DISTRICT COURT OF QUEENSLAND

CITATION:	*Paetzold v At Beach Court Holiday Villas Pty Ltd* [2024] QDC 35
PARTIES:	**HERMAN HERBERT PAETZOLD** (plaintiff) **v** **AT BEACH COURT HOLIDAY VILLAS PTY LTD** (defendant)
FILE NO/S:	BD No 207 of 2021
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	14 – 17 November 2022; 6 December 2022
JUDGES:	Sheridan DCJ

ORDER:

1. **The defendant pay to the plaintiff the sum of $41,076.88 less the statutory refund as determined by further order.**
2. **If the parties are able to reach agreement as to the amount of the statutory refund and/or as to costs, a consent order signed by the parties be filed by 4:00 pm Friday, 26 April 2024.**
3. **If the parties cannot reach agreement on either or both amounts:**
    a. **the plaintiff file submissions, of no more than six pages in length, excluding any attachments, by 4:00 pm Friday 3 May 2024;**
    b. **the defendant file submissions, of no more than six pages in length, excluding any attachments, by 4:00 pm Friday 10 May 2024; and**
    c. **the plaintiff file any submissions in reply, of no more than two pages in length, by 4:00 pm Wednesday, 15 May 2024.**
4. **The final form of order is to be pronounced following agreement or submissions.**

CATCHWORDS: TORTS – NEGLIGENCE – STANDARD OF CARE, SCOPE OF DUTY AND SUBSEQUENT BREACH – GENERALLY –where plaintiff employed by defendant as a gardener/caretaker – where role of plaintiff included mowing an area with a ride-on mower – where defendant was aware the mower had a defective battery – where plaintiff jumpstarted the mower due to the flat battery – where plaintiff was injured when overriding mower safety features to manoeuvre the mower after it became stuck without turning it off – where uncontested that plaintiff suffered a tear to his Achilles tendon – where plaintiff alleges he also suffered injury to the left knee in the incident – where plaintiff alleges injuries occurred because of defendant's negligence to provide a workable battery in the mower – where plaintiff was erroneously receiving Centrelink payments – where plaintiff not lodging tax returns – whether defendant breached duty of care – whether the illegality of receiving Centrelink payments affects past economic loss

LEGISLATION: *Workers' Compensation and Rehabilitation Act* 2003 (Qld) s 305B, s 306N
Workers' Compensation and Rehabilitation Regulations 2014 (Qld) sch 9
Social Security (Administration) Act 1999 (Cth) s 66A
Criminal Code Act 1995 (Cth) s 134, s 135

CASES: *AAI Ltd v Marinkovic* [2017] QCA 54
Brownbill v Kenworth Truck Sales (NSW) Pty Ltd [1982] FCA 7; 39 ALR 191
Czatyrko v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839
Fox v Wood (1981) 148 CLR 438
Giorginis v Kastrati (1988) 49 SASR 371
Graham v Baker [1961] HCA 48; (1961) 106 CLR 340
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506
Medlin v State Government Insurance Commission [1995] HCA 5; (1995) 182 CLR 1
Morvatjou v Moradkhani [2013] NSWCA 157
Nelson v *Nelson* [1995] HCA 25; (1995) 184 CLR 538.
New South Wales v Moss [2000] NSWCA 133
Sami v Roads Corporation [2008] VSC 377
Smith v Coles Supermarket Australia Pty Ltd [2020] NSWCA 206
Trajkovski v Ken's Painting & Decorating Services Pty Limited & Anor [2002] NSWSC 568

COUNSEL: S D Anderson for the plaintiff
M A Rothery for the defendant

SOLICITORS: Macrossan & Amiet Solicitors for the plaintiff
Cooper Grace Ward for the defendant

Introduction

[1] The plaintiff, Herman Herbert Paetzold (Mr Paetzold), was employed by the defendant, At Beach Court Holiday Villas Pty Ltd (At Beach) as a caretaker. At Beach carried on the business of managing holiday accommodation at the At Beach Court Holiday Villas at Cannonvale, including being employed by the body corporate of the complex in a caretaking capacity. Mr Paetzold says that as a result of an incident on 16 March 2020, in the course of his employment, he suffered an injury to his Achilles tendon and knee. That he suffered an injury to his Achilles tendon and later was found to have a disability to his knee is not seriously in dispute, but whether the disability to his knee was sustained at the time is in contest. The circumstances of the incident, liability and quantum are in issue.

