in the frame the afternoon before knocked down into the frame. Having regard to where the pack of bearers had been positioned along with the straps holding them together being broken, the plaintiff posited as one explanation for the bearer being knocked from the frame that the crane operator had hit the frame with the pack of bearers when lifting them into place.[9]

[10] Upon making those observations the plaintiff commented to Louis Barros that "this is all rad and hasn't been put where it's supposed to be"[10] before fixing up the pack of bearers as well as moving some of them over to where they were needed. At this time he was working with Phillip Hammond who was a couple of frames ahead of him. After tidying up a few of the bearers and leaning some of them up on other frames the plaintiff undid a pack of U-heads and "started putting a few U-heads ready [for Hammond]."[11] He told Hammond he would go ahead and start setting up the next set of frames. Because the set of frames which he believed may have been hit by the crane operator had "moved a bit" he decided to try and move that first. In order to do that it was necessary for him first to move the bearer that had fallen down back up onto its frames. It was whilst undertaking that task that the plaintiff says he injured his back. In evidence-in-chief the plaintiff described how he injured his back as follows:[12]

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[5] T 1-26 ll. 43-45
[6] T 1-27 ll. 2-5
[7] T 1-28 l. 46 – 1-29 l. 6
[8] T 1-29 ll. 20-25
[9] T 1-29 ll. 30-44
[10] T 1-30 ll. 1-2
[11] T 1-30 ll. 10-15
[12] T 1-30 l 25 – 1-31 l. 19

> "And I said, yeah, like, "I'll go ahead and start setting up." And because those – that set of frames had been, sort of, moved a bit as well, try and move that. But the first thing I had to do was get in there and get the header up – back up onto the set of frames. So I climbed in there and that's where I hurt myself, yeah. Climbing through the frames, meant to grab the U- the header. But as soon as I put my hands on it, I realised it was wedged in a bit more. So that's when I really – gave it a really good oomph. Because once you go to lift it up, and you've got to, sort of, slide it up there, and it had a balancing pivot point. But, of course, it's, you know, manual labour. You just slide it up and it, sort of, goes up, and you push it and it goes up. But in that one motion, as I was going up, there was a plank in the road, which I, you know, wasn't really prepared for. And then as I slipped – slide it up, it, sort of, went over like this. Instead of being on the frame it, sort of, slid like this at the same time. And that's when I, sort of, went up. The plank was in my way. I, sort of, went to move that. And – yeah. I didn't have the strength to, you know, move the plank and the header at the same time, and it, sort of, caught me off guard and then, yeah, came back into me. That – the actual header, timber header.
>
> What happened then? Well, I went arse-up. And went back and fell into the frames with the header. I was trying to, sort of, push it away from me at the same time. Because it all happened so quickly. And I went, "Argh," you know, sort of, fell on my back and hit that little steel bar on the frame, the bottom one. And I'd been like "Yeah, no." I just thought I'd, sort of, fell over at this stage and, you know, so I was in a bit of pain, you know and elbow as well and moving up. So then I, sort of, climbed through the frames. And, you know, I'm, sort of going, "Fuck, I think I hurt my back," you know? And of course I was sucking it in; you know, breathing really heavily. Because I'd just been doing all these headers and moving them and, you know, like, everyone who knows me knows I'm a hard worker and I like to hook in and have a go. So I'm, sort of, breathing heavily. And I'd just only been there five or ten minutes – I can't remember exactly how long it was. So from there, Phil's about – either next to me in the set of frames or two sets of frames or whatever. I can't quite remember. But not far. And that's when I said, "I think I've hurt my fucking back." And I was breathing heavily, and there was a couple of U heads right there that I, sort of, got ready for Phil to use. And at that same time as I'm lifting the U heads I, sort of, went to cough. And I'm – you know, from breathing in heavily. And I've coughed and, at the same time, picking up the U heads, and that's when I – I just couldn't move. That was when I got all the burning sensation right down my right-hand side, right down into my leg, and I went "Yeah, I have hurt my back." And then I've coughed and dropped them, and that's when I couldn't move. That's when I realised I really have hurt myself. But, of course, even at the time, I didn't think I'd hurt myself as badly as I did. I just, sort of, thought, I've really, you know, overdone my back or something or – you know, wasn't quite sure. But as soon as I did that burning sensation that's when I realised, yes, I really had hurt myself.

[11] The plaintiff explained that in using the term "oomph" when describing how he attempted to reposition the header, what he was describing was "You know, with all my might. You know, really gave it a good oomph, you know. As hard as I could, to

get it out. Because it was jammed in like that"[13] which he demonstrated by using his arms in a lifting to one side motion. He described the back pain he was experiencing as excruciating, that it was situated in his right lower back and that he also experienced a burning sensation which extended down his right leg and a little down his left leg.

[12] Following the incident the plaintiff stopped to gain his composure. He was approached by Hammond who asked him if he was alright. He then made his way over to Jason Vi as he was the only leading hand he could see at that time. He told Vi "I've hurt myself" and "You're not going to believe it. As soon as I coughed, I couldn't fucking move."[14] Vi directed the plaintiff to go and speak to Louis Barros. The plaintiff then turned around and made his way back to his water bottle and following a further short conversation with Hammond began to walk towards the Alimak. He described himself by then as walking "gingerly and sliding my feet."[15] He encountered Graeme Somerville on the way. As they passed each other Somerville asked him what was wrong. The plaintiff told Somerville that he had hurt his back and "no bullshit mate … as soon as I coughed, I couldn't walk."[16] Somerville suggested he go speak to Baros. The plaintiff motioned Baros, who was nearby, to come over. The plaintiff informed Baros that he had hurt his back. Baros asked him to go and speak to Susan Wallace, who was Hutchinson's safety officer, and to fill out an incident report.

[13] The plaintiff made his way to the ground floor using the Alimak. Upon arriving on the ground floor he observed Susan Wallace on a set of stairs walking to the Alimak. He told Wallace that he needed to go and lay down somewhere and Wallace asked him if he could come back on Monday and that they would do an accident report then. The plaintiff then left the construction site and went home.

[14] Upon arriving home the plaintiff had a shower and applied deep heat to his back before taking some painkillers and laying down. Later that day, when his back pain had not subsided, the plaintiff attended a medical centre and was prescribed pain killers and an appointment was made for him to have his back X-rayed. The following Monday the plaintiff attended an appointment to have his back X-rayed and also obtained a medical certificate from a doctor. He then returned to the construction site where he spoke to Wallace and she completed an accident report relating to the incident. He told Wallace "how I was lifting the header but I said a timber header, and it came back in on me and I went arse up in the frames."[17]

[15] In cross-examination the plaintiff agreed that he had told Somerville on Monday 11 February 2013 that his back was a bit tender but denied that he also told him that he was going to take it easy. He also denied that Somerville had advised him to speak to Susan Wallace or to go home. He agreed that his back was a bit sore in the days leading up to the incident on 16 February 2013 but explained that was not because he had suffered a back injury but rather he felt discomforted from muscle pain on the Monday of that week.[18]

[13] T 1-31 ll. 33-36
[14] T 1-32 ll. 4-6
[15] T 1-32 l. 37
[16] T 1-32 ll. 38-40
[17] T 1-35 ll. 1-3
[18] T 1-52 ll. 9-17

[16] The plaintiff disagreed that upon commencing work on 16 February 2013 he travelled up to level 8 in the Alimak before anyone else and that Jason Vi and Phil Hammond followed after him, maintaining they all travelled together. He denied that as he was leaning on a frame Vi exited the lift and approached him and that he then told Vi "I just coughed, and I've done my back in."[19] He said that he was the one who approached Vi and said to him "You're not going to believe this. I've hurt my back, and when I coughed I couldn't move."[20] The plaintiff denied that he told Somerville "You won't believe this, but I've just coughed and put my back out", that Somerville replied "You did" and that the plaintiff then said "I coughed. I'm not trying to scam you. I've hurt my back."[21] The plaintiff agreed that he did not tell either Vi or Somerville that he had hurt his back when lifting a beam back into position, explaining that he did not have the time to give them those details.[22] The plaintiff denied that the only thing he said to either Vi or Somerville was that he had coughed and refuted the suggestion that this was all that he said because he had not actually started work for the day and had coughed and threw his back out.[23]

[17] The plaintiff agreed it was his evidence that the bearer he had been lifting back into place was 4.8 metres long which had been in a diagonally upright position within one square metre of H-framing. He agreed that the section of framing where he had been working consisted of two H-frames on top of each other and that the total height of the section of framing with U-heads included would have been approximately 3.1 metres. The plaintiff agreed that bearers were positioned in each U-head and then nailed into place. He later qualified that by saying he could not recall whether the bearer was nailed into place but it was normal practice to do so.[24] He recalled that the particular bearer which had fallen down and which he was attempting to reposition was the last one he had placed into its U-heads the previous day because by then they had run out of certain materials.

[18] In addition to what he is alleged to have said to Vi and Somerville, the plaintiff was cross-examined extensively upon a number of statements he had made concerning how he hurt his back. For ease of reference those statements, and the plaintiff's evidence with respect to each of them, can be summarised as follows:

(a) **16/2/13: Dr Iqbul Ismail – GP Super Clinic**

Surgery consultation records: "Came with back pain since afternoon today after lifting heavy wt"

The plaintiff agreed that he had told Dr Ismail what was recorded in the note and that the note makes no reference to something happening in the morning. He said that where the note records "came with back pain in the afternoon" that it was the afternoon that he attended the medical clinic.

(b) **21/2/13: Telephone call with WorkCover**

[19] T 1-53 ll. 26-27
[20] T 1-53 ll29-33
[21] T 1-53 l46 – T 1-54 l. 5
[22] T 1-54 ll.10-15
[23] T 1-54 ll. 19-25
[24] T 2-6 ll.31-40

The plaintiff agreed that he telephoned WorkCover to register a claim relating to the incident. The WorkCover note records the plaintiff as saying:

"I was picking up a plank at work. It had been raining all night and was waterlogged. And as I was lifting, I felt pain in my lower back on the left-hand side".[25]

The plaintiff could not recall providing that version to the WorkCover officer who made the note. He said his pain had been mainly on the right side of his back not the left side.

(c) **11/3/13: Susan Wallace**

Susan Wallace completed the incident report form[26] relating to the plaintiff's incident which is dated 11 March 2013. Where the form asked for a brief description of the incident it records:

> "Jason claims he was picking up a alloy app. This is unclear as his foreman and co-workers claim they had not started work yet. They were standing around when Jason coughed".

The plaintiff was asked if he recalled telling Wallace that he had been picking up an "alloy app". The plaintiff denied telling Wallace that and said that there were no alloy apps on the site which he could have lifted. He thought that Wallace had shown him the incident report and that he had signed it. The plaintiff denied that he did not tell Wallace he had been lifting a bearer, maintaining that he did and that he had gone "arse-up in the frames … and lifting U heads at the same time – that was when I couldn't move".[27]

(d) **May 2013: Dr Richard Emery**

The plaintiff agreed he attended upon Dr Emery in May 2013. He was asked if he recalled telling Dr Emery:

> "…that you were setting up frames early one Saturday morning, 15 minutes into your shift, when you tried to pick up a large wooden plank which was particularly heavy, as it was waterlogged, that you bent over to lift the plank and developed pain in your lower back".[28]

The plaintiff said he was unable to recall the conversation he had with Dr Emery.

(e) **30/05/13: Dr Roger Watson**

The plaintiff was asked if he recalled telling Dr Watson on 30 May 2013 that he had been at a building site framing up a column when, in an action bending to pick

[25] T 1-59 ll. 6-17
[26] Exhibit 33
[27] T 1-59 ll.19-46
[28] T 1-60 ll.29-33

up a two-metre long plank, he experienced acute lower back pain as he took its weight.[29] He said "once again, the plank has always been involved".[30] It was further suggested to the plaintiff that he had alleged over the years the plank being involved in a number of different ways – at times lifting it, at times moving it with his shoulder, at times it falling on him. The plaintiff said that it all happened together at the same time and that the plank did not fall on him.[31]

(f) **June 2013: Dr Michael Coroneos**

The plaintiff agreed that he attended upon Dr Coroneos in June 2013 at the request of WorkCover. He was asked if he told Dr Coroneos that he had lifted a timber plank header after overnight rain and had to lean over some new frames that were packed in a tight position after the crane crew had stacked timber and stuff around the U-head frames. He was also asked if he told Dr Coroneos that he put his right arm out as he was working around a column and lifted the timber with Phil, his co-worker, and experienced immediate right lower back pain that caused him to walk around for a couple of minutes so he could shake it off.[32]

The plaintiff said that half of what was recorded by Dr Coroneos was right and half of it was not. He agreed that he had told Dr Coroneos that he had been working with Phil. The plaintiff was further asked if he recalled telling Dr Coroneos that he had picked up a U-header that was wet and heavy and that he had right lower back pain that was of a stabbing nature which travelled into the back of his left leg and right thigh. The plaintiff said no, explaining that as U-heads were made of steel they were the same weight whether wet or dry.[33]

(g) **September 2013: Dr Riccardo Caniato**

The plaintiff could not recall attending upon Dr Caniato, a psychiatrist, in September 2013. He therefore could not recall telling Dr Caniato that he was lifting a plank when he twitched his back.[34]

(h) **Medical Assessment Tribunal (date unknown)**

The plaintiff agreed that he attended the Medical Assessment Tribunal where he was reviewed by three orthopaedic surgeons. He was asked if he could recall telling the tribunal that "you lifted a six-by-four plank, which was waterlogged and heavy and developed low back pain".[35] The plaintiff said that planks do not come in six-by-fours.

(i) **20/02/14: Statutory declaration to WorkCover[36]**

[29] T 1-60 ll.41-47
[30] T 1-61 ll.1-2
[31] T 1-61 ll. 4-7
[32] T 1-61 ll. 30-38
[33] 1-62 ll. 10-14
[34] T 1-62 ll. 16-21
[35] T 1-62 ll. 23-31
[36] Exhibit 34

The plaintiff agreed that he had made a statutory declaration to WorkCover on 20 February 2014. In response to a request for information from WorkCover the plaintiff agreed that he provided the following answer (question 38):

> "I say that I was attempting to position a length of timber, called a "header" which was 4.8 metres long, 6 inches wide and 4 inches thick. I would estimate that the header weighed 40 kgs. The header appeared to have been knocked down by the crane which was used to place pallets of "u-heads" on the site. As a result of the header being knocked down, one end of it was on the concrete floor and the other end of the header was up in the air, as it was leaning against one of the metal construction frames, which were used to construct the flooring, upon which the concrete would be poured to make the next level of the high rise building. I had to adopt an awkward position, by leaning through one of the construction frames. I was not able to move freely around the site, due to the fact that there was a large column, which had steel reinforcing rods coming through it, which blocked my movement down the left hand side of the metal construction frames. I was also blocked from moving to my right due to the pellets of u-heads. As a result, I had to lean through the construction frame and take hold of the lower end of the header, with both hands. I did that, in an attempt to position the header back onto the u-head, where it was required to be.
>
> While attempting to put the header in its proper location, I was obstructed by a timber plank. The timber plank was also on an incline and was resting against the metal framework. The timber plank was 2.4 metres long, made of hardwood and was approximately 300mm to 400mm in width, and 40mm thick. I would estimate that the timber plank would have weighed at least 30 kgs when dry, but it was waterlogged at the time.
>
> Whilst attempting to put the header back into its correct place, I held the header in my left hand and reached with my right hand to move the timber plank, as it was obstructing me. I lifted the timber plank from the bottom end, in an attempt to make space so that I could put the header back into its correct location.
>
> The header and the timber plank were waterlogged because it had been raining and they were exposed to the elements. To the best of my recollection, the whole work site was waterlogged and consideration was given as to whether to shut the site down for the day. There was in fact a depth of water in some locations on the site".

The plaintiff was asked if what he was suggesting in the answer was that he was attempting to position the header back onto the U-head. He said yes he was, but to do that it was necessary for him to raise the header higher to reposition it onto the U-head. His objective was to raise it high enough to achieve that.[37] He agreed that the header was more than three metres off the ground. The plaintiff said that even when doing headers by himself the technique involved sliding the header up to its pivot point, which in this case was 2.4 metres, at which point it would drop down. He said what he was intending to do was normal practice.[38]

[37] T 1-65 ll. 13-17

[38] T 1-66 ll. 12-21

It was suggested to the plaintiff that what he was describing could not have worked in this case because the frame he was working in only had a space of 1.5 metres before the header could start to fall. The plaintiff said that this was why he was doing it that way, that he would "throw it up there as quick as hard as you can so it slides past the pivot point to get it out and you can get it up"[39] and that this was normal practice. It was suggested to the plaintiff that on his description he was "trying to throw a 40 kilogram 4.8 metre object high enough so that 3.3 metres of it became the pivot point and the remaining under 1.5 metres could swing up unobstructed by the H-frame on the other side".[40] The plaintiff said that this was how it was done, he rejected the proposition that this would have been an absurd manoeuvre and said that it was an accepted method.

It was suggested to the plaintiff that he had not described it as a "throwing manoeuvre" in his statutory declaration. The plaintiff said that it wouldn't be called "throwing" but as "using your body and muscles and…"[41] The plaintiff was asked if what he was suggesting was that he was holding the 40 kilogram 4.8 metre timber in his left hand while at the same time attempting to move a 30 kilogram plank. The plaintiff said it all happened in the one action, explaining:[42]

> "So imagine it happening in a form of three to four seconds, pushing, lifting, coming up, planks in the road as I'm going through the motion of pushing it and then went to push the – and I realise when the plank hit my shoulder, trying to push that out of the road as well as pushing it up, yeah. So I would have got it up if the plank wasn't in the road in one hit or if the plank was a little bit more further out of my way, but then, like I said it slid over this way because everything was wet".

It was suggested to the plaintiff that nowhere in the description he gave in his statutory declaration did he suggest that he had hit the plank with his shoulder. The plaintiff agreed that he had signed the statutory declaration but said "I'm not the best at writing constructive sentences to try and word it exactly how it's supposed to be …"[43] It was suggested to the plaintiff that the description he gave in his statutory declaration, which did not include anything about flipping or knocking the plank with his shoulder, was a different version to that which he had given in court. The plaintiff agreed that he had signed the statutory declaration. It was further suggested to the plaintiff that on the description he had given he was attempting to lift two objects weighing a total of 70 kilograms. The plaintiff said that he wasn't trying to lift two objects, that he had to push the other one out of the road when it hit him in the shoulder because he realised it was in the way and that it all happened in one motion.[44]

[39] T 1-66 ll. 30-33
[40] T 1-66 ll. 42-46
[41] T 1-68 ll. 5-7
[42] T 168 ll. 12-27
[43] T 1-69 ll13-20
[44] T 1-70 ll. 7-11

(j) **13/12/13: Notice of claim for damages**[45]

The plaintiff agreed that he had signed the notice of claim form which commenced his claim for damages against Heinrich. The plaintiff had no recollection that in the notice[46] the event resulting in his injury was described as:

> "The Claimant was required to lift and move a timber plank which was waterlogged in the course of his employment when he sustained injuries to his lower back".

The plaintiff also agreed that he had signed a similar notice of claim form[47] which commenced his claim for damages against Hutchinson. In that document the identical description of the event resulting in the plaintiff's injury was given.

(k) **15/5/14: Report of Brendan McDougall**

The plaintiff agreed that he was interviewed by Brendan McDougall who was an engineer engaged to prepare an expert report relating to the incident in support of the plaintiff's claim against both defendants. In his report Mr McDougall states:[48]

> "8. Mr McKenzie describes having one foot between the pallet of U-heads and the frame. His other foot was over the lowest horizontal member and on the floor inside the frame assembly. He was reaching to his right side (hands approximately 1 metre from body centreline) and gripping the lower end of the bearer with both hands.
>
> 9. Mr McKenzie describes giving the header a mighty heave (lifting), and raising the beam approximately 1 metre above floor level. As he came upright, his left shoulder/upper arm made contact with the timber plank and may have tried to flip the plank over.
>
> 10. At this time Mr McKenzie experienced sudden onset of low back pain. He dropped the bearer he was lifting and was unable to continue working".