LIABILITY

The incident

[2] Mr Paetzold commenced work on the day of the incident with his usual routine which was to unlock the swimming pool amenities and empty the bins. Mid-morning, Mr Paetzold went to the shed where a ride-on mower was located with the intention of mowing the lawn. He said in evidence that after he got the mower out of the shed "of course, the battery was absolutely dead".

[3] Mr Paetzold said that he knew it was dead because he had complained about the battery being dead some three months prior to the receptionist, Richelle. He explained that he had been told when he commenced work for his employer that he was to report everything to the receptionist. He said that he had reported three times that the battery was dead. He also said that he reported that fact to Mr Ross Martin, the maintenance manager of At Beach and Mr Paetzold's team leader. When he gave evidence, Mr Martin agreed that he had been told about the battery, and that after the incident it was replaced.

[4] Mr Paetzold said that he went over to his car to obtain a jump starter that he had. He used the jump starter to start the ride-on mower. He says he left the jump starter in the shed. After starting the mower, he started mowing at the front of the property. A culvert was located in this area.

[5] Mr Paetzold said that when he was reversing to do a three-point turn at a tree located in the area, a turn which he said he had always done, the rear wheels of the mower started spinning and the mower would not back up. He said that he tried rocking it a bit, while sitting on it, but "it wouldn't do anything."

[6] Mr Paetzold said he turned off the cutting blades and lifted the cutting deck with a lever to its higher position. He said he tried to reverse again, but it still would not back up and accordingly he decided that he would have to manually push it.

[7] In order to do this, Mr Paetzold said that he put on the parking brake so that he could get off the mower. He explained that if he got off his seat without applying the brake the engine would cut off (that being a safety feature of the mower). He said that once he was off, he placed his right hand on the seat and slowly eased off the brake with his left hand to enable him to push the mower. He said he was able to move the mower a bit forward and was hoping to give it one final push when he felt extreme pain in the back of his leg.

[8] He said that he "just collapsed, like, just clutched my leg." He said he was in that much pain, he let the mower go and the mower took off. He said that he "rolled down the hill a few - done a couple of summersaults down the hill at the same time." He said, "I was still clutching my left leg." He confirmed, when asked, that he was left-handed and left-footed.

[9] When asked as to why he was mowing that area, he said, "because we always did." He said the maintenance guy before him had done it that way.

[10] When challenged in cross examination about his trying to move the mower while it was still turned on, he said, "if the battery had …been correct and workable, I would have been able to turn the motor off….And then jiggle the front around." He described the movement he would have then used, as being lifting it, "bit by bit" and said that "you bounce it across, if you like." He confirmed it would be done from the front.

[11] He said that it was a continual slope at this point, about between 10 and 15 degrees and that it then "steepens off."

[12] He said he was pushing the mower backwards towards the front fence. He confirmed that it was when he was "trying to do that really hard push" with his left leg on the slope that the incident happened. He accepted in cross examination that, at the moment of the incident, his momentum was towards the fence and he was "pushing up the hill".

[13] In cross examination he was then asked to confirm the path he took in rolling down the hill. He said:

> "I don't remember how. It all, you know, was excruciating pain, clutching my knee. I didn't – you just about blank out, just about, yeah, so I don't remember how I rolled or what I've done after that moment of the incident. But I ended up in the bottom. The mower was already there."

He said, he was "sort of, lying next to it".

[14] In cross examination it was suggested to him that rolling the distance he said he did would have been a significant thing for him to experience. Mr Paetzold responded:

> "I can't – look, I can't remember, because when you, in excruciating pain collapse into the ground, your mind doesn't see or doesn't [know] – I didn't feel any other pain except my leg. You know, so everything else was – it's – it's called, I supposed, adrenaline mixed with everything else – out of my body, just except my leg."

[15] There is a photograph taken shortly after these events showing the mower at the bottom of the culvert. The photographs also show signs of the area at the top of the culvert having been recently mowed. The photographs were taken by Mr Martin.

[16] After the incident, Mr Paetzold said he crawled through the bottom of the culvert and went to the reception and the receptionist contacted Mr Martin. In his evidence, Mr Martin said that when he arrived at the complex, he observed Mr Paetzold limping, the position of the mower and the mowed grass.

[17] At Beach puts in issue the mechanism of injury. Reliance is placed upon the facts that Mr Martin did not observe any spin marks from wheels on the grass nor any marks on the uniform of Mr Paetzold that might be associated with him rolling down the hill.

[18] Reliance is also placed upon previous initial statements made by Mr Paetzold about the incident which did not refer to Mr Paetzold rolling down the slope. In the

incident report written by him on 16 March 2020, Mr Paetzold detailed the incident as follows:

> "While cutting grass with a ride-on mower the mower was stuck on an embankment I tried to push the mower back. While doing so - I felt a sharp pain in my leg."