The plaintiff was asked if he recalled providing Mr McDougall that description. He agreed that he could recall providing some of those details but could not recall providing other details. He was asked if he recalled telling Mr McDougall that he gave the header a mighty heave. The plaintiff said:[49]

> "Yeah, I gave it a heave. Yeah. So about a – you know, it wasn't – it wasn't a metre. It was lower down than that. But yeah, something like that. And then, yeah, I went to give it a heave and it didn't go, so that's when I sort of, you know, more or less had more of me body and body weight coming into the

[45] Exhibit 35
[46] In answer to question 38
[47] Exhibit 36
[48] Exhibit 10 (page 97)
[49] T 1-75 ll. 10-15

frame. And once again, picked it up with both hands, gave it a big heave, pushed the plank out of the ….”

The plaintiff agreed that there was no mention made in either Mr McDougall's report, his statutory declaration or in the statement of claim to him coughing. He denied that the first time he had made mention of coughing was in his sworn evidence in court or that his description of events was a "moving feast".

(l) **23/8/14: Report of Dr Malcolm Wallace**[50]

Dr Wallace records in his report the plaintiff's description of the incident as follows:

> "Your client states that the injury to his lower back occurred on the 16th of February 2013. He states that he was at work on that day and was lifting large pieces of 6 x 4 timber into place. Your client states that there were some other planks in the way and it dislodged and came down on his left shoulder and he twisted as it was coming down on his shoulder. Your client states that he experienced immediate lower back pain which he describes as sharp in nature."[51]

It was suggested to the plaintiff that he told Dr Wallace that there were some other planks in the way and that it dislodged and came down on his left shoulder. The plaintiff said that there was only one plank and not planks and that it was not the case that something had dislodged and fell onto him.

(m) **16/5/16 and 13/12/18: Pleadings**

The plaintiff was referred to paragraph 6 of the original statement of claim. The plaintiff agreed that in the statement of claim there was no suggestion the bearer fell onto him or that the bearer knocked him down onto the frame. The plaintiff said that he had never asserted that.[52] He agreed that in paragraph 6 of the statement of claim there was no suggestion of him picking up U-heads or to coughing. The plaintiff said he didn't know why that was so, but refuted the proposition that the reason was because he had recently concocted it.

The plaintiff was referred to paragraph 6 of the consolidated statement of claim filed on 13 December 2018. He agreed that in paragraph 6 there was no reference to the bearer knocking him down onto the frame or to coughing when he was lifting U-heads after the incident.

[19] The plaintiff agreed that he was an experienced formwork carpenter and that he had received training in workplace health and safety. He agreed that he understood the requirement when lifting something of keeping his back straight and lifting close to his body. He agreed that he had completed a Heinrich employee information form[53] and that in doing so he had acknowledged that he understood the Heinrich site safety plan

[50] Exhibit 4
[51] Exhibit 4 (41)
[52] T 1-78 ll. 1-8
[53] Exhibit 14 (289)

and work methods and that he had been trained in methods of manual handling.[54] The plaintiff agreed that he had signed the Heinrich work method statement acknowledgement form[55] and that in doing so he acknowledged that he understood and agreed to abide by safe work method statement ("SWMS") 83 manual handling.[56] The plaintiff said that although he had signed off as having read and understood SWMS 83, he was not aware of that particular instruction at the time of the incident.

[20] It was suggested to the plaintiff that there had been no previous occasions that he had observed a 4.8 metre bearer lodged within 1.5 metre square frame. The plaintiff said that he had similar situations many times before. He disagreed that what he described as having occurred was the kind of unusual situation which required him to go to Somerville and seek his guidance as to how to deal with it. He could not recall whether his evidence in court was the first occasion he had described the header as being jammed within the section of framing, but said that he had given the same version from the beginning.[57] The plaintiff maintained that both the header and the plank were waterlogged. The plaintiff disagreed with the suggestion that there had been 2.8 millimetres of rain recorded on the night of 15/16 February 2013. He maintained that the whole site had been waterlogged and that work had been stopped to enable the site to be de-watered.[58]

[21] The plaintiff agreed that when he went to level 8 and saw that the bearer had been dislodged he did not speak to Somerville, did not try to get help from another worker and did not try to get mechanical help. He said that there was no one else present other than Hammond and the reason why he didn't ask Hammond for assistance was because he did not think he needed it.[59] He agreed that there was no urgency requiring him to lift the bearer back in place but said that it was his job and "you don't stop".[60]

[22] Ultimately the plaintiff refuted the proposition that his claim that he had been lifting a bearer when he injured his back was concocted.[61] He accepted that he had back pain from his normal work duties over the preceding couple of years but he said that was nothing serious. It was suggested to the plaintiff that before he commenced work on 16 February 2013 he coughed and that it was his coughing that injured his back. The plaintiff disagreed, saying that whilst he did cough, that was when he was lifting U-heads which was after he had injured his back. The plaintiff disagreed that he had made no mention to anyone on 16 February 2013 of lifting a bearer and he refuted the suggestion that the reason why he did not do so was because there had been no incident involving him lifting a bearer.

[23] The plaintiff agreed that each U-head would be inserted into the top of the frame after the frame had been erected and that they were fitted by sliding them down into the frame. He estimated that the spigot of each U-head was 750-800 millimetres in length and that they were otherwise not fixed into position.[62] It was suggested to the plaintiff

[54] T 1-81 ll. 1-9
[55] Exhibit 16 (294)
[56] T 1-82 ll.1-6
[57] T 1-85 ll. 21-32
[58] T 1-86 ll. 10-27
[59] T 1-87 ll. 9-32
[60] T 1-88 ll. 7-22
[61] T 1-90 ll. 21-38
[62] T 2-7 ll. 7-30

that no degree of force could have dislodged a bearer being held in position by six U-heads. The plaintiff said that it would depend on how hard it was hit and that it might have been caught by a pallet which caused it to lift out which is something he said has happened many times.[63] The plaintiff also disagreed that if a bearer were hit with sufficient force to dislodge it then the entire frame would fall over.

[24] The plaintiff agreed that his evidence was that on 15 February 2013 he had been erecting H-frames and that when he finished work that day the pallet of U-heads had not been craned up to the site.[64] He could not recall the exact time he finished work that day or whether there had been a general site clean-up before workers departed. He agreed that there were regular general clean-ups conducted on site but he said these could occur on a different day each week and not necessarily only on a Friday. The plaintiff disagreed that the crane ceased operating on 15 February 2013 at 2.30pm.

[25] The plaintiff disagreed that he had first encountered Wallace at 6.30am when he attended her office and informed her that he had hurt his back and not when she was walking up the stairs as he claimed.[65] The plaintiff agreed that he next spoke to Wallace in the company of his wife but could not recall if that was the following Monday or Tuesday. He agreed that what was contained in the incident report was "straight from your mouth" but denied telling Wallace that he had hurt his back when lifting an alloy app.[66] He disagreed with the proposition that there had been no de-watering carried out before he started work.

Philip Hammond

[26] Philip Hammond was a formwork carpenter employed by Heinrich at the construction site in February 2013. He knew the plaintiff through his employment at that site. He recalled early on a Saturday morning in February 2013 being on the construction site with the plaintiff. His evidence relating to the incident was as follows:[67]

> "Can you tell the court, to the best of your recollection, what happened? I was working, had my back to Jason. I think I was doing U-heads or setting U-heads and I just heard him groan. I heard a bit of a – and he said, "I've fucked me back." And I've turned around and he's standing there, hands sort of on his back, half bent over and it looked like he was in pain. And I asked him if he was all right and he said, "I've done me back [indistinct] going to report it. And that [indistinct] off the hoist. He went down. I never saw him again.
>
> How did he appear to you at that time? He looked like he was hurting."

[27] Hammond explained that the plaintiff was standing half bent over and that he was holding his back. Where they were working were pallets and timbers on the floor of the slab as well as some U-heads which he was setting.[68] On that particular job he would

[63] T 2-9 ll. 3-11
[64] T 2-18 ll. 1-4
[65] T 2-22 ll.9-19
[66] T 2-24 ll. 4-8
[67] T 2-64 ll. 14-22
[68] T 2-64 ll. 33-41

often put bearers in by himself because "that's the way it is on any of the jobs", sometimes the whole timber and sometimes just lifting one end up into place.[69]

[28] In cross-examination Hammond accepted that the incident he was being asked to recall had occurred more than 7 years previous and that his recollection was vague. He disagreed that when he first observed the plaintiff to be in pain it was about 6.15am and that he had just arrived on level 8 with Vi about to commence work for the day.[70] He said that he was definitely on the deck with the plaintiff and that he was working setting U-heads. He said that he had not been working for long, maybe ten or fifteen minutes.

Defence lay witnesses

[29] The defendant Heinrich called Jason Vi and Graeme Somerville to give evidence. The defendant Hutchinson called Susan Wallace and Jeff Miller to give evidence.

Jason Vi

[30] Mr Vi is employed as a formwork carpenter with Heinrich. In February 2013 he was employed by Heinrich at the construction site in Townsville. He recalled the incident involving the plaintiff. Work had not started at the time of the incident. Having commenced work at around 6am Vi travelled up to level 8 together with Hammond in the Alimak. When he arrived at level 8 he observed the plaintiff leaning up against a frame over behind the crane. At that stage he appeared fine. Other than saying good morning, he did not speak to the plaintiff before work.[71] As to the incident involving the plaintiff's back, Vi recalled the plaintiff telling him that "he coughed and he pinched a nerve in his back or done something in his back".[72] He did not observe the plaintiff cough. The plaintiff did not mention he had been lifting anything. Vi informed the plaintiff that he would need to speak to Somerville and that they would then need to put in a report. At that stage he had not started work and from what he observed no one else had either.

[31] In cross-examination Vi was asked if it had rained the previous evening. He said that there would have been a light shower and he agreed that it had rained overnight[73] but that it was not necessarily the case that the site was wet from overnight rain. He agreed that the standard timber planks at the site were 2.4 metres x 300 millimetres x 50 millimetres and that these were placed across the horizontal members of H-frames. As to the size of the bearers, Vi said that at the beginning of construction there were 4.8 metre bearers on site but these had been shortened as the job progressed and that the longest they had were 3.6 metres in length. He agreed however that in 2017 he had told an investigator that there were a couple of 4.8 metre long bearers on site which he had obtained from Hutchinson. Vi initially said that he was not aware that the plaintiff was alleging that he injured his back trying to lift a bearer that had partially fallen down but subsequently agreed that he had become aware of that when he spoke to an investigator in 2017. He agreed that he had told an investigator in 2017 that the bearer had been left

[69] T 2-65 ll. 4-11
[70] T 2-66 ll. 4-14
[71] T 2-89 ll. 14-24
[72] T 2-89 ll. 25-28
[73] T 2-90 ll. 29-35

inside a frame, that it would have been laying horizontal on the frame and that he thought that the bearer had been left there overnight.[74]

[32] Vi agreed that it was not out of the ordinary for form set workers such as the plaintiff working at the construction site to manoeuvre bearers onto H-frames. He disagreed that this would often be accomplished without a second person, saying that with shorter bearers it could be but with a longer bearer you needed someone to slide it up to you. He agreed that he had manoeuvred bearers by himself up onto H-frames without a second person including at the Ergon site. He agreed that the crane crew would bring materials to the upper floors and position the materials on the slab where work was being carried out including formwork. He disagreed with the proposition that when he travelled to level 8 Hammond was not in the Alimak with him and that both the plaintiff and Hammond had started work at the time the plaintiff was injured. Vi agreed that what the plaintiff had said to him was "I've hurt myself. You're not going to believe it. As soon as I coughed I couldn't fucking move".[75] He also agreed that it was almost three weeks after the incident when he provided his version of events to Sue Wallace.

Graeme Somerville

[33] Mr Somerville was a foreman employed by Heinrich having been with the company for about 20 years. In February 2013 he was the foreman for Heinrich on the construction site in Townsville. All workers employed by Heinrich at the site had to undertake an induction process which included safe work methods. At the site Heinrich were using 1.8, 2.4 and 3.6 metre long bearers. Initially there had been longer bearers which were used in the construction of the ground floor but they were not really used after that. There were no 4.8 metre long bearers being used in the construction of level 9. In the construction of level 9 H-frames were assembled to be approximately 3 metres in height and bearers would be secured in place by nails. Positioning the bearer into place required a worker to stand on planks with another worker passing the bearer up to them.[76] He estimated that a plank would weigh less than 10 kilograms.

[34] Somerville recalled having a discussion with the plaintiff on the Monday prior to the incident during which the plaintiff had told him that his back was a bit sore and that he was going to take it easy that day.[77] The plaintiff continued to work for the rest of that week. On 16 February 2013 Somerville commenced work at either 6 or 6.30am. When he travelled to level 8 the plaintiff was already up there but work had not started. He recalled when arriving on level 8 being approached by both Vi and the plaintiff. He asked the plaintiff "what's up". The plaintiff said "I've coughed and thrown my back out". He said to the plaintiff "you did what" to which the plaintiff replied "I'm not scamming you. I've coughed and put my back out".[78] He directed the plaintiff to speak to Wallace and the plaintiff walked off to the Alimak. The plaintiff made no mention in the conversation to lifting a heavy bearer or being hit by a bearer and falling onto the frame. All that the plaintiff told him was that he had coughed. Somerville said that he did not observe within a section of framing a 4.8 metre bearer and that it would have

[74] T 2-91 ll. 20-45
[75] T 2-94 ll. 17-20
[76] T 2-98 ll. 30-39
[77] T 2-99 ll. 17-24
[78] T 2-100 ll. 17-34

been impossible for one to land in there.[79] Had there been such a bearer in that position the procedure for repositioning it would be to have someone up on planks, a second person at the bottom pushing it up and another person pulling it out of the frame.

[35] In cross-examination by counsel for Hutchinson, Somerville agreed that Heinrich had been sub-contracted to design the formwork and to supply labour and materials for the construction of the Ergon building. He agreed that Heinrich had significant autonomy in terms of how they went about constructing the formwork. That included where to stack material needed to complete the job. Each floor was constructed half a floor at a time with one half of the floor formed up and poured whilst the other half was being formed up. On 16 February 2013 half of level 9 had been formed up but not poured. He expressed the opinion that once a bearer was nailed in, were force to be applied to it, then it would push the frame over.

[36] In cross-examination by counsel for the plaintiff, Somerville agreed that in 2017 he had told an investigator that it had been raining for two days prior to the plaintiff stating he had hurt his back, that a big low had come through from Weipa and he agreed that it had rained overnight.[80] He said that he recalled a low coming though while he was working in Townsville but could not recall whether it was the week the plaintiff hurt his back. He was asked if he also recalled telling the investigator that men went up to the upper level to de-water before work started. He said that he could not recall a wet weather walk that morning. Somerville maintained that manoeuvring longer bearers always involved two men working together. It was suggested to him that Hammond was already working with the plaintiff when he arrived on level 8. He said from memory Hammond came up with him in the Alimak.[81] It was also suggested that in his conversation with the plaintiff he asked him "What have you done", to which the plaintiff replied "You are not going to believe this mate, I've hurt my back. When I coughed I couldn't move".[82] Somerville said the plaintiff had told him that he had coughed and put his back out but agreed that the plaintiff had also said that he hurt his back. He also agreed that he had supplied a version of events to Wallace about 3 weeks later. In re-examination Somerville said that what the plaintiff had said to him was that he put his back out.

Jeffery Miller

[37] Mr Miller was the site manager for Hutchinson on the Ergon building site. He said level 9 of the building was the roof. Hutchinson was the principal contractor. Heinrich supplied the design and all materials for the formwork. As at 16 February 2013 one half of level 9 had been formed up but it was not poured until 1 March 2013. On the afternoon of 15 February 2013 the crane crew ceased operations between 2.45pm and 3pm and signed off at 3.15pm.[83] The last task undertaken by the crane that day was to deposit a load of steel reinforcement onto the section of level 9 that had been formed up. The crane did not deposit a load on level 8 that afternoon. The crane would generally commence operations at 6.30am. Hutchinson employee time sheets[84] for the crane

[79] T 2-101 ll. 7-11
[80] T 1-104 ll. 26-47
[81] T 2-108 ll. 27-30
[82] T 2-108 ll.32-46
[83] T 3-16 ll. 26-33
[84] Exhibit 26

crew[85] showed they commenced work at 5.45am on 16 February 2013. Before operating the crane the crane crew had to be briefed on the list of work that day and then had half an hour to climb the crane and undertake their safety checks. His recollection was that in the preceding week there had been no weather stoppages. He recalled the site being closed on 15 February 2013 at 4 to 4.30pm and he recalled no inclement weather that evening including a storm.[86]

[38] Miller arrived at the construction site at 4.45 to 5am. After opening up the office area he carried out an inspection of the site which included a site walk of each floor. He observed nothing out of the unusual during that inspection.[87] He said that had there been a fallen bearer it would have caught his eye and had a crane knocked a bearer to the ground during a lift this would be a reportable incident.[88] No report was raised during the project regarding a fallen bearer or a bearer having been knocked by a crane load. The hoist would usually commence operations between 6.15 to 6.20am. On 16 February 2013 Miller recalled being on level 8 at around 6.15 to 6.20am to see who had turned up for work. The plaintiff was in the area at the base of the crane in company with another worker. At this time work had not yet commenced on site. He did not observe any fallen bearer and there had been no de-watering carried out on the site as it had not been required.

[39] In cross-examination by counsel for Heinrich, Miller agreed that the workers involved in operating the crane remained under the control of Hutchinson. He disagreed that at the beginning of the project Hutchinson supplied 4.8 metre bearers for use on the first three floors and thereafter shorter bearers were used, saying that Heinrich supplied their own material including bearers. He disagreed with the proposition that Heinrich did not supply 4.8 metre bearers.[89] He said that had he observed a fallen bearer which he believed was going to cause harm he would have informed Heinrich of it in order for them to remedy it.

[40] In cross-examination by counsel for the plaintiff, Miller agreed that he had been first asked to provide information in relation to the incident in February 2020. With respect to his evidence that the crane crew had signed off at 3.15pm on 15 February 2013, Miller was referred to the Hutchinson time sheets for the crane crew for that day. He agreed that according to those time sheets the crane crew finished work at 4.15pm.[90] As to his inspection of the site which he carried out after arriving at work on 16 February 2013, Miller said that he would have arrived at level 8 by around 5.05am. He disagreed that this would have been before dawn, saying that it was bright at that time of year. He did not dispute that the official sunrise for that day was 6.05am and before that time it would have been twilight. Miller disagreed that when he carried out his inspection there would not have been much light, saying that there was egress lighting also on site. Miller also gave the following evidence:[91]

[85] Wayne Todd, Peter McGee and Jesse Baumbach
[86] T 3-19 l.45 – T 3-20 l.8
[87] T 3-21 ll. 10-25
[88] T 3-22 ll. 10-15
[89] T 3-26 ll. 11-16
[90] T 3-31 ll. 1-19
[91] T 3-35 ll. 19-39

"So on that morning, just before sunrise early, is it possible that there was a fallen bearer in a H frame that you may not have seen? - Fallen bearer in an H frame. No.

You don't think that's possible that you just might not have seen it at that time of the day? - I'm not sure. Is it a big bearer, a small bearer? I – I – what type of bearer is what – I don't understand.

It's a wooden formwork bearer - - -? - Yeah.

- - - 4.8 metres long? - And it's – and it's what? Wedged in the framework?

It's fallen inside a H frame and so it's on a – on an angle? - Right. So if it's on an angle in a H frame it would be roughly 1.8 above the deck – a piece of timber 1.8 above the deck.

I'm not sure? - Well, if I saw a piece of timber, a bearer, laying at 1.8 above a deck, it would look unsightly, unsafe to me.

But is it possible that at that time of the morning you might not have seen it? - It's - it would[92] be hard to hard to miss if you're up on level 9 looking across the work of level 8 for the next day."