[19] A similar absence of any mention of Mr Paetzold rolling down the slope is also evident in the medical records and reports tendered in evidence without qualification.

[20] The records of the Cannonvale Medical Centre dated 23 March 2020 and completed by Dr Behrouz state that, "when he was trying to pull a heavy ride on lawn mower yesterday, he felt a stabbing pain on the back of his left ankle." The WorkCover Work Capacity certificate completed by Dr Behrouz the next day, in describing the mechanism, refers to Mr Paetzold as pushing, not pulling, the heavy ride on lawn mower. There is no mention of him having also rolled down the embankment.

[21] The report of Dr Hassan dated 26 March 2020 to Dr Behrouz says that Mr Paetzold sustained an injury to his left Achilles tendon when the pain occurred when he "tried to push it [the mower] to the side over a sloping area". In the medico-legal report of Dr Journeaux dated 29 April 2021, there is again no mention of rolling down the embankment.

[22] The first time there was reference to Mr Paetzold having rolled down the steep embankment in the incident was in his Notice of Claim for Damages sworn 23 July 2021 where it was stated, "as I tried to push the side of the lawnmower, I felt a sharp pain in my left calf. It felt like I had been bitten by a snake and I collapsed to the ground in pain and I rolled down the steep embankment."

[23] In cross examination it was put to Mr Paetzold that he had not told a single person until he commenced his claim in July 2021. It was put to him that he did not tell his GP, Dr Hassan and Dr Journeaux. Mr Paetzold responded that he did. He said he had told everybody that he had let the mower go, clutched his leg and rolled down the embankment.

[24] I have great difficulty accepting this evidence. If Mr Paetzold had told any of the doctors that he had rolled down the slope after the occurrence of pain, particularly if

it involved him clutching his knee, it is impossible to believe that it would not have been recorded. That view is reinforced by the absence of any reference to it in the incident report completed by Mr Paetzold.

[25] In giving his evidence, Mr Paetzold was clearly exaggerating. At one point, he described himself as having "done a couple of summersaults". The impression formed in relation to that evidence is that the exaggeration was designed to help increase the level of drama around the incident and support the contention that both the tear of the Achilles tendon and the injury to the knee occurred in that incident.

[26] Indeed grave doubts about the truthfulness of all the evidence given by Mr Paetzold attend this case. Whilst receiving income for working full time as a caretaker, Mr Paetzold was also in receipt of the age pension. Mr Paetzold did not report to Centrelink any income he had received since commencing to receive the age pension. Further, Mr Paetzold had not filed income tax returns for the financial years ended 30 June 2018, 2019 or 2020 by the due date; only doing so by July 2021. I will return to this subject later when dealing with the issue of economic loss.

[27] Leaving these issues aside, there can be no doubt that Mr Paetzold was mowing the grass near the culvert; the mower ended up down the slope; Mr Paetzold was limping afterwards; Mr Paetzold immediately informed his employer of the incident and shortly afterward, Mr Paetzold was found (by ultrasound) to have a near complete tear of his Achilles tendon.

[28] The evidence relating to the incident is such that I am prepared to accept that the injury to his Achilles tendon occurred when Mr Paetzold was trying to push the mower after it had become stuck during the course of his employment. I will address later, when dealing with the medical evidence, the injury to the knee.

Defendant's submissions on the claim

[29] A more interesting feature of the case is whether Mr Paetzold can prove, on the balance of probabilities, that any injury he sustained was caused by the negligence of At Beach.

[30] Much was made during the hearing and in submissions on behalf of At Beach as to the limited nature of the allegations against it. It was submitted that the complaint

in the pleadings, including the particulars, was limited to one about the defective battery, and to the complaint that if At Beach had fixed the battery then the incident would not have occurred.

[31] There is much in the submission. The generic allegations made in employer/employee claims - namely the failure to provide a safe system of work, the failure to ensure the workplace health and safety of the plaintiff, requiring the plaintiff to work with machinery that was not in a good serviceable condition, the failure to provide a safe place of work and the failure to provide safe suitable plant, machinery and equipment - were all made in this case. They were particularised as occurring essentially because At Beach failed to provide a mower with an operable battery and hence one which could be turned off and restarted. The generic allegations as to the instructions and failure to train or supervise were also particularised towards this issue. One of the allegations of negligence took the issue slightly further by alleging that the failure to provide machinery in good serviceable condition required Mr Paetzold to push the mower with one hand on the seat so that it remained running instead of turning the mower off and manoeuvring it through a series of lifts (presumably with both hands).

[32] It was later submitted by counsel on behalf of At Beach, notwithstanding this extensive submission about the pleadings, that the risk of harm - within the meaning of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) that should be considered, or was, in reality, articulated on behalf of Mr Paetzold - was simply the risk of physical injury from pushing the ride-on mower (regardless of the motivation for doing so). It was submitted that there was no evidence that there was any risk of injury from pushing the mower. In particular, it was submitted that there was no evidence of the forces involved in pushing the ride-on mower, or evidence that it was unreasonable for the employer to require a person to push the mower. Finally, it was submitted, with the same type of thinking, but in particular as to causation, that the need to push the mower did not arise from the flat battery, but because the mower got stuck.

[33] These submissions fail to appreciate the full set of circumstances and, in particular, to understand that causation is not one to be considered by the final act, but in a

commonsense way.[1] This might require, depending upon the situation, consideration of a series of acts and omissions. In this case, the injury occurred not just whilst Mr Paetzold was pushing the mower (a heavy piece of equipment) but whilst he was pushing it with one hand on the seat and whilst he was positioned on the slope. He adopted that manoeuvre not just because the mower got stuck, but because he did not want to turn off the mower. He refrained from turning off the mower because he was concerned, with some justification, that if he did so, he would not immediately be able to start it again.

Negligence

[34] The allegation of negligence essentially comes down to an allegation that At Beach failed to provide a ride-on mower with an operable battery in good condition so that it could be turned off and restarted after being manoeuvred, or failed to instruct Mr Paetzold as to a safe procedure to be followed, in circumstances where the mower could not be turned off because the battery was defective.

[35] At Beach knew of the condition of the battery. It is foreseeable that an employee might not turn off the mower in circumstances where that might be the most sensible course because the employee might not be able to start it again.

[36] In this respect, there is no suggestion that Mr Paetzold had been given any instructions about the ride-on mower.

[37] At Beach submits that there was no reason to train Mr Paetzold because of his experience with a ride-on mower and, as a gardener, that he was or ought to have been aware of the risks involved in using a ride-on mower on the slope around the culvert and was aware or ought to have been aware that the cut-off switch was a safety feature which should not be overridden.

[38] It is true that Mr Paetzold had experience with a ride-on mower. He owned one. It is perhaps of some relevance also that for most of his life, whilst not a gardener, Mr Paetzold had been employed either as a foreman or supervisor in the construction industry.

[39] None of this necessarily answers the allegations.

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1 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, [515].

[40] The common law description of the duty of care is that expressed by the High Court in *Czatyrko v Edith Cowan University,*[2] which was followed in a case referred by the counsel for At Beach,[3] as follows:

> "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 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."

[41] Section 305B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) deals with the circumstances in which a person is taken not to breach that duty. It provides 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."

[42] In my view, the risk that a person might be injured because the battery of the mower was flat was foreseeable and not insignificant. The mower was a large piece of equipment. It was required to be used close to, if not on, the slope near the culvert. It was accordingly probable that if the equipment was not operating properly, a worker would suffer serious injury; even through thoughtlessness, inadvertence or

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2 [2005] HCA 14; (2005) 79 ALJR 839, [12].

3 *Smith v Coles Supermarket Australia Pty Ltd* [2020] NSWCA 206, [257].

carelessness. Rather than being a burden, it was in the interests of the employer to have a battery in the mower in a condition such that it started promptly and without the need for a jump starter to be employed.

[43] If the battery was not one which had a history of being flat, the injury would not have occurred. I am satisfied that Mr Paetzold would have turned off the power, used both hands to jiggle the mower out of the position in which it had become stuck and then started the mower and resumed work.

[44] In the circumstances, I find that the injury was caused by the negligence of At Beach in not providing proper equipment which would have forestalled the desire to take a shortcut and failing to instruct or supervise Mr Paetzold against taking such a shortcut.

[45] Subject to what the parties might have said, had it been necessary, it is likely that I would have been prepared to find that Mr Paetzold had contributed to his injuries in undertaking the manoeuvre in the way he did, but that allegation was withdrawn on day one of the trial.

QUANTUM

Medical evidence

[46] Mr Paetzold was treated by Dr Hassan, orthopaedic surgeon of Mackay, shortly after the incident. He underwent surgical repair of his Achilles tendon on 31 March 2020. He was mobilised with a moon boot. By 28 May 2020, Dr Hassan reported that Mr Paetzold was walking comfortably with normal walking shoes, there was no pain in the tendon and he was to continue rehabilitation. On 17 August 2020, Dr Hassan reported that Mr Paetzold had recovered well and did not have any concerns about his Achilles tendon.