[41] In re-examination Miller was asked about the time sheets indicating that the crane crew finished work at 4.15pm. He said that it was common to reward the crane crew for the hours they worked by giving them an hour and it was also a requirement to conduct a toolbox meeting on a Friday afternoon to review the week. Asked if he could recall a toolbox meeting involving the crane crew being held on the afternoon of 15 February 2013, he said that "we always have a chat on a Friday afternoon" and that he believed the crane stopped operating at about 2.45pm.[93]

Susan Wallace

[42] In February 2013 Wallace was employed by Hutchinson as a safety officer for the Ergon construction project in Townsville. At around 6.30am on 16 February 2013 the plaintiff came to her office and whilst standing in her doorway informed her that he had hurt his back and that he was going to leave the site.[94] The plaintiff said that he was in pain but he did not inform her how he had hurt his back. She told the plaintiff that she would be needing an incident report. She said that she did not speak to the plaintiff that morning near the Alimak. After the plaintiff left she went up to level 8 where she spoke to both Vi and Somerville about what had happened. She was informed that they hadn't started work and that they had not observed the plaintiff working. She commenced preparing an incident report that morning with the information she had available.

[92] The transcript records the witness' evidence as "wouldn't be hard to miss". It is accepted by all the parties that the transcript is not accurate and that the evidence of the witness was "it would be hard to miss".
[93] T 3-40 ll. 1-6
[94] T 1-41 ll. 31-41

[43] Wallace recalled the plaintiff returning to her office the following week, possibly the following Wednesday, with his wife. She completed an incident report[95] on 11 March 2013, by which time she had no further information to add.[96] As to the source of the information contained in the brief description on page 1 of the report, Wallace said:[97]

> "So when Jason and his wife came into the office, I asked for, you know, what happened, and Jason didn't speak, only the wife spoke. She was very pushy. I asked her several times that I didn't want to hear her side of the story that I only wanted to hear what Jason had to say. I think Jason sensed my frustration and he attempted to start talking, but she whacked him on the leg and he stopped. So she was saying that he was picking something up, that's how – well, that was what I took from the conversation. But I never spoke to Jason again after that point."

[44] Wallace said that where in the description it is recorded that the plaintiff had been picking up an alloy app, it was the plaintiff's wife who said that he was picking up material on the deck, Wallace said "an alloy" and the plaintiff's wife said yes.[98] Wallace then went and spoke to both Vi and Somerville about the incident. Neither was aware of how the plaintiff had hurt himself because he had not started work and they had not seen him. The weather on 16 February 2013 was fine and there had been some showers overnight. She could not recall if there had been a storm.[99] No site walk was conducted by the safety committee that morning. She said that a crane knocking down a bearer could possibly be a reportable incident. No report had been made of a fallen bearer on level 8 and she did not observe a fallen bearer when she went back to level 8 following the plaintiff's departure.

[45] In cross-examination by counsel for the plaintiff, Wallace disagreed that her conversation with the plaintiff on 16 February 2013 occurred near the Alimak. It was suggested to her that in a conversation with a solicitor in April 2017 concerning the incident she informed the solicitor that the plaintiff had hurt his back lifting timbers or bearers.[100] Wallace said that she did not remember although she did appear to accept that there had been reference made in the discussion to the plaintiff hurting his back when lifting formwork components.[101]

<u>Other evidence</u>

[46] In addition to the lay witnesses called by the plaintiff and defendants, there are some aspects of the medical evidence to which some reference has already been made and, as will become obvious below, has relevance to the issue of liability.

Dr Malcolm Wallace

[47] Dr Wallace is an orthopaedic surgeon who examined the plaintiff on 16 August 2014 and again on 16 March 2020 and has provided two medico-legal reports relating to the

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[95] Exhibit 33
[96] T 3-43 ll. 1-3
[97] T 3-43 ll.8-15
[98] T 3-43 ll. 38-45
[99] T 3-44 ll. 16-21
[100] T 3-47 ll. 22-24
[101] T 3-47 ll. 22-24, 40-41

plaintiff's back injury.[102] Notes of a conference conducted between Dr Wallace and the plaintiff's legal representatives on 26 March 2020 were also tendered.[103]

[48] In cross-examination Dr Wallace confirmed that in his report under the heading "further history", the details of how the plaintiff came to injure his back described there were provided by the plaintiff. Dr Wallace agreed that the plaintiff had not told him that he was holding a 40 kilogram 4.8 metre long piece of timber in his right hand and then either attempted to lift or flip a 30 kilogram 2.4 metre plank of timber with his right hand. He also agreed that the plaintiff had not told him that he coughed when he was attempting to lift some items of alloy.[104]

[49] Dr Wallace was asked whether it was common or uncommon for coughing or sneezing to cause significant onsets of lower back pain in a patient. Dr Wallace said that what was being described was Valsalva removal where there is a sudden increase in venous pressure within the abdomen and the veins of the spinal cord. He said that could cause a sudden acute exacerbation of pain, but it is usually temporary.[105] He was asked whether on some occasions coughing or sneezing, especially in a forward flexed position, by a person who has degenerative disc disease can produce very significant back pain that can endure. Dr Wallace said that this was uncommon in his clinical experience of coughing or sneezing, that the exacerbation of pain was usually momentary and that it did not usually cause chronic ongoing lower back pain.[106] Dr Wallace then gave the following evidence:[107]

> "Well, can I put this scenario to you … A disc that is already damaged, as shown in an MRI, can be shown to have increased in the level of protrusion after an act such as coughing or sneezing? Yes, in the – in – a different – this is different pathology referring to. This – in a – in a disc prolapse which Mr McKenzie does not – does not suffer from. In a disc prolapse the act of coughing or sneezing could increase the size of and severity of a disc prolapse.
>
> Okay. Now, Doctor, assume for the moment that this particular man, 44 years of age, with degenerative changes visible in the radiology testing that had been done, with some prior episodes of relatively minor back pain, and a long history of manual work, assume that he coughed and very shortly thereafter told the people with him that he'd just coughed and put his back out, that scenario would be consistent with the activation of his lower back pain, wouldn't it? I would imagine that - if we exclude a disc prolapse from the scenario, and we have, because that – this gentleman does not suffer from a disc prolapse. That the act of coughing or sneezing would temporarily aggravate the pain.

[50] Dr Wallace reiterated his opinion that it was very unlikely that the exacerbation of back pain during a cough or sneeze would continue into chronic disabling pain.[108] He also

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[102] Exhibits 4 and 5
[103] Exhibit 6
[104] T 2-32 ll. 1-9
[105] T 2-34 ll. 7-12
[106] T 2-34 ll. 16-21
[107] T 2-34 ll. 23-39
[108] T 2-36 ll. 1-7

agreed that he was not aware that the plaintiff had complained to his supervisor of back pain five days before the event.

Brendan McDougall

[51] Mr McDougall is a consulting engineer who provided a report on behalf of the plaintiff in May 2014 assessing, inter alia, risk management and the effectiveness of procedural control measures at the plaintiff's workplace relevant to how the plaintiff described he injured his back.[109] Based upon the plaintiff's description of how he injured his back, Mr McDougall made a number of assumptions in his report in assessing the adequacy of the control measures in place, including:

(a) The bearer which the plaintiff was handling was 4.8 metres long which had partially fallen from the top of a H-frame (assumed to have been knocked by the crane) such that one end was at ground level wedged against a lower horizontal member and the other end resting against the top of the other side of the frame;[110]

(b) The plaintiff attempted to reposition the fallen bearer back onto the top of the frame;

(c) Access to the frame assembly and fallen bearer was restricted because of the position of timber pallets containing U-heads, steel reinforcing for a large column and a pack of timber headers.

(d) The plaintiff had one foot between the pallet of U-heads and the frame. His other foot was over the lowest horizontal member and on the floor inside the frame assembly. He was reaching to his right side (hands approximately one metre from his body centreline) and was gripping the lower end of the bearer with both hands. The plaintiff gave the header a mighty heave (lifting) raising the beam approximately 1 metre above floor level. As he came upright the plaintiff's left shoulder/upper arm made contact with the timber plank and may have tried to flip the plank over. It is then the plaintiff experienced a sudden onset of lower back pain and dropped the bearer he was lifting;

(e) Whilst toolbox talks were held every 3 months or so and manual handling issues were discussed, the plaintiff was provided with no information or instruction that would result in the task he was attempting of lifting a fallen header being considered acceptable;

(f) The bearer had an assumed weight of approximately 39.6 kilograms which if left wet or immersed in water for an extended period would increase in weight by up to 20%.

[52] Mr McDougall opined that the infrequent lifting of a 39.6 kilogram bearer, even under optimum conditions, will significantly exceed maximum weight recommendations and expose workers to increased risk of musculoskeletal injury. The risk in the plaintiff's case was exacerbated by a range of factors including, the beam was close to the vertical and therefore most of the weight would need to have been supported, the bearer was

[109] Exhibit 10
[110] Exhibit 10 (95)

wedged under/against the frame assembly restricting the direction in which movement was possible and the plaintiff performed the lift away from his body, the restricted access resulted in a flexed twisted posture.[111]

[53] Mr McDougall opined that as the work culture at the plaintiff's workplace was that the handling of 4.8 metre long bearers was an accepted and required aspect of daily work it appeared that many aspects of procedural control were lacking. Without the benefit of appropriate manual handling training, work procedures, supervision and work culture it was predictable that workers such as the plaintiff would attempt heavy manual tasks and use handling techniques which relied upon pain onset or maximum strength as the criteria of acceptability.[112] With the benefit of appropriate handling training and a work culture that supported safe work practices, workers would have had an increased likelihood of recognising that the manual handling of any 4.8 metre long bearer involved significant risk and that a worker in the plaintiff's situation would have recognised how to, and the need to, minimise the risk factors when attempting to lift and reposition a fallen bearer.

[54] In cross-examination Mr McDougall agreed that he had not been informed by the plaintiff that the bearer which he had found dislodged on 16 February 2013 had been positioned in six U-heads and nailed at each end the previous afternoon and he assumed that had not been the case. He said that the assumption made in his report, that the bearer had been knocked by the crane, was one that the plaintiff had made to him. He agreed that this assumption would not be possible were it assumed that the bearer had been positioned sometime before 4.30pm the afternoon before in six U-heads with a nail at each end, that the crane crew had stopped work at 2.30pm and that the crane had not started prior to the plaintiff finding the bearer dislodged the following morning.[113] He also agreed that the plaintiff had not told him that when he attempted to lift the bearer it fell back down on him onto his back, onto a lower member of the frame and that he had back pain at that stage, nor did the plaintiff tell him that after that happened he was lifting some U-heads when he coughed and suffered back pain.

[55] Mr McDougall agreed that lifting a 4.8 metre long bearer to the top of a 3 metre frame could not be achieved in one movement. He was referred to the Heinrich manual handling/lifting instruction[114] and asked to comment on its adequacy. Mr McDougall said that it was "woefully misleading and inadequate"[115] for a number of reasons including there being no scientific evidence that the form of training it prescribed reduced the risk of injury and that studies had shown that most people, when they voluntarily choose to do a lift, will choose a lift that is up to three times larger than safe manual handling guidelines allow. The instruction was therefore misleading and that what workers should be told is to limit the strength they use in manual handling tasks to below what their strength capability is.[116]

[111] Exhibit 10 (99)
[112] Exhibit 10 (105)
[113] T 2-44 ll.11-17
[114] Exhibit 13 (277)
[115] T 2-52 ll.26-27
[116] T 2-52 ll.30-47; T 2-53 l.44 to 2-54 l.18

[56] Mr McDougall agreed that even if the bearer had not been nailed into position when placed in six U-heads, no amount of lateral force would cause the bearer to dislodge, that the frame would tip over and that the only way a bearer positioned as such would be dislodged would be to lift it at some point along its length.[117]

Dr Michael Coroneos

[57] Dr Coroneos examined the plaintiff on 12 July 2013 at the request of WorkCover. His report to WorkCover dated 18 July 2013[118] is not sought to be relied upon by either defendant as a medico-legal report. Rather, the defendants rely upon the contents of the report only in relation to the factual account which the plaintiff gave to Dr Coroneos for how he injured his back, which, it is asserted, is factually different to his sworn evidence.[119]

LIABILITY

The pleaded cases

[58] The pleadings delineate the issues in dispute between the parties in respect to liability. The plaintiff's consolidated and amended statement of claim pleaded the following relevant factual matters:

> 6. On the 16th February, 2013 at the said construction site:
>
> (a) heavy rain and strong winds the previous night ("the storm") had affected the construction site;
>
> (b) representatives of Heinrich and Hutchinson inspected the construction site before work for the day commenced;
>
> (c) the Plaintiff, in the course of his said employment, was required to re-position a length of timber, called a "header" which was 4.8 metres long, 6 inches wide and 4 inches thick;
>
> (d) the header weighed approximately 40kgs;
>
> (e) the header appeared to have been knocked down from the top of a H-Frame by:
>
> (i) a crane which was used to place pallets of "u-heads" on the construction site; or
>
> (ii) as a result of the storm.
>
> (f) as a result of the header being knocked down, one end of it was on the concrete floor and the other end of the header was up in the air, as it was

[117] T 2-58 ll. 21-40
[118] Exhibit 3
[119] T 2-68 ll. 34-37

leaning against one of the metal construction frames, which were used to construct the flooring upon which the concrete would be poured to make the next level of the high rise building;

(g) the Plaintiff had to adopt an awkward position, by leaning through one of the construction frames;

(h) the Plaintiff was not able to move freely around the site, due to the fact that there was a large column, which had steel reinforcing rods coming through it, which blocked the Plaintiff's movement down the left-hand side of the metal construction frames;

(i) the Plaintiff was blocked from moving to the right due to the pallets of u-heads and as a result, had to lean through the construction frame and take hold of the lower end of the header, with both hands, in an attempt to position the header back onto the u-head, where it was required to be;

(j) while attempting to put the header in its proper location, a timber plank was in the Plaintiff's way;

(k) the timber plank was also on an incline and was resting against the metal framework;

(l) the timber:

    (i) was waterlogged due to the fact it had been raining and the plank was exposed to the elements;

    (ii) weighed approximately 30kgs;

    (iii) was made of hardwood and its dimensions were approximately 300mm to 400mm wide x 2.4 metres long x 40mm thick;

(m) while attempting to reposition the fallen bearer back onto the top of the H-frame ~~put the header back into its correct place~~, the Plaintiff reached to grip the lower end of the bearer; ~~held the header in his left hand and reached with his right hand to move the timber plank;~~

(n) the Plaintiff lifted the bearer, raising it approximately 1 m above floor level, and as he came upright, his left shoulder/upper arm made contact with the timber plank which he attempted to move or flip over out of the way ~~attempted to lift the timber plank from the bottom in an attempt to move it out of the road~~, so that the Plaintiff could put the header back into its correct location ("the lifting activity");

(o) as a result of the lifting activity ~~as the Plaintiff lifted the timber plank, he~~ the Plaintiff sustained injuries to his lower back ("the incident").

[59] Relying upon these pleaded factual matters, the plaintiff alleges in paragraph 8 of the consolidated and amended statement of claim each defendant to be liable for the back injury which he suffered at the construction site on 16 February 2013 on the following pleaded bases:

(a) the negligence and/or breach of contract of the Defendant Heinrich, its servants or agents;

Particulars

(i) failed to provide the Plaintiff with a safe place of work;

(ii) failed to provide the Plaintiff with a safe system of work;

(iii) required or permitted the Plaintiff to perform a task which the Defendant knew or ought to have known unreasonably exposed the Plaintiff to risk of injury;

(iv) failed to warn or instruct the Plaintiff as to the risk of carrying out his work tasks;

(v) failed to adequately assess the Plaintiff's work tasks in the context of safety and design, implement and enforce safe working practices;

(vi) failed to provide the Plaintiff with any or any adequate assistance from co-workers;

(vii) failed to identify the fallen bearer as a risk of injury requiring:

A. risk assessment

B. risk control;

C. instruction and supervision to ensure that repositioning the fallen bearer was carried out by two or more workers after pallets and other materials were relocated out of the way before repositioning the fallen bearer.

(viii) failed to ensure, so far as was reasonably practicable, the health and safety the Plaintiff is required by s 19 WHS Act;

(ix) failed to ensure, so far as was reasonably practicable, that the way in which the H-frame and the bearer was installed, constructed or commissioned ensured that they were without risks to the health and safety of person including the Plaintiff as required by s 26 of the WHS Act;

(b) the negligence of the Defendant Hutchinson, its servants or agents:

Particulars:

(i) failed to identify the fallen bearer as a risk of injury requiring supervision and/or instruction of Heinrich to ensure that the fallen bearer would be repositioned without risk of injury to workers including the Plaintiff;

(ii) failed to supervise and/or instruct Heinrich to ensure that the fallen bearer would be repositioned without risk of injury to workers including the Plaintiff;

(iii) failed to ensure, so far as was reasonably practicable, the health and safety the Plaintiff as required by s 19 of the WHS Act;

(iv) failed to ensure, so far as was reasonably practicable, that the workplace and anything arising from the workplace were without risks to the health and safety of persons including the Plaintiff as required by s 20 of the WHS Act.

[60] In its further amended defence Heinrich pleads the following factual matters:

3. In regards the allegations in paragraph 6 of the Consolidated & Amended Statement of Claim, ~~the Defendant~~ Heinrich:

.....

(aa) Denies the allegations in paragraph 6(a) as untrue, because of its belief that there were no strong winds or heavy rainfall at the site on 16 February 2013 and recorded rainfall was 4.6mm on 15 February 2013 and 2.8mm on 16 February 2013;

…..

(b) ~~Does not plead~~ denies the allegations contained in subparagraphs ~~(a) to ((l)~~ (c) to (n) as untrue, because of its belief:

i. ~~The allegations made are solely within the knowledge of the Plaintiff~~ there was no timber bearer present within or against metal construction frames at the construction site and requiring re-positioning on 16 February 2013; and

ii. ~~Despite reasonable investigations the Defendant Heinrich has not been able to establish the truth or otherwise of the allegations~~ no timber bearer had been or was knocked down from the top of the formwork framing present at the site;

iii. no timber bearer was in an upright position between sections of the formwork framing on the morning of 16 February 2013;

iv. it was not possible having regard to the length of the timber bearers alleged (4.8 metres) and the spacing between the

formwork frames of 1.5 metres, for a bearer to be knocked from the top of the framing into an upright position within a section of the framing;

v. it was not possible for a bearer weighing 40 kilograms and being 4.8 metres in length to be knocked down into an upright position within a section of the formwork framing;

vi. there was no bearer of the size and type alleged present within the metal framing for the plaintiff to grip, lift or manoeuvre in any way.

[61] Accordingly, in addition to denying the particulars of negligence and/or breach of contract pleaded by the plaintiff in paragraph 8(a) of the consolidated and amended statement of claim, Heinrich also in its defence contests the plaintiff's claim against it on the basis that:

1. ……

(g) The Plaintiff sustained injuries to his lower back by reason of coughing ~~sneezing~~ and the wrenching of his back in the process of coughing ~~sneezing~~;

(h) There was no bearer present in an upright position within the metal framing at the site on the morning of 16 February 2013 requiring any risk assessment, risk control or instruction or supervision;

(i) Sections 19 and 26 of the *Work Health and Safety Act 2011 (Qld)* do not confer a private right or cause of action;

(j) There was no bearer present in an upright position within the metal framing at the site which required any reasonably practicable measures to be undertaken to comply with any obligations imposed by sections 19 and 26 of the *Work Health and Safety Act 2011 (Qld).*

[62] In its second amended defence Hutchinson pleads the following factual matters in response to those alleged by the plaintiff in paragraph 6 of the consolidated and amended statement of claim:

5. …….

(a) Denies the allegations contained in paragraph 6(a) and believes the said allegation to be untrue because:

(i) There was no storm or extreme weather event in Townsville on the evening of 15 February 2013 as alleged;

(ii) There was no strong winds on the evening of 15 February 2013 as alleged;

(iii) There was no heavy rain on the evening of 15 February as alleged;

(iv) Total rainfall recorded at the Townsville airport for 15 February 2013 was only 4.6mm;

(v) The construction site was not affected as alleged.