[47] On the other hand, on that date Dr Hassan recorded that Mr Paetzold had a complaint about his left knee, mainly over the medial side which he said had started two months previously. On 1 October 2020, Dr Hassan reported that an MRI showed degenerative changes and a torn medial meniscus to that knee. In this report, Dr Hassan opined that the symptoms in the left knee could be an aggravation due to pre-existing degenerative changes in the medial compartment which could

have resulted from the activities related to exercises and rehabilitation he was performing as part of his recovery from the Achilles tendon injury.

[48] Dr Hassan offered an arthroscopic debridement if symptoms failed to improve. This took place on 10 November 2020. Writing on 16 December 2020, Dr Hassan reported that Mr Paetzold was walking with a normal gait and noted that Mr Paetzold mentioned that his knee has very good days "but occasionally he gets pain and swelling on the knee." He further reported that Mr Paetzold had said he was managing his current suitable duties.

[49] WorkCover sent Mr Paetzold for examination and report by Dr Journeaux, consultant trauma and orthopaedic surgeon of Medilaw. In his report dated 29 April 2021, he made various impairment assessments relating to both the left knee and Achilles tendon, but appears to say that the knee impairment was wholly pre-existing. In his report to the solicitors acting for At Beach dated 9 September 2021, Dr Journeaux stated that it was more probable than not that the knee symptomology related to the natural history of the constitutional condition of the individual who is aging in years performing work that had effectively "overloaded" his knee.

[50] The solicitors acting for Mr Paetzold sent him to Dr Cook, specialist orthopaedic consultant. In his report dated 8 March 2022, Dr Cook records that Mr Paetzold still had knee pain, and a strange feeling of tightness and tingling in his lower left leg. Dr Cook considered that Mr Paetzold had sustained a rupture of the left Achilles tendon, tears of the medial and lateral meniscus in his left knee and aggravation to the mild early pre-existing degenerative changes of osteoarthritis left knee joint in the incident on 20 March 2020.

[51] The report of Dr Cook was provided to Dr Journeaux on 11 April 2022. Dr Journeaux disagreed with the opinion of Dr Cook that the imaging done on 30 September 2020 showed early mild degenerative changes. Dr Journeaux stated that Mr Paetzold had in fact significant osteoarthritis of the knee with complete loss of articular cartilage and with evidence of medial compartment "bone bruising". Dr Journeaux considered that the medial meniscal tear, more likely than not, was part of the pathological process of the natural history of degenerative change pertaining to Mr Paetzold's left knee. He considered it possible that work-related events caused a temporary symptomatic and/or mild pathological aggravation, but did not

believe the work-related events were the cause "based on the clinical history and considering the concomitant documentation". He accepted that the process of picking up a palm frond, which was mentioned by Mr Paetzold to Dr Cook as leading him to seeing his general practitioner about his knee, potentially could cause an exacerbation (temporary aggravation), but said it was unlikely that an acute injury would occur. Further, Dr Journeaux said that there was no evidence that the event on 16 March 2020 contributed to his left knee condition. He considered that the knee symptoms occurred in the rehabilitation phase "most likely due to muscle deconditioning in the presence of a vulnerable knee."

[52] A conference was conducted between Dr Cook and the lawyers acting for Mr Paetzold on 17 October 2022. The notes from that conference have Dr Cook explaining why he considered that the meniscus tear occurred during the events of 16 March 2020 or, at least, during the subsequent rehabilitation shortly afterwards. The factors listed by him as indicating when the tear occurred included:

> "
> - the articulate cartilage joint space measured from the weight bearing x-ray for the left knee being at least 3mm or greater;
> - the operation report by Dr Hassan evidencing localised severe degenerative changes (Grade IV) to the weight bearing area of the medial femoral condyle only with asymmetrical low grade changes elsewhere;
> - the absence of significant osteophytes on the medial and/or lateral femoral and tibial condyles for the knee and edges of the patella;
> - the mechanics of a meniscus tear being more likely to be caused from an acute injury;
> - radiology imaging identifying the existence of a meniscus tear which, if pre-existing, more likely than not would have become symptomatic prior the work-related events;
> - the bone bruising at the medial tibia being more likely than not caused from an injury or trauma; and
> - Herman being asymptomatic prior to the incident on 16 March 2020 with no history of previous injury."