(b) With respect to paragraph 6(b):

(i) Admits that a representative from the Defendant (Hutchinson) inspected the construction site before the commencement of work on 16 February 2013;

(ii) Says that the said inspection revealed no fallen header as alleged by the Plaintiff in paragraph 6;

(iii) Does not admit that an inspection was conducted by a representative of Heinrich prior to the commencement of work as despite reasonable enquiry the Defendant remains uncertain of the truth or falsity of the said allegation;

(c) The defendant denies the allegations of fact in paragraphs 6(c) to 6(n) (inclusive) and believes the said allegations to be untrue because:

(i) There was no storm on the evening of 15 February 2013;

(ii) There were no high winds sufficient to dislodge a header on the evening of 15 February 2013;

(iii) At the time of the alleged incident the site crane had not commenced operations that day;

(iv) There was no incident involving the crane on 15 February 2013;

(v) There was no dislodged header as alleged.

[63] Finally, in addition to denying the particulars of negligence and/or breach of contract alleged against it by the plaintiff in paragraph 8(b) of the consolidated and amended statement of claim Hutchinson, whilst admitting that it owed the plaintiff a duty of care to exercise all reasonable care and skill to be expected of a principal contractor, otherwise denied it owed the plaintiff any of the duties of care alleged by the plaintiff. Further, whilst asserting that it had complied with all of its obligations under the *Work Health and Safety Act* 2011 (Qld) (WHS Act) Hutchinson also asserts that any breach of the WHS Act does not provide the plaintiff with a private cause of action.

Legal framework of liability - Heinrich

[64] The plaintiff's claim against Heinrich is founded upon common law negligence as well as the duty of care which the plaintiff alleges was owed to him by Heinrich under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (WCRA). There is no dispute that Heinrich did owe a duty of care to the plaintiff. Such a duty arose out of the employer/employee relationship which existed at the relevant time between

Heinrich and the plaintiff. The general principles by reference to which an employer's breach of duty is to be determined are not controversial. They were stated by the plurality in *Czartyrko v Edith Cowan University* (2005) 79 ALJR 839 at 842 in the following terms:

> "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work." (citations omitted)

[65] As to whether an employer has breached its duty of care to its employee, it has been said[120] that the so called "Shirt calculus" as set out by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 is almost universally applied on the question of negligent breach of duty at common law:

> "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."

[66] It is well established that the duty of care owed by an employer to an employee will include a duty to take reasonable care to avoid exposing them to unnecessary risks of injury,[121] a duty not to expose an employee to a risk of injury the employer knew or ought to have known about,[122] a duty to provide safe plant and machinery[123] and a duty to provide a safe system and a safe place of work. [124] A failure to warn an employee of a risk even where the risk might be obvious can also constitute a breach of the duty of care owed by an employer to an employee.[125]

[67] However determining the liability of Heinrich for any injury suffered by the plaintiff in the present case does not fall to be decided by reference to the common law alone. Section 305B–305E of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

[120] Stokes v House with No Steps [2016] QSC 79 at [56]
[121] Czatyrko v Edith Cowan University (2005) 79 ALJR 839 at [12]
[122] Hayes v State of Queensland [2017] 1 Qd R 337 at [7]
[123] Kondis v State Transport Authority (1984) 154 CLR 672 at 680
[124] Nicol v Allyacht Spars Pty Ltd (1987) 163 CLR 611 at 616
[125] Mclean's Roylen Cruises Pty Ltd v McEwan (1984) 58 ALR 3, per Gibbs J at 7

(WCRA) apply to the question of liability against Heinrich by reason of Heinrich being the plaintiff's employer. Section 305B and 305C of the WCRA provide as follows:

"**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;

(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."

[68] Sections 305E of the WCRA also provide:

305E Onus of proof

In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[69] Broadly speaking, sections 305B–305E WCRA correspond to sections 9–12 of the *Civil Liability Act* 2003 (Qld) (CLA)[126] Similar statutory provisions to these contained in the *Civil Liability Act* 2002 (NSW) were considered by the High Court in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420.

[70] It will be obvious from the pleadings that in terms of the scope of the duty of care owed by Heinrich to the plaintiff, reliance is placed by the plaintiff on sections 19 and 26 WHS Act. The reliance by the plaintiff on these provisions was the subject of both written and oral submissions. Whilst acknowledging that by operation of section 267 WHS Act neither section 19 or 26 themselves confer on the plaintiff a separate right of action in civil proceedings, the plaintiff argues that the statutory framework prescribed under the WHS Act is however relevant in informing the common law duty of care. Conversely, each defendant argues that the way in which the plaintiff has pleaded his case what the plaintiff in effect is seeking to do is translate the obligations prescribed under the WHS Act as a duty of care under common law. Thus each defendant argues that section 267 WHS Act precludes the plaintiff from relying upon section 19 and 26 for that purpose and, in any event, these sections do not materially add to the cause of action advanced by the plaintiff.

[71] In my view the relevance of obligations imposed upon an employer under the WHS Act was correctly explained by McMeekin J in *Kerle v BM Allaince Coal Operations Limited & Ors* (2016) QSC 304, namely, that the obligations are relevant to informing the existence and scope of the duty owed by an employer at common law. McMeekin J's approach is consistent with that explained by the High Court in *Leighton Contractors v Fox* (2009) 240 CLR 1 at [49], where it was held:

> "While it is true that obligations under statutory or other enactments have relevance to determining the existence and scope of a duty, it is necessary to exercise caution in translating the obligations imposed on employers, principal contractors and others under the OHS Act and the Regulation into a duty of care at common law. This is because, as Gummow J explained in *Roads and Traffic Authority (NSW) v Dederer*, "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden".

[72] Accordingly, I do not understand from his pleaded case that the plaintiff is seeking to rely upon sections 19 and 26 WHS Act as giving rise to a discrete right of action against Heinrich, the breach of which would establish liability. As the plaintiff has accepted in submissions, the sections as pleaded are relevant only in terms of informing the existence and scope of the duty of care owed by Heinrich to the plaintiff. That is how I understand the plaintiff's reliance on the provisions which, in my view, accords with the approach explained in *Leighton*.

[126] Stokes v House With No Steps [2016] QSC 79 at [60]

Legal framework of liability - Hutchinson

[73] In its defence[127] Hutchinson admits to owing the plaintiff a duty of care to exercise all reasonable care and skill to be expected of a principal contractor but has denied that it owed the plaintiff a duty of care to devise a safe system of work for the plaintiff, the denial being predicated upon an assertion that the allegation constitutes an incorrect principle of law.

[74] As the WCRA has no application to Hutchinson, its liability as principal contractor is to be assessed by reference to common law principles. The nature of the duty owed by a principal to an independent contractor was explained in *Leighton Contractors v Fox supra* at [20]:

> "The common law does not impose a duty of care on principals for the benefit of independent contractors engaged by them of the kind which they owe to their employees However, it is recognised that in some circumstances a principal will come under a duty to use reasonable care to ensure that a system of work for one or more independent contractors is safe."

[75] It was also explained in *Leighton* at [48] that:

> "It may be accepted that Leighton, as the occupier of the site, owed a duty to persons coming on to it to use reasonable care to avoid physical injury to them. However, this says nothing about whether Leighton owed a duty to Mr Fox to take reasonable care to prevent him suffering injury on the site as the result of the negligent conduct of Mr Stewart. The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken."

[76] The High Court in *Leighton* also approved the following observations of Brennan J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 as to a circumstance that may impose a duty of care on the principal, albeit a more limited one than that owed by an employer to its employee:

> "The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur."

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[127] Paragraph 3A(b)

Determination of liability - Heinrich

[77] It is not in dispute that Heinrich, as the plaintiff's employer, owed him a non-delegable duty of care at common law to take reasonable care to avoid exposing the plaintiff to unnecessary risk of injury. It can also be accepted that the content of Heinrich's duty of care included providing him with a safe system and safe place of work, providing him with safe plant and equipment, providing him where necessary with adequate assistance in carrying out his work tasks and to warn or instruct the plaintiff as to the risks in carrying out his work tasks.

[78] Whether Heinrich has breached its duty of care owed by it to the plaintiff is a question of fact for my determination. Fundamental to my determination of whether Heinrich breached the duty of care is whether, on balance, I can be satisfied that the plaintiff did suffer an injury at the construction site on the morning of 16 February 2013 and, if so, the mechanism of that injury.

[79] It is clear from the pleadings and submissions made by the parties that neither defendant disputes that the plaintiff did suffer a back injury at the construction site on the morning of 16 February 2013. It is how the plaintiff came to suffer that back injury which is in contest. That the plaintiff did suffer an injury to his lumbar spine at the construction site on the morning of 16 February 2013 is, in my view, incontrovertible. It is not disputed that the plaintiff did attend the construction site that morning to commence work or that he had made his way up to level 8 prior to him first complaining that he had hurt his back. Whilst there is a dispute as to whether the plaintiff had already started work, it is also common ground that sometime after arriving on level 8 the plaintiff complained to Hammond, Vi and Somerville, as to having hurt his back. The plaintiff then left the job site, on the way also complaining to Wallace, the Hutchinson safety officer, that he had hurt his back and was in pain.

[80] Later the same day the plaintiff attended a GP Superclinic complaining of back pain. When examined by Dr Ismail the plaintiff is recorded as presenting with tenderness in his right lower back. On 4 March 2013 the plaintiff attended the first of several appointments at NQ Physio where he was provided treatment for lower back pain.[128] The evidence of Dr Wallace, which the defendants have not challenged, is that the plaintiff has suffered an injury to his lumbar spine, described by Dr Wallace as damage to one of the intervertebral discs.

[81] There is evidence of the plaintiff suffering from pre-existing back pain. However the plaintiff's sworn evidence, which was not challenged and which I accept, is that shortly after arriving at the construction site on the morning of 16 February 2013, he suffered an injury to his lower back. In light of the plaintiff's unchallenged evidence as to suffering a lower back injury coupled with the chronological evidence of complaints of pain made by the plaintiff both on the day and subsequently, I am satisfied on the balance of probabilities that there was an incident at the construction site on the morning of 16 February 2013 which resulted in the plaintiff suffering a permanent lumbar spine injury.

[128] Exhibit 32

[82] Accepting that the plaintiff did permanently injure his lower back in an incident at the construction site on 16 February 2013, the crucial issue which I must determine is what the defendants identify as the "threshold" issue, namely, the mechanism by which the plaintiff came to injure his lower back. The plaintiff's case in simple terms is that he suffered the injury as a result of what is described in the pleadings as the "lifting activity" which involved him attempting to manoeuvre a bearer back onto the H-frame from where it had dislodged. In response, both defendants submit that the "lifting activity" the plaintiff alleges he was undertaking when he injured his back could not have occurred because the evidence either does not support, or contradicts, the existence of any such dislodged bearer which the plaintiff could have been attempting to manoeuvre back into place. Therefore, the defendants submit, the "threshold" issue must be decided against the plaintiff such that there is no basis upon which to find either defendant liable for the plaintiff's back injury. Both defendants' also posit as an alternative explanation for the plaintiff injuring his back that he coughed and wrenched his back in the process of coughing.

[83] Again, accepting that the plaintiff injured his lumbar spine at the construction site on the morning of 16 February 2013, to succeed in his action against either defendant the plaintiff bears the onus of establishing on the balance of probabilities that his back injury was caused by the negligence of the particular defendant. Whether either defendant breached any duty of care which they owed to the plaintiff can only be assessed by first determining the threshold issue in dispute here - the mechanism by which the plaintiff injured his back. My assessment of the credit and reliability of witnesses, especially the plaintiff, are crucial to my determination of liability.

[84] The difficulties confronting a trial judge in making assessments of credit and reliability as arise in a case such as the present have been the subject of much judicial consideration. It has long been accepted that human memory is fallible for a variety of reasons and that ordinarily the degree of fallibility will often increase with the passage of time.[129] Whilst a trial judge is entitled when making assessments of credit to rely upon observations relating to the demeanour of a witness, caution must be applied to assessments based upon demeanour because this is now considered a notoriously crude and inaccurate methodology.[130] For as was observed by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at [30]-[31]:

> [30] It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses."
>
> …..
>
> [31] Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from

[129] Watson v Foreman (1995) 49 NSWLR 315 at 319

[130] Craig v Silverbrook [2013] NSWSC 1687 at [140]

falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility..."

[85] Accordingly, it will not be appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other.[131]

[86] Thus in *Camden v McKenzie* (2008) 1 Qd R 39 at [34], Keane JA expressed the view that:

> "Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."

[87] Contemporaneous statements and documents are likely to be more accurate than a recollection of events by reason that a statement made at the time of an event, particularly when relatively spontaneous, is likely to be more accurate than a later statement made at a time when false memories can intrude. False memories can be honestly believed because the person recalling the events has tried to assemble recollections logically so that what happened can have some rational explanation in the person's mind.[132]

[88] It will be apparent from the evidence adduced in the trial as well as the various matters the plaintiff was cross-examined upon, that the crucial aspect of the plaintiff's account as to how he says he injured his back, which is challenged by both defendants, involves the existence of the fallen bearer. I have earlier set out in some detail the evidence of the witnesses called in the trial. It will also be apparent from a review of the evidence that the only witness who asserts that there was, on the morning of 16 February 2013, a bearer which had fallen and was leaning against an H-frame was the plaintiff. No other witness, including for example Hammond who had been working close to the plaintiff at the relevant time, gave any evidence of observing a fallen bearer in the position described by the plaintiff prior him complaining that he had hurt his back.

[89] Accepting that no other witness has given evidence of having observed the fallen bearer the plaintiff described, my finding on this issue is largely dependent upon my acceptance of the plaintiff's evidence. The credit and reliability of the plaintiff clearly is crucial to my finding on this issue. It is for that reason any other relevant evidence adduced in the trial, particularly any independent evidence, which casts light on the probabilities of the existence of such a fallen bearer becomes crucial.

[90] Before turning to a consideration of the evidence it is appropriate that I make some observations of the witnesses. In terms of my assessment of the witnesses generally,

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[131] Goodrich Aerospace Pty Ltd v Arsic, [2006] NSWCA 187 [28]-[29]:

[132] Nominal Defendant v Cordin [2017] NSWCA 6 at [171]

each witnesses, including the plaintiff, impressed me as making a genuine effort of giving a truthful account. Whilst some witnesses gave evidence by telephone and others by video-link thereby precluding my assessment of them in court from the witness box, having carefully followed the evidence of each of them I am satisfied that no individual witness left me with the impression that they were not desirous of telling the truth. Each of the lay witnesses were at times vague in their recollection. This is perhaps unsurprising given the passage of time which has elapsed since the events they were being asked to recall occurred. In the case of a witness such as Miller, he laboured under the added disadvantage of being asked to provide information concerning the events relevant to these proceedings only in February 2020. Moreover, whilst some of the defendants lay witnesses remain in the employ of the defendants, it was not suggested to any of those witnesses that they were tailoring their evidence to support their particular employer or otherwise were giving favourable evidence because they remained employees. I therefore accept that, having regard to my assessment of the demeanour of each witness and how they presented to me, each appeared desirous of giving a truthful account.

[91] Specifically in relation to the plaintiff, it was submitted by each defendant that I should find that the plaintiff has intentionally concocted his account of the events of 16 February 2013 as to how he injured his back in order to support his case and therefore I should not accept him as a witness of truth. I am not prepared to make that finding. Having observed the plaintiff give evidence from the witness box which included lengthy cross-examination, as with all of the witnesses who gave evidence I was left with the impression that the plaintiff was endeavouring to recall events as best he could. There was nothing about how he presented in the witness box that left me with the impression that he was being intentionally untruthful when giving evidence. The evidence does however raise a number of issues concerning the reliability of the plaintiff's account and it is in respect to the reliability of his evidence and the account he has given as to how he injured his back that my attention must be directed.

[92] In terms of the reliability of the plaintiff's recollection generally, he was adamant that the construction site had become waterlogged following what he described as a "big storm" on the night of 15/16 February 2013. He recalled that the construction site had become waterlogged because of the rain, it had to be dewatered before anyone was permitted to start work and that he waited in the smoko room while that occurred.[133] According to the plaintiff, because it had rained overnight both the bearer and plank which he said were involved in the lifting activity were also waterlogged thereby substantially increasing their weight. The plaintiff has remained consistent in his recollection since the incident as to it having rained overnight causing the construction site to become waterlogged. For example, the plaintiff is recorded as having told WorkCover on 21 February 2013 (5 days after hurting his back) that it had been raining all night and that he was picking up a plank that was waterlogged. The plaintiff described the bearer and/or plank being waterlogged in his conversation with Dr Emery in May 2013. At the Medical Assessment Tribunal the plaintiff is recorded as saying that he had been lifting a six-by-four plank which had become waterlogged and heavy. And in his Statutory Declaration to WorkCover dated 20 February 2014 the plaintiff again described the header and the timber plank involved in the lifting activity being waterlogged because it had been raining.

[133] T 1-86 l.18 – T 1-87 l.4

[93] The evidence of other witnesses who were asked to recall whether it had been raining overnight and the site becoming waterlogged is far from consistent. Hammond was not asked and therefore gave no evidence on the point. The evidence of Vi was that it had rained overnight but he was unable to say whether the site had become wet from the rain. Somerville agreed in cross-examination that he had told an investigator in 2017 that a low had come down from Weipa and that it had been raining for two days prior to when the plaintiff hurt his back but he could not recall also telling the investigator that the site had to be dewatered before work commenced, saying that he could not recall if a wet weather walk had been conducted that morning. He did accept that it had rained overnight. Miller's evidence was that the weather overnight was normal albeit hot and that it had not rained overnight nor did he recall a storm. Finally Wallace said that the weather on 16 February 2013 was fine, that there had been some showers overnight but she could not recall if there had been a storm.

[94] The best evidence as to the extent of any rainfall overnight seems to me to come from official rainfall records. The Bureau of Meteorology recorded a total of 4.6mm of rainfall to 9am on 15 February 2013 and a total of 2.8mm to 9am 16 February 2013 at its Townsville Airport recording station. The Bureau also recorded 4.6mm of rainfall to 9am 15 February 2013 and a total of 5.4mm to 9am 16 February 2013 at its Oonoonba recording station.[134] The construction site is located geographically at about the mid-point as between those two rainfall recording stations.[135] The weather forecast for both 15 and 16 February 2013 for the Townsville area was for a few showers.[136] Therefore, according to the official rainfall records, it is likely that the construction site would have received somewhere between 2.8mm and 5.4mm of rain in 24 hour period to 9am 16 February 2013. These rainfall figures would tend to contradict the plaintiff's recollection both of there being a "big storm" in Townsville overnight on the 15/16 February 2013 and that the rain that did fall caused the construction site to become waterlogged. The plaintiff himself in cross-examination on the recorded rainfall figures doubted the veracity of the figures.[137] The rainfall figures are consistent with light showers having fallen in the Townsville area overnight on 15/16 February 2013 and *prima facie* tend to contradict the plaintiff's recollection in terms of the site becoming waterlogged[138] as well as his recollection that because of rain the plank and header he had been attempting to manoeuvre were heavier because they were waterlogged.

[95] I have referred to the divergence in the recollections of other witnesses as to whether it had been raining overnight and whether the site had become waterlogged thereby requiring a dewatering. Miller was the first at the construction site on the morning of 16 February 2013. His recollection was that he conducted an inspection of the site early and that no dewatering of the site was required. Wallace's recollection was that no safety committee walk around occurred at the site on the morning which would have been required had there been a weather event.[139] Whilst Somerville agreed in cross-examination that he had told an investigator in 2017 that a low had come down from Weipa and that it had been raining for two days prior to when the plaintiff hurt his back,

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[134] Exhibit 12 (p.173)
[135] Exhibit 12 (p.179)
[136] Exhibit 12 (p.175)
[137] T 1-86 ll. 10-20
[138] See also the opinion of Mr McDougall to the same effect – T. 2-42 ll. 41-47
[139] T 3-44 ll. 25-37

his recollection is obviously at odds with the rainfall records. None of the other witnesses were asked, and therefore gave no evidence, as to whether work was delayed that morning because the site had to be dewatered.