[53] A conference occurred between the lawyers acting for At Beach and Dr Journeaux on 2 November 2022. A file note of that conference records Dr Journeaux's continued disagreement with Dr Cook that the injury to the left knee occurred on 16 March 2020. He stated that if there was a significant knee injury, a person would

know about it at the time contemporaneous to when an injurious event occurred. Further, he considered that if the tear to the meniscus happened on 16 March, then he would expect to see, with that meniscal tear, pain plus swelling if it was of significant severity. He stated:

> "In respect of the 'tear' that I can see on the imaging, particularly taken with the degeneration I see, I would have expected knee symptoms to manifest if that tear was an acute injury suffered on that date."

[54] Both Dr Journeaux and Dr Cook gave oral evidence. The cross-examination highlighted the difference between the two doctors. Dr Cook considered that the tear in the meniscus was a result of an acute incident, and that it occurred when Mr Paetzold lost his balance after pushing the ride-on mower. Dr Cook explained that it was likely that when Mr Paetzold felt pain in his Achilles, he turned around and twisted his knee such that a tear resulted. He did not think that the incident with the palm frond was violent or strong enough to tear the meniscus. Dr Journeaux, on the other hand, said he was not aware of any traumatic event to Mr Paetzold's knee and considered that the MRI scan, which he considered pivotal to the formulation of his opinion, demonstrated advanced degeneration of the left knee. Both agreed that a tear could either come from acute trauma to the knee or degeneration in the knee.

[55] Dr Journeaux was of the view that the natural history of constitutional pathology was "aided and abetted by what was likely to be an inappropriate arthroscopy". He considers that such a procedure aggravates the underlying diagnosis.

[56] There is little objective evidence to separate the weight that should be attached to the differing expert opinions. Both doctors had seen Mr Paetzold only once and for the purposes of medico-legal opinion. Both were experienced orthopaedic surgeons, and both gave their opinions based on that life experience. Dr Cook was no longer practising surgery, but there was nothing in his opinion that suggested that he was disadvantaged by that fact in expressing one. Both were reliant on the x-rays and MRI to give their opinion as well as the history provided by Mr Paetzold. There was not much material difference in that history. Both gave their evidence professionally and with care.

[57] In the end, the difference in opinion came down to the view of Dr Journeaux that it was unlikely that the events on 16 March 2020 caused the injury to the knee, given

that complaint was made about it so long after the event, and the view of Dr Cook that the rupture of the Achilles tendon on 16 March 2020 had simply masked the injury to the knee.

[58] Influencing Dr Journeaux's opinion was his view that Mr Paetzold "who was aging in years" was "performing work that has effectively 'overloaded' his knee." Much was made of the fact that Dr Journeaux was not provided with any evidence as to the type of work and that he was making an assumption. While Dr Journeaux commented in cross examination that his approach was multifaceted, he accepted that he had made an over-assumption as to the nature of Mr Paetzold's work; noting he was undertaking at the time a maintenance role which would involve some lifting and squatting and that overloading can occur over a relatively short period of time.

[59] The best that can be done, in the circumstances, is to make a finding based on the facts assisted by the medical opinion. In my view, the absence of any actual evidence of any action on 16 March 2020 that might have caused the injury to the knee; the absence of any complaint about pain in the knee until the Achilles was essentially healed; the absence of any swelling; the clear evidence of degeneration in the knee; the opinion that the degeneration would be enough to explain the condition of the knee and Mr Paetzold's work history makes it impossible to find that the condition of the knee was caused by the negligence of At Beach.

General damages

[60] Dr Journeaux assessed the injury to the left Achilles tendon with reference to chapter 17 of AMA5[4] as causing a 9% lower extremity impairment based upon a loss of motion and 6% based on calf atrophy. He considered that the left Achilles tendon would equate to a 4% whole person impairment. He considered the left knee would be assessed as a 10% lower extremity impairment and that the knee would be also assessed at 4% whole person impairment. The lower left extremity was therefore a 19% and the whole person impairment 8%.

[61] The assessment by Dr Cook under the AMA5 was 20% based upon the loss of range of motion in the left ankle and 10% in relation to the left knee joint, which he

[4] American Medical Association, *Guide to Evaluation of Permanent Impairment*, 5th edition ('AMA5').

considered gave a 28% on the left lower limb as a whole. That converts to an 11% whole of person impairment.