[96] In assessing the recollection of a particular witness as to whether it had rained overnight it is relevant to bear in mind that each was being asked to recall events which occurred 7 years earlier. For that reason, the most reliable evidence as to the extent of rainfall at the construction site is that provided by rainfall records. The extent of rainfall recorded does not, in my view, support and in fact appears to contradict the plaintiff's recollection. In that regard I prefer the evidence of Miller and Wallace on this point. Miller was the first person on site on the morning of 16 February 2013 and his recollection was that no dewatering of the site had been undertaken that morning because it had not rained overnight. His recollection was based upon his inspection of the site and, in my view, is more consistent with the recorded rainfall. Similarly, Wallace's recollection was that the weather was fine but that there may have been showers overnight. Therefore, in my view the rainfall records do not permit a finding that there had been a "big storm" in Townsville on the evening of 15/16 February 2013 which caused the site becoming waterlogged and which necessitated the site being dewatering before work was able to commence. The plaintiff's recollection on these matters is, in my view, unreliable.

[97] The unreliability of the plaintiff's recollection of the "big storm", whilst relevant to my assessment of his evidence generally, is not of or in itself fatal to my accepting his evidence as to the existence of the bearer he described attempting to manoeuvre. Nevertheless, because the evidence of the existence of the fallen bearer also comes entirely from the plaintiff, there being no other witness who gave evidence of having observed the bearer, my assessment of the reliability of plaintiff's evidence as to the existence of the fallen bearer necessitates my consideration of any other evidence which sheds light on the probabilities of that fact.

[98] The effect of the plaintiff's evidence is that he does not know how the bearer came to be in the position where he found it when he arrived a work on the morning of 16 February 2013, although he proffered two possible reasons for why the bearer might have dislodged: the possibility that strong winds caused by a storm overnight dislodging it or the possibility that it was dislodged when the frame in which it was positioned was struck by a pack of U-heads or a pallet as it was being lifted onto level 8 by the crane.

[99] As to the possibility of strong winds dislodging the bearer, the BOM records provide what in my view is unequivocal evidence of there being no storm in Townsville on night of 15/16 February 2013 which might have produced winds strong enough to dislodge the bearer. The maximum wind gust recorded by the BOM on 15/16 February 2013 was 48kmph in the early evening of 15 February 2013. Given that evidence it would not in my view be open to find that a gust of wind dislodged a bearer. Furthermore, the opinion of Mr McDougall is that a gust of wind could not have lifted the bearer out of the U-heads in which it had been positioned, although I note that his opinion was predicated upon the assumption the header had been nailed into position. But given the dimensions of the bearer and the size of the U-heads it was positioned in I am unpersuaded that a gust of wind scenario would explain a bearer dislodging.

[100] A more plausible explanation for a bearer dislodging from its U-heads is the second scenario suggested by the plaintiff, namely that the crane inadvertently dislodged the header when moving packs of materials onto the construction site. Some support for that scenario can be drawn from the evidence of Hammond. He recalled observing on the slab where the plaintiff had been working at the time he complained of hurting his back pallets and timbers along with U-heads. If those pallets or timbers had been craned into position then the possibility of the crane inadvertently striking an H-frame with a pallet could not in my view be discounted.

[101] In assessing the plausibility of this scenario, it must be recalled that the plaintiff's evidence is that the bearer which he was attempting to manoeuvre back into position was the same bearer (and indeed the last bearer)[140] which he had placed into position prior to finishing work the afternoon before. Whilst the plaintiff said that it was his normal practice to nail bearers into place at each end after they had been placed into position in their U-heads, he could not be sure if he had done that with the particular bearer he found dislodged.[141] Whether the plaintiff did nail the bearer into position was the subject of submissions, the defendants contending that if it was the plaintiff's normal practice as an experienced form worker to do so then I should be persuaded that he had done so on this occasion. Ultimately I am unpersuaded that merely because the plaintiff would normally nail a bearer into position means that he did so every time. Given the plaintiff's evidence that this was the last bearer he had placed before finishing work and that by this stage he had run out of materials, the possibility that he simply forgot to nail the bearer cannot be discounted. The plaintiff's sworn evidence is that he is unsure whether he did and there is no other evidence on this point. In these circumstances I am not persuaded that it is more probable than not that the plaintiff had nailed the bearer into position prior to leaving work.

[102] Accordingly, if it is accepted that the plaintiff on the afternoon of 15 February 2013 shortly before finishing work placed a bearer into position which was not nailed in to secure it, the issue then raised for consideration is whether, on balance, it is open on the evidence to find that the bearer was dislodged by the crane through the movement of materials onto the slab sometime between when the plaintiff finished work but before he started the following morning, causing the bearer to fall into the position the plaintiff described finding it.

[103] There is a body of evidence which bears upon the probabilities of that scenario. Evidence has been adduced relevant to whether the crane was operating after the plaintiff had finished work for the day. If the crane had ceased operating when the plaintiff finished work then there would have been no opportunity for it to have dislodged a bearer in the way postulated by the plaintiff. On this point, the plaintiff's evidence was that he was unsure what time he finished work on 15 February 2013 but that usually knock off time was earlier on a Friday.[142] Miller's evidence is that the crane crew finished operating the crane "roughly" between 2.30 to 2.45pm on the Friday afternoon and that they signed off at 3.15pm. Miller's evidence on this point was predicated upon his best recollection. However, the Hutchinson time sheets[143] show that the three members of the crane crew finished work at 4.15pm on Friday 15 February

[140] T 1-57 ll. 16-20; T 2-5 ll.29-30;T 2-9 ll.31-36; T 2-19 ll.34-36
[141] T 2-6 ll. 29-31
[142] T 2-18 ll.6-17
[143] Exhibit 26

2013 suggesting that Miller's recollection on this point is inaccurate. In his sworn evidence Miller sought to explain the discrepancy between his recollection and what is recorded in the time sheets on the basis that because of the extra hours the crane crew commonly worked it was a practice to "give them a little gesture, an hour"[144], in essence suggesting that the crane crew were allowed to sign off later in the time sheets than when they actually finished work as a reward for the long hours they were working. As Miller's evidence was predicated upon what he could best recall from seven years earlier in circumstances where he had no reason in the interim to recall the events, that effluxion of time necessarily impacts upon the reliability of his recollection on this point. In my view the best evidence as to when the crane crew finished for the day comes from the contemporaneous time sheets. If it be the case that the crane crew signed off at 4.15pm as recorded in the time sheets and if be accepted that Miller's own recollection which is contradicted by the time sheets is questionable, then it is open to find that the crane continued to operate after the plaintiff finished work.

[104] As to whether there was also opportunity for the crane to have been operating before the plaintiff started work on 16 February 2013, the plaintiff could not remember whether he started work that morning at 6 or 6.30am[145] and he thought that it was not until around 7.30am that he left the site after having reported it to Wallace.[146] The time sheets record the crane crew signing on at 5.45am. Miller's evidence was that "hook-down" (being when the crane started operating) on 16 February 2013 was at 6.30am. Miller explained that following sign on the crane crew would have participated in a tool box meeting following which the driver would have climbed up to the cab and the crew would have performed mandatory safety checks. As a consequence, the crane would not have commenced operating before 6.30am given the time involved in performing those tasks. Miller also gave evidence that a noise abatement rule applied to the site which prohibited work from commencing before 6am. The plaintiff agreed that because of the noise abatement rule the crane would not have commenced to operate before 6.30am.[147] The evidence as to when the crane commenced operating is unclear and it may well be that the crane started operating earlier than 6.30am given the crew sign on time. However, it seems unlikely in the time available, even if the crane commenced operating earlier than 6.30am, for it to have inadvertently struck an H-frame with a pallet on the morning of 16 February 2013 prior to the plaintiff starting work.

[105] To challenge a finding being made that there would have been no opportunity for the crane to have dislodged a bearer when moving materials into position between when the plaintiff finished work on 15 February 2013 and when he started the following morning, the defendants also rely upon the evidence of Somerville as to how the crane was used to deliver material. The effect of Somerville's evidence is that the crane was used to deliver materials to the deck being constructed and not the slab below on which the formwork was being erected and that the practice was for materials used to construct the deck to be brought up using the Alimak. It is therefore submitted that if the majority of material for constructing the deck (including for example framing gear and U-heads) was brought up to the slab on which the deck was being constructed via the Alkimak then there would be no opportunity for a pallet of material being hoisted by the crane to dislodge a bearer. However the effect of Somerville's evidence was that most (on his

[144] T 3-39 ll. 38-46
[145] T 2-21 ll. 30-31
[146] T 2-21 ll. 1-12
[147] T 2-20 ll. 18-19

estimate 90%) but not all formwork materials were brought up using the Alimak and the evidence of Vi was that the crane would deposit materials when needed onto the slab for the form workers to put up.[148] Therefore even if the majority of materials were brought up as Somerville described that leaves open the possibility of some formwork material being craned up to level 8. If that be accepted then it leaves open the possibility that a pallet of material being transported by crane could have struck an H-frame as it was being manoeuvred onto the slab in the area where the plaintiff had been working.

[106] Therefore I am satisfied that it is open on the evidence to find, on balance, that (a) the crane was still operating after the plaintiff finished work on 15 February 2013 and (b) a pallet or pack of material which was being moved onto level 8 by crane after the plaintiff had finished work inadvertently struck an H-frame holding a bearer. Accepting these findings to be open on the evidence, the more crucial issue relevant to resolving what I referred to earlier as the "threshold" issue relates to whether on this scenario it is also open on the evidence to find that the bearer could have dislodged and fell into the position the plaintiff described finding.

[107] There are a number of features of the evidence directly relevant to determining the plausibility of this occurrence. Noting that the plaintiff's evidence is that the dislodged bearer was 4.8 metres long, the first relates to whether bearers of that length were being used on level 8 as part of the form work construction at the time of the incident. As there is dispute in the evidence on this point it has been the subject of detailed submissions. The plaintiff maintained that 4.8 metre long bearers were being used in the construction of the form work on level 8. The evidence of Vi was to the effect that 4.8 metre bearers had been used at the beginning of the project but as the construction progressed they were chopped up so that by the time of the incident the longest bearers being used were 3.6 metres. He however accepted in cross-examination that he had told an investigator in 2017 that there were "a couple of 4800 millimetres up there"[149] as he had got them from Hutchinson. Thus Vi's recollection is that at the time of the incident there were a couple of 4.8 metre bearers still being used on level 8. The evidence of Miller was that Heinrich supplied their own bearers, Hutchinson did not supply 4.8 metre bearers and that Heinrich would have had 4.8 metre bearers. The evidence of Somerville was that by the time of the incident the longest bearers being used were 3.8 metres by reason that as they had to be transported to level 8 using the Alimak the longest bearers that could be loaded into the Alimak were 3.8 metres. Hammond's evidence was that he could not remember the length of bearers being used.

[108] It is not in contest that 4.8 metre long bearers were used on the site. Where there is a contest relates to whether they were being used only at the beginning of the project or whether they were still being used on level 8 at the time of the plaintiff's incident. The evidence of Vi and Miller as to the use of 4.8 metre bearers on the project tends to support the plaintiff's evidence as to there being at least a couple of 4.8 metre bearers being used on level 8 at the time of the incident. For purposes of determining liability I am therefore prepared to accept, on balance, the plaintiff's evidence on this point that 4.8 metre bearers were being used as part of the form work on level 8 on 16 February 2013. If it is accepted that 4.8 metre long bearers were still in use on level 8 at the time of the incident to construct the form work, the more crucial issue which then arises is

[148] T 2-93 ll. 4-5
[149] T 2-91 ll. 10-11

whether it is plausible that a bearer, had the H-frame it had been positioned in been knocked by a pallet of material, could fall into the position which the plaintiff described finding it. The plausibility of that occurrence is to be assessed against the evidence of the plaintiff as to the size and position of the bearer which had fallen: it was 4.8 metres in length, it had been positioned by him the afternoon before in U-heads spanning across three sets of H-frames[150], he could not remember if he had nailed it in and it had fallen on the inside of an H-frame diagonally upright leaning against the H-Frame with one end of it on the concrete floor and the other end in the air.[151] The report of Mr McDougall provides a diagrammatic representation of the position of the bearer in its fallen position as the plaintiff described finding it.[152]

[109] It is not in contest that the H-frame's being used at the time of the incident were 1.5 metres square when assembled and that the height of the particular H-Frame which the plaintiff described the bearer falling into was approximately 3.1 metres.[153] Thus if the scenario involving a pallet inadvertently striking the H-frame is to be accepted as a plausible explanation for the bearer dislodging and falling into the position the plaintiff described finding it, it would need to be accepted on balance that the bearer would not only be dislodged in those circumstances but would then have fallen down into the 1.5 metre square single section of framing.

[110] A careful consideration of the evidence in my view casts doubt on the plausibility of this scenario. Again it is to be noted that the plaintiff's evidence is that shortly before finishing work the previous afternoon he had placed the bearer into the U-heads of three separate H-frames and being a 4.8 metre long bearer meant that it was positioned into a total of six U-heads.[154] It should also be noted that although the plaintiff's sworn evidence was that the bearer had been positioned that way prior to him finishing work, he also instructed Mr McDougall that the bearer "had been temporarily placed on the top horizontal members of the H-frame"[155] which Mr McDougall understood to be a different positioning to being placed into U-heads. There is an obvious inconsistency in this aspect of the plaintiff's evidence as to where he recalls placing the bearer. The difference in positioning is perhaps of little relevance save in one important respect. Had the bearer been placed into six U-heads then undoubtedly the force required to dislodge it from its U-heads (accepting it was not nailed in) would logically have to be substantially greater than if the bearer had simply been placed on top of the horizontal members of the H-frames. In the latter case, because the bearer would not be held in place by U-heads, it logically would take little in the way of force to cause the bearer to move. In this regard the evidence of Mr McDougall is relevant. He conceded that even if the bearer had not been nailed at each end, having regard to the dimensions of a U-head and that of the bearer no amount of lateral force applied to the bearer would cause it to dislodge from its U-heads.[156] He accepted that the only mechanism by which the bearer could be dislodged from its U-heads would be through lifting it out, whether that be the middle or at one end.[157]

[150] 1-57 ll. 20-42
[151] T 1-54 ll. 36-37
[152] Exhibit 10 (p.96)
[153] T 1-55 ll. 29-41; T 1-56 ll. 3-19; T 2-44 ll. 33-33
[154] T 2-4 ll.25-27; T 2-5 ll. 8-21
[155] Exhibit 10 (p.94); T. 2-43 ll. 1-11
[156] T 2-58 ll. 29-34
[157] T 2-58 ll. 39-40

[111] Mr McDougall also agreed that where lateral force was applied to a bearer, the frame holding the bearer would tip over before the bearer would dislodge if it was positioned into U-heads.[158] The plaintiff's evidence was that when he arrived on level 8 he observed a pack of headers lying next to where he was working which had been busted open. He inferred that this pack of headers had knocked into the frame because in addition to the pack being busted open he also saw that the H-frame which had been holding the bearer "was a bit skew-if"[159] and that it had moved a bit.[160] There is however no evidence from any other witness called in the trial which corroborates this aspect of the plaintiff's evidence. In particular, Hammond, whom the plaintiff said had been working in close proximity to him[161] gave no evidence of seeing any H-frame which was out of alignment or appeared to have been moved. Given the stage to which the form work had been constructed up to that point, had there been an H-frame which had been knocked out of alignment then presumably someone must have moved it back into alignment. The plaintiff's evidence was that he was attempting to manoeuvre the fallen bearer back into position when he hurt his back which occurred before he had realigned the H-frame meaning that on his evidence the H-frame would have still been "skew-if" when he departed the construction site after hurting his back.

[112] The absence of any evidence corroborating the plaintiff's recollection of the H-frame holding the bearer being out of alignment tends to cast doubt on the accuracy of the plaintiff's recollection. The evidence indicates that there were a number of other workers on level 8 immediately after the plaintiff had departed and it is obvious that construction of the form work had continued. Accepting that to be so, if a H-frame had become skew-if as the plaintiff recalled, it is inconceivable in my view that another worker would not have observed it and repositioned it back into its correct alignment to enable the form work construction to be completed. The person whom it might be thought to be most likely aware of an H-frame being out of alignment would be Hammond who was working alongside the plaintiff in the same section of H-frames. Whilst Hammond gave evidence of observing a busted pack of timbers in the area where the plaintiff was working and to that extent his evidence was consistent with that of the plaintiff, he however gave no evidence of also observing a misaligned H-frame.

[113] If, contrary to the plaintiff's sworn evidence, it were accepted that the bearer had been placed on the top horizontal members of the upper H-frame as described by the plaintiff to Mr McDougall, it could be accepted that in such a position little by way of force would have been required to move it. On this scenario an H-frame, even if struck by a pallet of material with sufficient force to move a bearer, might not necessarily have been moved out of alignment. However even accepting a scenario in which the bearer came to be dislodged by a pallet without the H-frame in which it was positioned being moved, the more fundamental issue which then arises relates to the possibility of the bearer then falling into the position the plaintiff described finding it. The possibility of that occurring has, in my view, to be assessed by reference to both the length of the bearer, here 4.8 metres long, and the space into which it purportedly fell, here a section of framing 1.5 metres square and approximately 3.1 metres high. Having regard to the length of the bearer and space into which the bearer is purported to have fallen, it is

[158] T 2-58 ll. 36-37
[159] T 1-29 ll. 15-32
[160] T 1-30 ll. 25-28
[161] T 1-31 ll. 5-8; T 1-60 ll. 11-15

difficult to conceive any scenario involving an H-frame being inadvertently impacted by a pallet of material or something else, even with significant force, which would result in the bearer not only dislodging but also falling vertically into a 1.5 metre square opening of an H-frame.

[114] As a matter of logic and common sense, it seems to me that for a bearer which had been positioned horizontally (whether in U-heads or lying across the members of an H-frame) to have fallen down into the H-frame and into the position the plaintiff described finding it, it would have needed to have been lifted close to vertical into the opening of the H-frame which measured 1.5 metres square. It seems highly improbable, if not impossible, for a 4.8 metre long bearer to fall vertically into a relatively narrow opening in a scenario involving dislodgement by lateral force. Accepting Mr McDougall's evidence on this point which is perhaps more a matter of common sense, it is only a scenario involving the bearer being raised vertically which is capable of providing a plausible explanation for how a bearer might end up vertically inside an H-frame with a 1.5 metre square opening, especially one that was 4.8 metres long. For this reason I am not persuaded that a scenario involving the crane inadvertently knocking an H-frame with a pallet provides any basis upon which to make a finding on balance that the 4.8 metre bearer described by the plaintiff dislodged by that mechanism falling vertically into the H-frame. Whilst the plaintiff's evidence was that this was something he had seen happen many times before, the paucity of evidence capable of supporting such a scenario counts against making such a finding.

[115] I acknowledge of course that the effect of the plaintiff's evidence is that he does not actually know how the bearer came to be dislodged and that the two scenarios proffered by him were merely possible explanations which he based upon his experience in the industry. I accept that even where I am not persuaded as to either scenario proffered by the plaintiff is a plausible explanation for a fallen bearer this does not mean that there might not be some other explanation, unknown to the plaintiff, for how the bearer ended up where the plaintiff said he found it. However there are, in my view, at least two reasons as to why the evidence does not support a finding being made as to the existence of the fallen bearer described by the plaintiff. The first, which for the reasons explained, relates to the implausibility of the bearer which the plaintiff was certain he placed in position the afternoon before somehow being dislodged and falling vertically into the narrow opening of the H-frame where the plaintiff said he found it. Even if it is accepted that there was opportunity for the crane to have struck the H-frame on which the bearer was positioned neither that scenario, nor any other raised on the evidence, provides a plausible explanation as to how the bearer upon being dislodged then ended up falling vertically into the narrow opening of the H-frame.

[116] The second, and perhaps more compelling, reason which I have also alluded to already, is that other than the plaintiff there is no evidence from any other witness of having observed the fallen bearer described by the plaintiff. I have earlier summarised the plaintiff's sworn evidence as to how he injured his back: he had been attempting to lift the bearer and plank at the same time, the header came back into him, this caused him to go "arse-up" and he fell back into the frame with the header before extricating himself though the frames and informing Hammond he had hurt his back. By contrast, Hammond's evidence was that he had his back to the plaintiff, he heard the plaintiff groan and when he turned around he observed the plaintiff standing with his hands on his back half bent over. He asked the plaintiff if he was alright and the plaintiff told him

he had done his back. Of all the witnesses who gave evidence it was Hammond who in my view was in the best position to have observed the fallen bearer if it had existed. He was working in close proximity to the plaintiff either in the next set of frames or two sets down.[162] Because of his proximity it would be reasonable to expect that Hammond would have had an unobstructed view of the set of H-frames where the plaintiff said the fallen bearer was positioned. Even if Hammond had for some reason not observed the fallen bearer when he first commenced work, when he turned around upon hearing the plaintiff groan he would reasonably be expected to have observed the bearer at that point which, on the plaintiff's evidence, had fallen back where he had found it.

[117] Furthermore, if it be accepted that it would have become necessary for a fallen bearer to be repositioned into its U-heads in order for the form work to be completed, had the fallen bearer described by the plaintiff existed then inevitably someone must have manoeuvred it back into position after he had left the work site. Again, given his proximity to where the plaintiff said the bearer had fallen, it would in my view be unlikely that Hammond would not himself have observed the fallen bearer at some point before it was repositioned or that he would have at least been aware that a fallen bearer had to be repositioned, had there been one. Hammond was not expressly asked nor did he give any evidence of seeing the fallen bearer or to having heard the plaintiff go "arse-up". Therefore whilst Hammond's evidence supports the plaintiff's evidence of having complained of hurting his back, it otherwise provides no support to the plaintiff's evidence as to the existence of the fallen bearer in circumstances where it might have been reasonably expected he would have also observed it. Likewise of the other witnesses who gave evidence. Vi was neither asked nor did he give any evidence of having observed any fallen bearer. Somerville's evidence was twofold – whilst not directly asked if he observed the fallen bearer described by the plaintiff he agreed that he could not recall finding on any job a 4.8 metre timber bearer inclined into a single section of framing, saying that it was impossible for one to land in there.[163] He also agreed that he could not recall, after the plaintiff departed the construction site, putting a fallen bearer back into place.[164]

[118] Miller, as site manager, was the first to arrive at the construction site on the morning of 16 February 2013 at around 4.45 - 5.00am. After opening up he said that he conducted a site inspection shortly after 5am which included inspecting each floor. He agreed that this was before sun rise but he said there was access and egress lighting which provided ample light to get up and down the site. He said that he did not observe any damage or fallen bearers when he inspected level 8.[165] Miller said that a fallen bearer would have caught his eye and had he observed one he would have gone and had a look at it. He refuted the proposition that given the state of lighting when he conducted his first inspection he might not have seen a fallen bearer, explaining that if the bearer was 4.8 metres long then 1.8 metres of it would have been above the deck and that if he saw a 1.8 metre piece of timber above the deck that "would look unsightly, unsafe to me".[166] Ultimately Miller's evidence was that it would be hard to miss a bearer which was 1.8 metres above the deck when you are standing on level 9 looking across the work area of level 8. Miller also said that had the crane knocked a bearer to the ground that would

[162] 1-31 ll. 6-7
[163] T 2-101 ll. 10-11
[164] T 2-104 ll. 11-13
[165] T 3-21 ll. 21-23
[166] T 3-35 ll. 34-35

be a "near-miss" and therefore a reportable incident requiring an incident report to be compiled and there had been no incident report completed for a near-miss on the project relating to a fallen bearer.[167] Finally, Miller said that he returned to the work site at around 6.15 - 6.20am as he wanted to see who had turned up for the day. In the course of that he made his way up to level 8 first. He recalled the plaintiff was in the area of the base of the crane with another worker. He again did not observe any fallen bearer. Wallace's evidence was that after the plaintiff reported to her that he had hurt his back she went up to level 8 to speak to other workers about what had happened. When on level 8 she also did not observe any fallen bearer.

[119] Miller conceded in cross-examination that the first he was asked to recall the events of the plaintiff's incident was in 2020. That effluxion of time naturally impacts upon the reliability of his recollection. Nevertheless even factoring that in, it is difficult to accept that had there been the fallen bearer described by the plaintiff, which given its length would have been protruding by up to 1.8 metres from the deck on level 9, Miller would not have observed it or remembered it. Whilst the state of lighting is also relevant in assessing this aspect of Miller's evidence, Miller was confident that there was sufficient artificial lighting for him to have observed a fallen bearer had there been one. In any event, Miller returned to level 8 at a time when it was daylight and again said that he did not see a fallen bearer. To make a finding that there was a fallen bearer on level 8 as described by the plaintiff would require me not to accept the evidence of Miller, Wallace and Somerville, each of whom claim not to have observed a fallen bearer, in circumstances that had there been one it would be reasonable to expect that at least one of them would have seen it. Added to that, the absence of any evidence from any other witness, especially Hammond, of a fallen bearer needing to be manoeuvred back into its H-frames after the plaintiff had departed is a further feature of the evidence which in my view counts against making a finding as to the existence of the fallen bearer described by the plaintiff.

[120] There is one other feature of the evidence raised by the parties for my consideration relating to statements made by the plaintiff on various occasion as to how he injured his back as well as the plaintiff having used the word "coughing" when he first complained of hurting his back. The plaintiff was extensively cross-examined on what were suggested to be differences or inconsistencies in the accounts he has given at various times and I have referred earlier to relevant parts of that evidence. What is clear from the evidence is that whilst the plaintiff did make an immediate complaint to Hammond and then a little later as he was leaving the site to Vi, Somerville and Wallace that he had hurt his back, the plaintiff did not expressly tell any of them that he had hurt his back when attempting to lift a bearer back into place. Whilst the plaintiff agreed that he did not tell anyone at the site that he had injured his back lifting a bearer, the effect of his evidence was that his reason for not doing so, at least in the case of Somerville, was because he didn't have time.[168]

[121] Later on 16 February 2013 the plaintiff attended upon Dr Ismail at GP Super Clinic complaining of back pain. Dr Ismail recorded that the plaintiff had said that he had back pain "since afternoon today after lifting heavy wt". Contrary to the defendants' submission, I am not persuaded that the reference to "afternoon" recorded by Dr Ismail

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[167] T 3-22 ll. 10-18

[168] T 1-54 ll. 14-15

is of any moment. In particular, I do not accept what Dr Ismail has recorded should be interpreted as the plaintiff informing Dr Ismail that he had hurt his back that afternoon as opposed to earlier in the day. What the plaintiff told Dr Ismail is, in my view, consistent with the plaintiff having hurt his back earlier in the day but only attending the medical clinic when the pain had increased in the afternoon. The greater relevance of Dr Ismail's notation is that it supports a finding that later on the same day the plaintiff alleges he had hurt his back at work he was complaining of back pain from having lifted a heavy weight.

[122] Thereafter the evidence, which is largely unchallenged, confirms that the plaintiff has been asked on a number of occasions to provide an account of how he injured his back. The earliest in time following the day of the incident was when the plaintiff spoke to Wallace which generated the incident report exhibit 33. As to what weight can be placed on the contents of that report is debateable given how it came to be made. The plaintiff's recollection of how the report was compiled seems not entirely reliable. For example his evidence was that he thought he signed the report but that is clearly not the case. Whilst it is also not in contest that the plaintiff attended a meeting with Wallace the following week for the purpose of completing the incident report and that he was accompanied by his wife Stacy, the plaintiff thought that it was he who provided the details to Wallace of what happened. Wallace on the other hand recalled that it was the plaintiff's wife who provided the details she recorded.

[123] The report itself is based upon different sources of information. Wallace spoke to both Vi and Somerville on the day of the incident and included in the report what they each informed her about the incident. The report was not signed off on until 11 March 2013 which Wallace explained was when she had no further information to add to it. The more critical part of the report relates to the description in the report that "Jason was picking up an alloy app". The evidence of Wallace is that she was told by the plaintiff's wife it was an alloy app and in circumstances where it was Wallace who asked if that was what it was. I note that it was suggested to Wallace in cross-examination that in April 2017, in a conversation with a lawyer, she had disclosed that during her conversation with the plaintiff and his wife the week following the incident the plaintiff had said that he had hurt his back lifting timbers or bearers. Wallace could not remember saying that to the lawyer but conceded that in the discussion there had been reference made to "formwork components".[169]

[124] There are two considerations which are relevant to the use that can be made of the "alloy app" reference in the incident report. The first and perhaps most obvious relates to the source of the information from which that description was obtained. The evidence of Wallace is that it was the plaintiff's wife and not the plaintiff who provided that detail in response to a direct question asked by Wallace. As I understand it the defendants seek to rely upon the brief description in the report as an admission by the plaintiff that he had been picking up an "alloy app" at the time he injured his back rather than he was lifting a timber bearer. If that be accepted, the defendants argue that the admission is inconsistent with the plaintiff's sworn evidence. A statement made in his presence of a party is admissible in circumstances where the party is invited, or might reasonably be expected, to respond in some way indicating their denial or acceptance of the

[169] T 3-47 ll. 40-41

statement.[170] Thus it is not what is said in the presence of a party that can of itself be evidence against the party but their response or reaction. That is, the words, silence or conduct by a party may amount to an admission of the truth of what was said by someone else in the party's presence.

[125] It might therefore be accepted that what was said by the plaintiff's wife to Wallace in the plaintiff's presence is, by the plaintiff's silence or lack of response, capable of amounting to an admission by him that he was picking up an "alloy app" at the time he injured his back. However that being said, if capable of amounting to an admission it nevertheless becomes a question of the weight, if any, that should be placed on the admission. Factors relevant to the question of weight here would include the evidence of Wallace that when she interviewed the plaintiff she was aware that he was on painkillers as well as her evidence that the plaintiff's wife kept stopping him from speaking to Wallace during the interview. In the circumstances here, where the plaintiff's wife was evidently preventing him from speaking to Wallace, it seems in my view that no weight should be attached to the description in the report that the plaintiff had been picking up an "alloy app."

[126] A second consideration relates to whether the description in the report of the plaintiff picking up an "alloy app" is inconsistent with the plaintiff's evidence as to how he injured his back. The plaintiff described an "alloy app" as being similar to a timber but made out of aluminium and therefore lighter than a timber.[171] He said that at the time of the incident there were no "alloy apps" where he was working and therefore he was not lifting any on that day. The plaintiff also denied that Wallace had been told that he had hurt his back lifting an "alloy app".[172] It might be accepted having regard to the plaintiff's description of an "alloy app" that it was different to a timber bearer which the plaintiff said he was lifting when he injured his back. The evidence of Wallace was that her description in the report which included reference to an "alloy app" was based upon what the plaintiff's wife had told her but in response to a direct question and there is no reason to doubt her evidence on that point. However, whilst I accept that the description given in the report as to what the plaintiff was lifting is different to the plaintiff's evidence, for the reasons explained I place no weight on this inconsistency in the evidence.

[127] There are however other statements made by the plaintiff since the incident in February 2013 which are relevant to an assessment of the reliability of his account. The plaintiff was extensively cross-examined upon these. On a number of occasions since the incident the plaintiff has described injuring his back when he was lifting up a "plank". He first described that he was lifting up a plank in a telephone call with WorkCover on 21 February 2013. He subsequently repeated that description to both Dr Emery and Dr Rogers in May 2013, at a review undertaken by the Medical Assessment Tribunal and to Dr Caniato in September 2013. However the plaintiff has on other occasions described the object he was lifting as a "timber plank". For example he gave that description to Dr Coroneous in June 2013 and in his notice of claim for damages in December 2013. I accept for purposes of assessing the plaintiff's evidence that he is unsophisticated and would not appreciate the need for precision in language as might a

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[170] See for example Woon v The Queen (1964) 109 CLR 529 at 541
[171] T 1-59 ll. 26-38
[172] T 2-24 ll. 7-8

lawyer do. I am prepared to accept that the plaintiff has in the past used the terms "bearer" and "plank" interchangeably when describing to others what he said he was lifting when he injured his back and that his use of the term "plank" of itself does not impact on the reliability of his evidence.

[128] Reliance is also placed by the defendants on the instructions provided to Mr McDougall in preparation of his report. There are undoubtedly a number of discrepancies as between the description provided by the plaintiff to McDougall and his sworn evidence. Those discrepancies have been identified by the defendants in support of a submission that the evidence of Mr McDougall is so damning of the plaintiff's case that the plaintiff's evidence should not be accepted. Some of those discrepancies are in my view not made out. For example, emphasis is placed upon Mr McDougall conceding that the plaintiff had not told him that he had nailed the bearer into its U-heads the previous afternoon. However, as explained earlier, whilst it may have been the plaintiff's normal practice to nail a bearer into place, his evidence was that he was unsure if he had done that with the bearer in question and therefore, having regard to the state of the evidence, the importance of the failure of the plaintiff to tell Mr McDougall he had nailed the bearer into place loses its cogency.

[129] To similar effect, I am also prepared to accept that any inconsistencies in documents prepared by the plaintiff's lawyers as to how he injured his back when compared to his sworn evidence might be explained away by the plaintiff himself not drafting the documents and not appreciating the relevance of any differences in the description contained in those documents. I accept of course as a matter of common sense that when evaluating the evidence of a witness such as the plaintiff a prior inconsistent statement made by the witness will be a relevant consideration. The reliability of a witness who has given inconsistent statements about the same matter is naturally called into question. However in weighing the effect of any inconsistency or discrepancy in a witnesses' evidence I am obliged to consider whether there is satisfactory explanation for it. With respect to the plaintiff, whilst I accept the general import of the defendants' submissions that the plaintiff has provided a number of inconsistent descriptions since February 2013 as to how he injured his back which were explored with him in cross-examination, there is a satisfactory explanation for many of those inconsistencies which largely do not impact the reliability of his evidence.

[130] However whilst I accept that many of the discrepancies in the plaintiff's statements over time as to how he injured his back do not necessarily impact upon the overall reliability of his evidence, there are nevertheless some aspects of his evidence which raise concerns that his account of events is not based upon his actual recollection but rather upon what he has reconstructed in his mind to provide an explanation for how he injured his back. The relevance of the descriptions given by the plaintiff in 2013, and therefore at a time more contemporaneous with the incident, is that they are likely to be more accurate than the plaintiff's evidence at trial in which he was being asked to recall events 7 years earlier and therefore at a time when false memorises could intrude. The consistency in the plaintiff's earliest descriptions of how he injured his back is that he had been lifting an object, primarily described as a plank, which had been waterlogged. The plaintiff's recollection, even very close in time to the incident, that the construction site or timber he was lifting, had become waterlogged, is for the reasons explained earlier contradicted by the rainfall records. But even putting that detail aside, the consistency of the plaintiff's recollection, at least in the earlier descriptions he gave,

involved him lifting a plank or bearer in the course of which he hurt his back. The key detail which the plaintiff's earliest descriptions are missing is the reason why he said he was lifting the plank or bearer, namely that it had fallen down and he was manoeuvring it back into place. And so for example, the plaintiff's very first description on the day of the incident after he departed the site was to Dr Ismail who he told he had been "lifting a heavy wt". Some five days later the plaintiff informed WorkCover that he had been "picking up a plank at work". Dr Emery was told by the plaintiff in May 2013 that he "tried to pick up a large wooden plank which was particularly heavy". Dr Watson was told by the plaintiff in May 2013 that he had been at a building site framing up around a column when in an action to pick up a two metre long plank he experienced back pain. And notably, according to Dr Wallace he was told by the plaintiff that as he was lifting large pieces of 6 x 4 timber into place, other planks in the way had dislodged and fell on his left shoulder and that when he twisted he experienced immediate pain.

[131] It would appear that the first time the plaintiff described a situation involving him leaning over a frame and picking up the bearer was in what he told Dr Coroneous in June 2013, some four months after the incident. However I note that the plaintiff is also recorded as having told Dr Coroneous that he had put his right arm out as he was working around a column and that he had lifted the timber with his co-worker "Phil" at which time he experienced immediate lower back pain. That description is clearly different to the plaintiff's sworn evidence and does not accord with the evidence of Hammond. On the evidence before me, it appears that the first time the plaintiff has provided a description consistent with the bearer he was lifting having been dislodged and fallen into a set of H-frames was in his statutory declaration to WorkCover in February 2014, some 12 months after the incident.

[132] In addition to the absence of any description by the plaintiff contemporaneous in time with the incident of having injured his back when lifting a dislodged bearer is the absence in any account given by the plaintiff prior to trial of having coughed. It is of course true that both Vi and Somerville were each told by the plaintiff that he had coughed and hurt his back. The plaintiff's evidence at trial was that he did tell each of them that he had coughed but he denied the context in which they recalled him mentioning coughing. The effect of the plaintiff's evidence at trial was that he did cough, but that this was after he had hurt his back lifting a bearer and at a time when he was attempting to lift some U-heads. The point however is that leaving aside what the plaintiff recalled telling Vi and Somerville on the day of the incident, in none of his accounts after leaving the construction site on 16 February 2013 prior to his evidence at trial had the plaintiff made mention in any context of coughing nor did it form part of the plaintiff's pleadings.

[133] Finally, when compared to his earlier accounts of how he injured his back, in my view in his sworn evidence the plaintiff was more expansive in detail. For example at trial the plaintiff, in addition to describing how he was lifting the bearer in the course of which he made contact with the plank, also recalled going "arse-up", falling into the frames with the header, falling onto his back and hitting the bottom bar of the H-frame. As was observed in *Nominal Defendant v Corbin* [2017] NSWCCA 6, false memories of how an event occurred can be honestly believed when the person recalling the event has tried to assemble their recollections of the event logically to give some rational explanation in their own mind as to how the event must have occurred. Upon a chronological review of the various accounts provided by the plaintiff since the incident

as to how he recalled injuring his back, it is apparent in my view that over time the plaintiff has recalled greater detail including in his sworn evidence at trial. There are inconsistencies in some of the accounts which the plaintiff has given which I have referred to earlier. Those inconsistencies in themselves do not necessarily render the plaintiff's account inherently unreliable. However when regard is had to the plaintiff's initial descriptions as to how he injured his back which were essentially confined to him lifting a plank or bearer and compare those with later descriptions by him which included a fallen bearer, there is a distinct possibility that the plaintiff's recollection of the events on 16 February 2013 at the construction site involve either false memories or at least involve an unreliable reconstruction of those events.

[134] Ultimately however, the resolution of the "threshold" issue is in my view best determined by the objective or independent evidence. I have referred earlier to the features of the plaintiff's account which are either not supported, or are contradicted, by other evidence which has not been challenged. The rainfall records demonstrate that the plaintiff's recollection of it raining overnight which caused the construction site to become waterlogged objectively cannot be correct. The inspections which were conducted on the site prior to work commencing by Miller revealed no fallen bearer. A 4.8 metre long bearer protruding 1.8 metres out of the H-frame it had fallen into would in my view, had it existed, been obvious to anyone conducting an inspection of the site even if the lighting was poor. But even if it were accepted that Miller might have inadvertently not seen the bearer because it was too dark, the most telling aspect of the evidence which in my view counts against accepting the plaintiff's account of the fallen bearer is the absence of any evidence from any other witness to having observed the fallen bearer after the plaintiff had left the site. Perhaps most remarkably Hammond, who was working alongside the plaintiff, gave no evidence of observing a fallen bearer after the plaintiff had complained of hurting his back nor did he give evidence of having to reposition a fallen bearer which as explained earlier must have been necessary for the form work to be erected. Neither Miller, Somerville, Vi or Wallace, who were either on level 8 or attended level 8 after the plaintiff had left made any observation of a fallen bearer. The fact remains that on the plaintiff's evidence the fallen 4.8 metre long bearer must have remained in the position the plaintiff found it after his departure. The absence of any evidence from any other witness which corroborates the plaintiff's account of the fallen bearer coupled with the implausibility of a 4.8 metre long bearer falling into the H-frame where the plaintiff said that he found it, is in my view compelling evidence that the plaintiff's recollection as to the existence of the fallen bearer cannot be accepted.