[62] In reliance on Dr Cook's assessment, it was submitted on behalf of Mr Paetzold, that his injury is to be assessed under item 137 (serious knee injury), in Schedule 9 of the *Workers' Compensation and Rehabilitation Regulations 2014* (Qld) which has an ISV of between 11 and 24. It was submitted that an ISV of 20 was appropriate because Mr Paetzold had been left with a painful left knee and the assessment should reflect a 25% uplift to account for the left Achilles tendon rupture which was treated with surgery.

[63] That approach assumes the inclusion of the knee injury in the award and seeks a significant uplift for the Achilles tendon, despite the fact that it has healed. The ISV advocated is for injuries well above even Dr Cook's opinion of the degree of permanent impairment. An ISV at or near the middle of the range for that item is appropriate for a ligamentous injury that required surgery and prolonged rehabilitation causing a degree of permanent impairment of 15% and functional limitation. There was no prolonged rehabilitation arising from the condition of the knee. This item requires ongoing pain, discomfort, limitation of movement, instability or deformity, and a risk of degenerative changes caused by the injury.

[64] For reasons that I have made apparent elsewhere, I am unable to accept much of what Mr Paetzold says, let alone that he suffers the pain and limitation to movement to the extent that he alleges and that, on any view of it, any degenerative changes were not caused by the incident, but at best involved an aggravation of a pre-existing condition. In this regard, I do not find my conclusion is impacted by the evidence of his son, Richard Paetzold, or his sister, Illona Amos. The injury to the knee, even accepting the opinion of Dr Cook, is quite unlike that referred to in the item; namely a leg fracture extending into the knee joint, causing pain that is constant, permanent and limits movement or impairs agility.

[65] Item 138, which provides for an ISV of between 6 and 10, allows for a torn meniscus causing ongoing minor instability, and requires an ISV at or near the top of the range where there is a degree of permanent impairment for the injury of 8%. If I had considered that the condition of his knee was caused by the incident in

question, I would have assessed Mr Paetzold under this item and allowed an uplift for the Achilles tendon to arrive at an ISV of 10.

[66] At Beach submitted that the injury was to be assessed under item 143 (minor ankle injury) which has an ISV range of between 0 to 5. It was submitted that the appropriate ISV was 3; it being noted that the Achilles tendon injury was successfully surgically repaired and is now only a source of minor symptoms.

[67] Given the findings with respect to the knee, the injury should be assessed under item 143. An example of an injury given under that item is a sprain, ligamentous or soft tissue injury. A factor affecting the assessment is said to be whether the injured worker has recovered from the injury. I accept that the appropriate ISV is 3 and therefore the award is $4,470 (with no interest being payable on that amount).

Past special damages

[68] There is a claim for medical expenses in the sum of $1,395, pharmaceutical expenses in the sum of $2,193 and travel expenses in the sum of $3,240.

[69] The medical expenses are based on a claim of charges, mostly for Dr Behrouz and Queensland X-Ray. No submission is made that the claim should be dissected because two injuries were the subject of medical treatment. I will allow the claim of $1,395, as appears on the Medicare Statement. No interest is claimed or payable on that amount.

[70] At Beach submits, however, that the pain medication ceased when the Achilles injury, following surgery, healed and only a small amount should be allowed. It would be reasonable to allow these charges for the 22 weeks until 17 August 2020. At the claimed rate of $15.80 per week, that is approximately $350.

[71] The travel expenses are disputed on the grounds that they are unproven. There is, however, evidence of travel to Dr Hassan on 7 occasions in the period between 16 March and 17 August 2020. Accepting the evidence of a round trip being 300km at 0.72c per kilometre, I am prepared to allow the amount of $1,512.

[72] Interest is payable for the pharmaceutical and travel expenses of $1,862. Adopting the statutory prescription in s 306N of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), interest on these expenses should be allowed for the

period from the date of injury to the date of judgment (a period of 4.07 years) at the rate of 2.034% (being half of the rate for 10-year Treasury bonds published by the Reserve Bank of Australia as at 2 April 2024). An amount of $154.15 should be allowed.

[73] Mr Paetzold claims the whole of the expenses paid by WorkCover, as detailed in the WorkCover History Report. At Beach contests whether all of these payments are recoverable on the basis that the expenses relating to the left knee were not caused by the negligence of At Beach. That is consistent with my findings. Accepting the evidence of Dr Hassan that the Achilles tendon injury was resolved when Mr Paetzold was reviewed by him on 17 August 2020, the relevant cut-off date should be that date. The history report from WorkCover records the dates and costs of the hospitalisation in March (a total of $2,835), the medical expenses up until 17 August 2020 (a total of $4,174.60) and the physiotherapy and occupational rehabilitation up until 17 August 2020 (a total of $3,575.83), making the total amount $10,585.43. No interest is payable on this amount.