[135] For completeness, there are a number of other issues raised by the parties which need to be considered. Each defendant has pleaded that the plaintiff sustained injuries to his lower back through the process of coughing. That allegation is of course based upon comments the plaintiff made to Vi and Somerville when he first complained of back pain to the effect that he coughed and hurt his back. The plaintiff, while admitting that he informed both Vi and Somerville that he had coughed, said that his use of the word cough was in an entirely different context to that described by Vi and Somerville. The defendants' reliance on a coughing mechanism as to the cause of the plaintiff injuring his back does not mean that they can only succeed in avoiding liability if they can prove that was the cause. The onus remains on the plaintiff to prove his cause of action. However, whilst raised on the evidence, I am not prepared to accept on balance that it was the plaintiff's coughing which caused the injury to his back. I accept the evidence

of Dr Wallace that whilst a scenario by which the plaintiff coughed and injured his back might explain a temporary aggravation of pre-existing back pain which the plaintiff was suffering, Dr Wallace was clear in his opinion that it is implausible that such a mechanism would have caused the lower back injury which the plaintiff continues to suffer from. In my view the plaintiff's statements to the other workers of having coughed are equivocal. Therefore I am not persuaded that a finding that it was the plaintiff's coughing which is what caused his back injury is open on the evidence.

[136] There were a number of witnesses who might have been called by the defendants but who were not. The plaintiff identifies various witnesses in support of a submission that certain inferences can be drawn from the failure of the defendants to call these witnesses in accordance with the rule in *Jones v Dunkel.*[173] The witnesses whom the plaintiff submits should have been called include:

(a) Louis Barros who was a project manager with Heinrich and was present at the construction site on the morning of 16 February 2013;

(b) The person employed by Heinrich who undertook a pre-work inspection of the construction site on the morning of 16 February 2013;

(c) The person/s who gave instructions upon which cross-examination on the "hour-of-power" was based;

(d) The Hutchinson site foreman;

(e) The members of the crane crew who operated the crane on the afternoon of 15 February 2013 and on the morning of 16 February 2013;

(f) The female operator of the Alimak hoist who was referred to in evidence;

(g) Other Heinrich workers.

[137] It can be accepted that there has been no evidence adduced by the defendants which provides an explanation for why none of these witnesses identified by the plaintiff have not been called. It is not in contest that Barros was working at the site on the morning of 16 February 2013. The plaintiff's evidence as to his interactions with Barros which was unchallenged was twofold. First he said that when he first arrived on level 8 he observed a pack of bearers "half-spewed over the place" because the straps holding them together had broken which prompted him to make a comment to Barros that "this is all rad and hasn't been put where it is supposed to be". The plaintiff also said that after he had injured his back he approached both Vi and Somerville informing them that he had hurt his back and that both told him he should go speak to Barros. The plaintiff said that he motioned Barros over, informed him as well that he had hurt his back and was told by Barros to go speak to Wallace. Therefore on the plaintiff's evidence Barros was present on level 8 both at the time he first arrived as well as shortly after he injured his back and therefore Barros is a witness who might have been able to give evidence touching upon the broken pack of timbers as well as any observations he may have made of the area where the plaintiff was working including whether there

[173] (1959) 101 CLR 298

was a fallen bearer. As to whether a Heinrich employee might have undertaken a pre-work inspection of the site prior to work commencing, the plaintiff's submission relies upon admissions made by the defendants in the pleadings that a Heinrich employee had done so. Whilst the name of the particular employee has not been identified the existence of such an employee is alluded to by Somerville in his evidence.[174] Therefore if it be assumed that such an employee was working on 16 February 2013 who undertook a pre-work inspection, it can be accepted that they too might have been able to give evidence touching upon their observations of the plaintiff's work area as well as whether they saw a fallen bearer.

[138] The evidence as to there being an "hour-of-power" which involved tidying up the worksite before work finished for the day on 15 February 2013 is scant. It was expressly suggested to the plaintiff by Counsel for Hutchinson in cross-examination that it was common place for a general site clean up to be undertaken by workers on Friday afternoons prior to work ceasing which was known as the "hour-of-power".[175] The plaintiff said that he had not heard of that term. No evidence was led from either Miller or Wallace as to the use of this term. The plaintiff's own evidence was that he could not recall whether a general site clean-up had in fact occurred prior to him finishing work. The proposition that there was an "hour-of-power" put to the plaintiff was obviously based upon instructions and it can be accepted that evidence could have been adduced by Hutchinson from a witness who gave those instructions. The evidence of Miller was that if a subcontractor wanted materials moved by the crane that had to be arranged either through him or his site foreman.[176] Therefore it can be inferred that another employee employed by Hutchinson at the construction site was the site foreman but the identity of that person is unknown. It can be accepted that evidence could have been adduced from the person Miller described as the site foreman. The names of the crane crew are readily identifiable from exhibit 26 employee time sheets. Therefore it can be accepted that if the crane crew names were evident they too could have been called to give evidence touching upon the crane's movements on the 15/16 February 2013 and whether a pallet of material had knocked into an H-frame. It is also not in dispute that a female employee was operating the Alimak hoist who was identified in evidence and that employee also might have been called to give evidence. As to other Heinrich workers, the evidence suggests that there were others involved in the construction work on level 8 on 16 February 2013 none of whom were called.

[139] In *Payne v Parker* [1976] 1 NSWLR 191 Glass JA, although dissenting as to the application of the principles to the facts but whose judgment has been widely adopted as stating correctly the legal principles applicable to the rule in *Jones v Dunkel* observed at 201-202:

> "(6) Whether the principle can or should be applied depends upon whether the conditions for its operation exist. These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.

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[174] T 2-105 ll. 1-6
[175] T 2-18 l. 41-43
[176] T 3-7 ll27-30

(7) The first condition is also described as existing where it would be natural for one party to produce the witness: Wigmore, par 286, or the witness would be expected to be available to one party rather than the other: *O'Donnell v Reichard* [1975] VR 916, at p. 921, or where the circumstances excuse one party from calling the witness, but require the other party to call him: ibid [1975] VR 916, at p. 920, or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him: ibid [1975] VR 916, at p. 920, *Regina v Burdett* (1820) 4 Barn & Ald 95; 106 ER 873, or where the witness' knowledge may be regarded as the knowledge of one party rather than the other: *Earle v Castlemaine District Community Hospital* [1974] VR 722, at p. 733, or where his absence should be regarded as adverse to the case of one party rather than the other: ibid [1974] VR 722, at p. 734. It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary: ibid [1974] VR 722, at p. 728. If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so: ibid [1974] VR 722, at p. 728. Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman: *Cafe v Australian Portland Cement Pty Ltd* (1965) 83 WN (Pt 1) (NSW) 280; his safety officer: *Earle v Castlemaine District Community Hospita*l [1974] VR 722; his accountant: *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348; his treating doctor: *O'Donnell v Reichard* [1975] BR 916, at p. 921."

[140] No evidence was given as to the reasons why none of the witnesses whom the plaintiff says should have been called were not called. The defendants contend however that no *Jones v Dunkel* inferences can be drawn against them for a failure to call any of the witnesses identified by the plaintiff. For Hutchinson, it is conceded that there was no evidence which proved that an "hour-of-power" clean-up had occurred on Friday 15 February 2013 given that no witness who was asked about it had ever heard of the term.[177] Therefore, it is submitted that there is no scope for an adverse inference to be drawn from the failure to call a witness to prove there had been one in circumstances where the evidence does not establish there was. As to the failure by Hutchinson to call the site foreman, it is submitted that the plaintiff has not identified the evidence that the site foreman might have given in addition to that of Miller. On behalf of Heinrich it is contended that the first time the plaintiff made reference to Barros was in his evidence-in-chief and that if the plaintiff's evidence was accepted, in effect he had imparted to Barros information which would have put Barros on notice of a risk of harm to the plaintiff which should have formed part of the plaintiff's pleadings. As to the Heinrich employee who had undertaken a pre-work inspection, it is submitted that there was no basis for Heinrich to call that employee because it had been admitted by Heinrich that one had taken place and therefore it was not necessary to call a witness to give evidence in support of matters admitted. As to the remainder of the witnesses whom the plaintiff submitted should have been called by Heinrich, it was submitted that the evidence any

[177] T 4-18 ll. 8-13

of those witnesses might have given was not material to any fact in issue and therefore there was no obligation to call any of them.

[141] The real issue as to whether a *Jones v Dunkel* inference should be drawn against the defendants for their failure to call a particular witness turns on the first and second considerations identified by Glass JA in *Payne v Parker*, namely whether the missing witness would be expected to be called by a particular party and whether the evidence of the witness would elucidate a particular matter. According to the plaintiff Barros could have corroborated his evidence that a pack of bearers had broken open in the area where he was working as well as his evidence that he had complained to Barros of having injured his back after the incident. As with Vi and Somerville, if Barros had been on level 8 as the plaintiff described he might also have given evidence as to the existence or otherwise of a vertical bearer in a set of H-frames. The evidence of Barros would therefore potentially elucidate a number of facts in dispute. Whilst Heinrich is correct in its submissions that the plaintiff had failed to plead the broken pack of headers or the comment he had made to Barros concerning them, in my view that provides no answer as to why Barros, who appears to have been the site foreman, was not called. Even accepting that Heinrich may not have been aware of the interactions between Barros and the plaintiff on level 8 before or after he injured his back, as a witness Barros falls into the same category as Vi and Somerville who were called, namely an employee of Heinrich who was present on level 8 at around the time the plaintiff injured his back. I am therefore persuaded that the evidence which Barros could have given would have elucidated the matters referred to and that as an employee of Heinrich at the relevant time would be expected to have been called by Heinrich.

[142] Likewise, the Heinrich employee who had undertaken a pre-work inspection of the site, like Miller, was a witness who in my view was capable of giving evidence as to what he observed during his inspection and whether he observed the fallen bearer described by the plaintiff. The absence of evidence from the person who provided instructions as to the "hour-of-power", having regard to the express absence of any evidence that one had occurred on 15 February 2013, would not have shed light on a particular matter in dispute and therefore the evidence that might have been given by that witness would be largely irrelevant. The Hutchinson site foreman might also have given evidence touching upon some of the facts in issue but the extent that employee might have done so seems largely speculative given the brief mention of that person in evidence. It is therefore difficult in those circumstances to conclude that the site foreman could have given evidence elucidating a particular matter in dispute. Similarly with the crane crew. Whilst evidence from the crane crew might have shed light on a number of matters including the time the crane crew finished work on Friday, what time they started next morning, whether a pallet of material had been transported to level 8 after the plaintiff had finished work on Friday and whether a pallet had knocked into a H-frame, given my findings as to the implausibility of a pallet knocking into an H-frame after the plaintiff had finished work on Friday causing a bearer to fall vertically into an H-frame, the evidence of the crane crew would not in my view have elucidated those matters in any real sense. The evidence of the Alimak driver, whilst potentially shedding light on matters such as who accompanied the plaintiff to level 8, seems to me to be largely peripheral to the facts in dispute. Finally, as to other Heinrich workers, again whilst it might be accepted other workers would have been at the construction site on 16 February 2013, the absence of any direct reference to any other witness being on level

8 at times relevant to the matters in dispute seems to me would render speculative the nature of the evidence those other workers might have given.

[143] For these reasons, I am satisfied that the failure to call Barros and the Heinrich employee who undertook the pre-work inspection on the morning of 16 February 2013, given their respective employment relationships with the defendants, gives rise to the application of the rule in *Jones v Dunkel*. I am not however persuaded that the evidence raises the application of the rule with respect to the other witnesses identified by the plaintiff. In *Australian Securities Commission v Hellicar* (2012) 286 ALR 501 at [165] the operation of the rule in *Jones v Dunkel* was explained in the following terms:

> "Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the absence of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC."

[144] In addition to these considerations, there are a least two further results which flow from the application of the rule in *Jones v Dunkel*:[178] first, inferences available on the evidence which has been given against a party not tendering the other evidence, or which favours that party's opponent, may more confidently be drawn and; second, inferences proposed by the party not tendering the other evidence may more readily be rejected.

[145] For the reasons explained, I accept the plaintiff's submissions based upon the rule in *Jones v Dunkel* relating to the witnesses Barros and the Heinrich employee who conducted the pre-work inspection and as such I am prepared to infer that the evidence of these two witnesses would not have assisted Heinrich's case. Of course it is not to be inferred that their evidence would have been adverse to it. The failure by Heinrich to call Barros and the employee who conducted the pre-work inspection is not, of itself, determinative of Heinrich's case and it does not mean that the evidence called by Heinrich should be rejected. However the fact that it can be inferred that the evidence of Barros and the employee who conducted the pre-work inspection would not have assisted Heinrich is relevant to that question.

[146] Accepting the application of the rule in *Jones v Dunkel* is relevant to my assessment of Heinrich's case, nevertheless I am not persuaded that the failure by Heinrich to call either witness affects the ultimate outcome of my determination of liability against either defendant. Even inferring that the evidence of Barros and the Heinrich employee who conducted the pre-work inspection would not have assisted Heinrich, for the reasons explained earlier the largely uncontested evidence which I accept does not support, and in fact largely contradicts, the making of a finding on the balance of

[178] See Rossi v Westbrook & Anor [2013] QCA 102 at [35]-[37]

probabilities that the 4.8 metre long bearer which the plaintiff described positioning the afternoon before somehow became dislodged and fell vertically into the H-frame where the plaintiff purports to have found it the following morning. For the reasons explained the making of such a finding is not, in my view, one that is open on the evidence.

[147] As I have noted earlier, it is not in contest that the plaintiff did injure his back at the construction site on the morning of 16 February 2013 and that the crucial issue in contest relates to what is identified as the threshold issue, namely, the mechanism by which the plaintiff came to injure his back. For the reasons explained I am not satisfied, on the balance of probabilities, that there was a bearer positioned vertically in a set of H-frames which the plaintiff was attempting to manoeuvre back into position when he injured his back. Not being satisfied that there was a bearer, that finding necessarily means that I do not accept the plaintiff's evidence that he found a 4.8 metre fallen bearer positioned vertically in an H-frame when he commenced work on 16 February 2013. Accordingly, as the plaintiff has failed to persuade me on balance as to the existence of the fallen bearer then it must follow that it is not open on the evidence for me to find on balance that the plaintiff was performing the "lifting activity" particularised in the statement of claim which caused the injury to his back. It follows that I am not satisfied the evidence, on balance, has established that any breach of duty or breach of contract by Heinrich caused the injury to the plaintiff's lower back and the plaintiff's action against Heinrich must therefore fail.

[148] For completeness, I accept that the plaintiff had commenced work when he injured his back. In this regard I prefer the evidence of the plaintiff and Hammond to that of other witnesses on this point. The evidence is consistent that both the plaintiff and Hammond were on level 8 shortly before the plaintiff complained of injuring his back and it seems to me to be unlikely that either would be mistaken as whether they had already started work. Moreover, as I do not accept as plausible that the plaintiff injured his back by coughing, it seems to me that the more plausible explanation for how the plaintiff injured his back was from him picking up a heavy object such as a plank or bearer shortly after starting work. It is noteworthy that this was broadly the explanation given by the plaintiff in a number of statements he made relatively soon after the incident which I have referred to in [137] above. In some circumstances a plaintiff's cause of action will not necessarily fail where a finding is made that there has been a breach of duty other than that which has been particularised.[179] However even accepting that the plaintiff probably injured his back when lifting a plank or bearer (but not when performing the "lifting activity" particularised), that finding is not in my view capable of establishing that either defendant breached its duty of care owed to the plaintiff. In other words the plaintiff's cause of action is predicated upon my accepting that he injured his back when he was performing the "lifting activity". As I am not satisfied on the balance of probabilities that there was a fallen bearer as described by the plaintiff and therefore I am not satisfied that the plaintiff was performing the "lifting activity" when he injured his back, even if it were accepted that the plaintiff injured his back when lifting a heavy object such as a plank or bearer whilst working at the construction site does not provide a basis for finding either defendant liable.

[179] Katsilis v Broken Hill Pty Co Ltd (1978) 52 ALJR 189

Determination of liability - Hutchinson

[149] In light of my finding with respect to my determination of the liability of Heinrich that the plaintiff has failed to satisfy me, on balance, as to the existence of a bearer which had fallen vertically into a set of H-frames, it follows that the same finding must also be made with respect to determining the liability of Hutchinson. Accordingly, as the plaintiff has failed to persuade me on balance as to the existence of the fallen bearer when he commenced work at the construction site on 16 February 2013 it must follow that it is not open on the evidence for me to find, on balance, that the plaintiff was performing the "lifting activity" particularised in the statement of claim which caused the injury to his back. It follows that I am not satisfied the evidence, on balance, has established that any breach of duty by Hutchinson caused the injury to the plaintiff's lower back and the plaintiff's action against Hutchinson must therefore also fail.

Damages

[150] Despite my findings on liability I am required to make an assessment of damages.

[151] The plaintiff's damages against Heinrich are to be assessed both under common law principles and pursuant to Chapter 5 part 9 WCRA as well as schedules 8 – 12 *Workers' Compensation and Rehabilitation Regulation* 2003 (WCRR) to calculate general damages by reference to an injury scale of value (ISV). The plaintiff's damages against Hutchinson are to be assessed under common law principles by reason of s 5(1)(b) CLA.

Expert Medical Evidence

[152] The plaintiff relies upon the expert opinion of Dr Wallace, orthopaedic surgeon. The defendants rely upon the expert opinion of Dr Coroneos, a neurosurgeon.

<u>Dr Wallace</u>

[153] Dr Wallace examined the plaintiff on 16 August 2014 and again on 16 March 2020 and has provided two reports in respect to the plaintiff. In Dr Wallace's first report dated 23 August 2014[180] he expresses the following:

> **EXAMINATION:**
>
> …
>
> Examination of the lumbar spine revealed tenderness over lumbosacral junction and in the para-vertebral musculature of the lumbar spine. There was spasm observed on your client's attempt to forward flex. He had 30 degrees of forward FLEXION. He had difficulty returning to erect posture. He had symmetrical lateral flexion to left and right.
>
> Examination when recumbent revealed straight leg raising of 30 degrees bilaterally and there was no objective neurological deficit.

[180] Exhibit 4

OPINION

Your client has been involved in a workplace incident described in the body of the text. In that workplace incident he sustained an injury to his lower back. He has not been able to work since and he continues to suffer from ongoing symptoms and in my opinion he has discogenic lower back pain.

There were pre-existing degenerative changes in the spine which were minimally symptomatic and although he has a past history of intermittent back strain, he was able to continue working until the index incident.

In my opinion the incident has been the significant contributing factor to his ongoing disability.

Your client has not been able to rejoin the workforce since his injury and in my opinion taking into consideration his training, education and experience, he remains essentially unemployable and is now in receipt of a disability support pension.

ASSESMENT USING AMA GUIDES, 5th EDITION

Your client has$_{ooo}$ a DRE II category impairment of the lumbar spine according to Table 15.3 of the Guides which allows a range of impairments between 5 and 8%. In my opinion your client has a 5% whole person impairment.

[154] Dr Wallace provided a supplementary report dated 24 March 2020[181] following his further examination of the plaintiff. In this report Dr Wallace expressed the following:

EXAMINATION

Mr McKenzie was consistent with his presentation. He was 180cm in height and weighed 76kg. He walked with a symmetrical gait. There was no spinal deformity.

Examination of the lumbar spine revealed tenderness principally to the right midline in the paravertebral musculature. He had some 50% restriction in forward flexion. Extension was of normal range. Lateral flexion to the left and right was symmetrical.

Neurological examination of the lower limbs was unremarkable. Straight leg raising was 40° bilaterally. Deep tendon reflexes were symmetrical and of normal amplitude. Peripheral sensation was intact.

OPINION

Mr McKenzie continue to suffer ongoing lower back pain as a result of workplace injury as described in my previous report. In my opinion, he does not require further investigation and will not require any surgical treatment and has reached maximum medical improvement.

[181] Exhibit 5

He is unlikely to return to the workforce in any capacity and remains dependent on narcotic medication.

….

With respect to the assessment using AMA Guides, 5th Edition, in my opinion, Mr McKenzie has a DRE II Category Impairment of the lumbar spine according to Table 15-3 of the Guides. This is based upon non-radicular radiation into the right lower limb. The range of impairments within these categories is between 5 and 8%. Taking into consideration the adverse effects his injuries have had upon his activities of daily living, any pervious leisure-time activities, and his work, there is an elevation to 7% of the whole person.

[155] Finally, in a conference with the plaintiff's lawyers Dr Wallace clarified a number of matters referred to in his reports.[182] He explained that "spasm" is where paravertebral musculature becomes prominent as if the muscle is in contraction, that it is usually associated with acute pain and restriction of movement and that spasms can be variable. He also explained that the index injury was a significant event and that there had been an injury to one of the plaintiff's discs which had been degenerate prior to the incident. He said that had the incident not occurred the plaintiff would still be working with episodic self-limiting pain with analgesics.

[156] Dr Coroneos examined the plaintiff on 12 July 2013 at the behest of WorkCover. In his report dated 18 July 2013[183] Dr Coroneos expresses a number of opinions, including:

4. Examination findings including tests and investigations required if the diagnosis is still uncertain.

I could not determine any objective neurological deficit on examination. The claimant advised me that he could not demonstrate any lumbar or straight leg raising movement and did not force him to proceed. Objective neurological examinations were normal and there was no spasm, guarding or deformity. … All the changes on the CT and MRI were of pre-existing degeneration and not significantly neuro compressive. I could not see the disc protrusions reported to be present by Dr Watson and neither could the radiologist who reported the MRI. I cannot determine any significant neurosurgical injury diagnosis that would explain the ongoing symptoms and incapacity from 16 February 2013 to the present, some five months later, and the ongoing requirement for S8 and S4 narcotics and benzodiazepines.

… The MRI does not show any left sided nerve root compression to explain neurological deficits that Dr Watson advised that he viewed…

5. Diagnosis of all work related conditions, please include if any of these are an aggravation of a pre-existing condition.

I cannot determine any significant neurological injury or diagnosis that would explain the ongoing symptoms and incapacity from 16 February 2013 to the

182 Exhibit 6

183 Exhibit 3

present, some five months later, and the ongoing requirement for S8 and S4 narcotics and benzodiazepines.

6. Relationship of the current work related diagnosis to the stated mechanism of injury.

I am unable to relate the work related incident to the ongoing symptoms and I advise that the changes on CT and MRI are all due to pre-existing lumbar degenerative disease with broad based disc bulging, facet osteoarthritis, no focal herniation, no focal disc protrusion and no significant neural compression. All the changes are degenerative.

[157] Both defendants contend that I should prefer the evidence of Dr Coroneos to that of Dr Wallace on the basis that as a neurosurgeon he was better placed to provide an opinion as to the plaintiff's injury. The defendants also place reliance upon the evidence of Dr Coroneos in which he said Dr Wallace was mistaken in assessing the plaintiff's injury as falling within DRE II in the absence of non-radicular radiation. Conversely the plaintiff contends that the evidence of Dr Wallace be preferred.

[158] Ultimately I prefer the evidence of Dr Wallace over that of Dr Coroneos. Accepting their differences in areas of expertise, it is important to note that the report of Dr Coroneos was not relied upon by the defendants as a medico-legal report but for its contents relating to the description given by the plaintiff as to how he sustained his back injury.[184] Whilst Dr Coroneos was cross-examined by counsel for the plaintiff on the contents of his report relating to his examination and findings concerning the plaintiff, the limitations of Dr Coroneos' evidence for purposes of assessing quantum are in my view obvious. Dr Coroneous' report was prepared in July 2013 following his assessment of the plaintiff on 12 July 2013. His report therefore relates to his assessment and findings as at July 2013. In contrast to Dr Wallace, there has been no follow up assessment undertaken of the plaintiff by Dr Coroneos. In those circumstances, particularly given the antiquity Dr Coroneos' report and findings and the lack of any follow up assessment, I prefer the evidence of Dr Wallace who, in my view, was suitably qualified to express the opinions contained in his reports. Despite the arguments raised by the defendants as to why I should prefer Dr Coroneos' evidence, I attach little weight to his evidence for purposes of assessing damages. Accordingly, I accept the opinion of Dr Wallace that whole person impairment with respect to the plaintiff's lumbar spine should be assessed at 7% under DRE category II.

[159] In terms of the plaintiff's future employment prospects, Dr Wallace has opined that the nature of the plaintiff's lumbar spine injury is such that he is unlikely to return to the workforce and will remain dependent on narcotic medication.[185] I accept Dr Wallace's opinion in that regard which in my view accords with the assessment undertaken by Dr Wallace and his findings in that regard.

[184] T 2-29 ll. 11-15
[185] Exhibit 5 (p.48)

General damages

[160] The plaintiff's case is that he ought to be assessed under item 92 of schedule 9 of the WCRR - Moderate thoracic or lumbar spine injury - soft tissue injury. To satisfy item 92 it is necessary that the lumbar spine injury "will cause moderate permanent impairment, for which there is objective evidence, of the …. lumbar spine." I am satisfied that the lumbar spine injury suffered by the plaintiff should be assessed as an item 92 moderate lumbar spine injury. The findings of Dr Wallace, which I accept, support that. In his report[186] Dr Wallace refers to observing spasm when the plaintiff attempted to flex forward which in my view is objective evidence for purposes of item 92. Dr Wallace's opinion, which was not challenged, is that spasm can be variable from time to time.[187]

[161] The plaintiff had a pre-existing symptomatic spine prior to the injury. In light of that, having regard to item 92, I accept the plaintiff's submission that the plaintiff's lumbar spine injury should be assigned an ISV of 8. The ISV range prescribed under item 92 is 5 -10. Had the plaintiff's spine been asymptomatic then an ISV of 9 may have been appropriate. Some reduction however is necessary to reflect the plaintiff's pre-existing symptoms. Assigning an ISV of 8 appropriately reflects a reduction for the plaintiff's pre-existing symptoms.

[162] Table 3 of schedule 12 WCCR ascribes to an ISV of 8 the amount of $10,940. I therefore assess general damages against Heinrich in the amount of $10,940. Pursuant to s 306N WCRA there is no entitlement to order interest to be paid by Heinrich on general damages.

[163] As general damages against Hutchinson are to be calculated according to common law principles, the plaintiff submits that having regard to the plaintiff's disabilities, pain symptoms and loss of amenities of life, an amount of $50,000 should be awarded against Hutchinson for general damages. In support of that submission the plaintiff relies upon the calculation of general damages made in a number of comparable decisions.[188] Hutchinson on the other hand contends that general damages be assessed at $45,000, again supporting that submission by a number of comparable decisions.[189] Acknowledging the plaintiff's pre-existing lower back pain, having regard to the extent of the plaintiff's disabilities as supported by the evidence of Dr Wallace, his pain symptoms which he continues to experience, the impact which his lower back injury has had on his amenities of life together with the comparable decisions relied upon by the parties, I am persuaded that the proper level for general damages at common law be assessed at $50,000. I therefore assess general damages against Hutchinson in the amount of $50,000.

[164] S 58(3) *Civil Proceedings Act* 2011 (Qld) allows interest to be awarded upon the general damages assessed at common law. Both Hutchinson and the plaintiff agree that

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[186] Exhibit 4
[187] Exhibit 6
[188] Klein v SBD Services Pty Ltd [2013] QSC 134; Philips v MCG Group Pty Ltd [2012] QSC 149; Paskins v Hall Creek Coal Pty Ltd [2017] QSC 190
[189] Cameron v Foster [2010] QSC 372; McMillan v Kissick [2006] QSC 202; Cokery v Kingfisher Bay resort Village Pty Ltd & Anor [2010] QSC 161; McClintock v Trojan Workforce No 4 Pty Ltd & Anor [2011] QSC 216

interest on general damages be calculated at 2%. Accordingly I calculate interest on general damages for Hutchinson at $3,875.[190]

Past economic loss

[165] The plaintiff's evidence, which I accept, is that but for the back injury he sustained on 16 February 2013 he would have continued to work. Dr Wallace expressed the opinion that had the incident not occurred the plaintiff's pre-existing symptomatic spine would not have prevented him from working. The plaintiff has not been able to return to work since the incident and, I accept, the plaintiff has been totally incapacitated because of his back injury since 16 February 2013. The unchallenged evidence is that the plaintiff enjoyed a long productive work history in the construction industry and was readily able to find employment. The plaintiff's back injury has had significant financial consequences on him including losing his house due to his inability to work.

[166] The plaintiff's claim for past economic loss which is set out in paragraphs 27 – 30 of the Quantum Statement is calculated at $1,150 net per week.[191] The plaintiff underwent surgery for a medical condition on 20 August 2014 which he accepts would have precluded him from re-entering the workforce for approximately 18 months until February 2016 due to his incapacity. The plaintiff's claim for past economic loss is calculated so as not to exclude that period of incapacitation. Accordingly the plaintiff's claim for past economic loss is calculated at $379,500.[192] The plaintiff also contends that a reduction of 10% should be made to the plaintiff's past economic loss to reflect contingences relating to the chance of increased symptoms in his spine and by natural aging and deterioration.

[167] Conversely, relying upon the plaintiff's income for the 3 and 4 year pre-accident period as set out in exhibit 2, the defendants contend that the plaintiff's average net weekly income over that preceding period was $683.11 and $795.20 respectively. Accordingly, the defendants submit that the plaintiff's income fluctuated from year to year reflecting the unpredictable nature of the construction industry and therefore it is appropriate to calculate the plaintiff's past economic loss on an average of his earnings in preceding years rather than relying upon his average weekly income at the time of the accident. The defendants further submit that given the plaintiff had ceased work, some allowance should be made for costs he would otherwise have incurred if he remained employed such as travel expenses, tools and protective equipment he would have been liable for. In addition to each of these matters, the defendants submit that a further discount to reflect contingencies should be applied when calculating past economic loss. In that regard it is submitted that a discount for contingencies is justified here given the plaintiff's pre-existing degenerative condition which would have resulted in the plaintiff being unable to work for at least part of the 7 year period from the date of the incident as well as the effect of the historical emergence of the plaintiff's cervical symptoms on his ability to continue to work as a formwork carpenter. That on the defendants submissions should result in a 50% deduction for contingencies.

[190] $50,000 x 2% x 7 years 9 months x .5 = $3,875
[191] Exhibit 1
[192] Being the period 16 February 2013 to 13 November 2020 (404 weeks) less the period 20 August 2014 to 20 February 2016 (74 weeks) = 330 weeks. 330 x $1,150 = $397,500

[168] Were I to accept the defendants submissions the plaintiff's past economic loss would be calculated at $750 net per week or a total of $247,500.[193] Allowing for a further reduction of 50% for contingencies, the defendants therefore contend that the plaintiff's past economic loss be calculated at $123,750.

[169] It may be accepted, as was observed by McMeekin J in *Pollock v Thiess Pty Ltd (No.2)* [2014] QSC 95, that it is a feature of the lives of workers such as the plaintiff that the nature of their employment inevitably means that they go from contract to contract with no permanence in their employment. The plaintiff's work history prior to 16 February 2013 bears this out. I accept that he was obviously regarded as hardworking and his employment history demonstrates his capacity to readily find employment in his trade. I accept however the defendants' principal contention of the risk attendant to calculating the plaintiff's past economic loss simply by reference to what he was earning at the time of the incident. Adopting that method does not in my view reflect the lack of permanency in the plaintiff's employment and that there inevitably would have been periods between jobs when he was unemployed. Therefore some allowance should be made for that. Relying upon the plaintiff's net income for the 4 years prior to the incident, I am prepared to accept that even taking into account periods between jobs and changes of employers attendant to the plaintiff's employment his average weekly income should be calculated at $950 per week. That was certainly the case both in 2010 and 2012 and I note that at the time of the incident the plaintiff was earning $1,367 net per week. Having regard to those matters I am satisfied that the plaintiff's past economic loss should be calculated at $950 net per week. The plaintiff obviously had a capacity for hard work even when experiencing back pain, which he demonstrated in the week leading up to the incident. In my view allowing $950 net per week for past economic loss appropriately reflects the plaintiff's pre-existing condition and the considerations identified by McMeekin J in *Pollock* relating to the nature of the plaintiff's employment.

[170] However I also accept that some further discount should be allowed for contingencies. Again having regard to Dr Wallace's evidence, there is nothing in the evidence which persuades me that the plaintiff would have been incapable, because of his pre-existing condition, of continuing to work essentially in a full-time capacity as a formwork carpenter. In my opinion a discount of 15% adequately takes into account the arduous nature of the plaintiff's employment and is an appropriate discount for contingencies. Therefore I calculate the plaintiff's past economic loss at $266,475.[194]

[171] Interest on past economic loss for Heinrich is to be calculated in accordance with s 306N WCRA on the plaintiff's net economic loss less the net statutory benefits received by the plaintiff from WorkCover. It is agreed between the parties that the plaintiff's net statutory benefits figure is $41,536.02. Total estimated Centrelink benefits which are refundable from damages have also to be brought into account.[195] The rate to be applied

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[193] Being the period 16 February 2013 to 13 November 2020 (404 weeks) less the period 20 August 2014 to 20 February 2016 (74 weeks) = 330 weeks. 330 x $750 = $247,500

[194] Being the period 16 February 2013 to 13 November 2020 (404 weeks) less the period 20 August 2014 to 20 February 2016 (74 weeks) = 330 weeks. 330 x $950 = $313,500 less 15% = $266,475.

[195] Calculated at an average of $450 per week over [330 weeks – 45 weeks on WCQ payments] 285 weeks = $128,250

is 0.35%.[196] I allow interest against Heinrich on past economic loss of $3,310[197]. S 306N WCRA does not apply to the interest calculation relating to Hutchinson. It is submitted on behalf of Hutchinson that interest on past economic loss be calculated at 3.75%. The plaintiff submits for a rate of 2.75% relying upon the rate adopted by Crow J in *Cootes v Concrete Panels & Ors* [2019] QSC 146. Consistent with the approach of Crow J, I will adopt a rate of 2.75%. Accordingly I allow interest on past economic loss for Hutchinson at $26,001.25.[198]

[172] It is agreed between the parties that past loss of superannuation be calculated at 9.5%. I will allow $25,315[199] for the plaintiff's past loss of superannuation.

Future loss of earning capacity

[173] The plaintiff's claim for future loss of earning capacity at the time of trial was $258,635 calculated at $1,150 net per week for 8 years until age 60 less a discount of 35% for contingencies. The defendants contend that future loss of earning capacity be calculated on a global basis in the amount of $155,000 calculated over a 10 year period discounted by 50% for contingencies.

[174] Having regard to the evidence of Dr Wallace I accept that it would be unrealistic to find that the plaintiff would have continued to work to age 67. His employment involved heavily lifting, he suffered from a pre-existing symptomatic spine and in recent times there has been the emergence of cervical spine symptoms. The plaintiff was aged 44 at the time of the incident and is now aged 52. It is conceded on behalf of the plaintiff that it is unlikely the plaintiff would have worked to the nominal pension age of 67 given the nature of his employment and his pre-existing condition.

[175] Having regard to the evidence of Dr Wallace, despite the plaintiff's pre-existing condition I accept that the plaintiff had reasonable prospects of continuing to work to age 60. The proper approach to calculating the plaintiff's future loss of earning capacity in circumstances where he has an underlying degenerative condition is in my view that explained in *Hopkins v WorkCover* [2004] QCA 155.

[176] As with the plaintiff's past economic loss, it is appropriate to calculate his future loss of earning capacity at $950 net per week for 8 years, reflecting when I am satisfied it is reasonable to find that the plaintiff would have continued to work. By that time the plaintiff would have been slightly older than 60.[200] That equates to an amount of $328,700. A discount of 35% should be allowed for contingencies. I therefore allow the amount of $213,655 for future loss of earning capacity.

[196] Being 50% of the rate for 10 year Treasury bonds published by the Reserve Bank of Australia under 'Interest rates and yields - capital market' at the beginning of each quarter in which an award for interest is made.

[197] Interest is payable on net economic loss of [$266,475 + $25,315] – [$41,536.02 + $128,250] = $122,003.98. Thus $122,003.98 x .35% x 7 years 9 months = $3,310

[198] Interest is payable on net $122,003.98 x 2.75% x 7 years 9 months = $26,001.25

[199] $266,475 x 9.5% = $25,315

[200] 8 years [346] x $950 per week = $328,700

Future loss of superannuation

[177] Future loss of superannuation should be calculated at 11.25% which reflects the average superannuation rate over the next 10 years. Calculated on $213,655, I allow $24,036 for future loss of superannuation.

Past special damages

[178] The plaintiff claims $27,981.25 for past special damages. The defendants contend for an amount of $26,435.43. It is common ground between the parties that the plaintiff received $17,931.25 in workers compensation payments and a further $4,798.35 in Medicare refunds. The total refunds received by the plaintiff therefore amount to $22,798.35. There was no challenge to schedule A of the plaintiff's Quantum Statement with respect to the listed items for medical and rehabilitation expenses totalling $25,496.65. The plaintiff was challenged about other items listed as special damages including his claim for 1,400 km of travel as well as the rate of 90c per km which he claimed for travel. Having regard to the plaintiff's condition which necessitated visits to his GP in respect to his condition, I accept the plaintiff's submission that past special damages should be calculated on the basis of the plaintiff undertaking four trips per year to the GP and six trips per year to fill prescriptions. I therefore adopt the calculations relied upon by the plaintiff and I will allow the amount of $27,981.25 for past special damages. I will allow interest against Heinrich of $133.25 and interest of $1,119.26 against Hutchinson adopting the plaintiff's calculations.

Future special damages

[179] The plaintiff's claim for future special damages is predicated upon the plaintiff likely requiring at least 4 attendances upon a GP per year together with the incidental costs of travel and medication. A claim is also made for massage therapy and consultation with a pain specialist. The plaintiff claims the amount of $16,875 to age 70 for future special damages calculated at $36 per week.

[180] Having regard to the plaintiff's evidence at trial the defendants contend that the evidence does not support the proposition that the plaintiff will require ongoing medical or rehabilitation treatment and therefore there is no basis to make any allowance for travel expenses. It is also submitted that the plaintiff's future medical expenses will be limited to ongoing pharmaceutical support. Accordingly, the defendants submit that future special damages be assessed on a global sum for future pharmaceuticals in the sum of $10,000.

[181] I accept the thrust of the defendants' submissions concerning the plaintiff's evidence at trial which seemed to indicate that that he had limited ongoing visitations of GP's and physiotherapist at least in more recent years. For that reason the approach submitted by the defendants seems to me to be the more appropriate way in which to assess the plaintiff's future special damages, acknowledging that the plaintiff's ongoing pain will necessitate him continuing to use pharmaceuticals as pain relief. I will therefore allow the sum of $10,000 for future special damages assessed as a global sum.

Summary

[182] In summary, my assessment of damages is:

Head of damages	Heinrich	Hutchinson
General damages	$10,940.00	$50,000.00
Past economic Loss	$266,475.00	$266,475.00
Past loss of superannuation	$25,315.00	$25,315.00
Future loss of earning capacity	$213,655.00	$213,655.00
Future loss of superannuation	$24,036.00	$24,036.00
Past special damages	$27,981.25	$27,981.25
Future special damages	$10,000.00	$10,000.00
Fox v Wood	$11,366.00	$11,366.00
Interest on general damages	$0.00	$3,875.00
Interest on past economic loss	$3,310.00	$26,001.25
Interest on past special damages	$133.25	$1,119.26
Sub total	**$593,211.50**	**$659,823.76**
Less WCQ refund	$70,851.27	$0.00
TOTAL	**$522,360.23**	**$659,823.76**

Apportionment

[183] The approach to apportioning liability as between the defendants has been the subject of written as well oral submissions. It is common ground that my findings with respect to apportionment hinged upon my findings on liability. Had I found both defendants liable then in the circumstances it would have been necessary for me to have invited further submissions from each party on the question of apportionment to reflect any findings I made with respect to liability. However in light of my findings I do not consider it necessary or appropriate to attempt to make findings on apportionment where I have found neither defendant liable.

Orders

[184] 1. There will be judgment for the defendants.

2. Any submission in respect of costs, or alternatively a proposed consent order if the parties are agreed, be filed by 18 January 2021