[74] The total loss for past special damages is accordingly $13,842.43.

Future expenses

[75] Given the fact that the Achilles injury is healed and my findings in relation to the knee, no amounts are recoverable as future expenses on pharmaceuticals, cortisone injections or physiotherapy, let alone a knee replacement or repeat arthroscopy.

Fox v Wood

[76] The agreed *Fox v Wood* amount is $5,133.

Economic loss

[77] Mr Paetzold was born on 19 April 1950. His resumé shows that he worked solidly in the construction industry, holding a variety of supervisory jobs, between 1981 and November 2008. Two further positions are mentioned on the resumé, but no dates are provided. In the statement of loss and damage which was tendered by At Beach, it is alleged that Mr Paetzold left the last employment mentioned in the resumé in 2011 and then worked as a civil ECPM inspector at Argyle Mine for about a year, then in a quality inspection role at Roma for about two and a half years

and then as a foreman for an entity doing a variety of roadworks in South East Queensland for about two months.

[78] His history from the Australian Tax Office describes a taxation return as not being necessary for the years 2014-2015, 2015-2016 and 2016-2017.

[79] The statement of loss and damage says that in 2017, Mr Paetzold relocated to Airlie Beach and then, not long after, he obtained a position as a gardener at Waters Edge Resort. The statement provides that, "after doing that for a while I was offered a position as a gardener/caretaker with At Beach Court Holiday Villa. I took up that position and have worked as a gardener/caretaker for that employer since." That position is also confirmed in the plaintiff's amended reply which provides that he worked at Waters Edge Resort until he commenced his employment with At Beach.

[80] The documentary evidence at trial discloses that Mr Paetzold commenced casual employment with Waters Edge Resort, a subsidiary of the Hotel Group, on 17 November 2017.

[81] In his oral evidence Mr Paetzold denied that he did gardening duties at that place. In his evidence-in-chief he said that he worked at Waters Edge Resort for about three months and then he had to go and do maintenance work at Marina Shores. He said in his evidence-in-chief that he worked there for about four weeks, and then went to work for At Beach.

[82] In fact, the Australian Taxation Office records show that he ceased work at Waters Edge Resort on 30 January 2018 and commenced working for Recruitment Solutions Group Australia Pty Ltd on 28 February 2018, but only until 30 June 2018. In his oral evidence Mr Paetzold did refer to working for Recruitment Solutions Group, but insisted that this was prior to working for the Hotel Group; not afterwards. That evidence is inconsistent with the documentation.

[83] Mr Paetzold did not commence work with At Beach, another subsidiary of the Hotel Group, until 8 April 2019. It was his nephew, Mr Aquilina, the managing director of the Hotel Group, who arranged his employment with At Beach. Mr Aquilina had also arranged Mr Paetzold's employment at Waters Edge Resort. On 16 October 2019, his employment with At Beach was varied to require Mr Paetzold to reside onsite in return for payment of rent of $150 per week.

[84] The incident occurred on 16 March 2020. Mr Paetzold continued working for a few days and then underwent surgery to his Achilles tendon.

[85] Mr Paetzold was then in receipt of WorkCover payments until 5 January 2021.

[86] During that period in November 2020, Mr Paetzold had a left knee arthroscopy. He resumed work for At Beach in January 2021. By 20 January 2021 he was receiving a slightly higher wage than he was before the injury.

[87] On 12 October 2021, At Beach sent Mr Paetzold an email stating that in view of the COVID-19 pandemic, they wished to discuss the option of reducing his hours to 25 hours per week, or retaining his casual hours at 38 hours but by providing his services at Heart Hotel and Gallery Whitsundays. At a meeting to discuss the situation, Mr Paetzold said he accepted the reduced hours due to the struggles with his leg and also told his employer that he would not work at other resorts. Later he elaborated that even if he had not been injured, he would have refused to go to other resorts because it would have required him to use his own private car for work. He explained that he did that one time and it was covered in dust and other stuff, and decided he would never do that again because the car had leather interior.

[88] In any event, his hours were accordingly reduced from 13 October 2021. His income dropped to approximately $500 net per week. Mr Paetzold says the reduced hours suited him given the pain he suffered in his knee.

[89] Mr Paetzold resigned on 4 February 2022. His resignation was precipitated by a disagreement between him and his employer about the means by which the weeding at the premises was to occur. Mr Paetzold explained that he dealt with the weeds by spraying roundup, and that they die and that it was unnecessary to pull them out. He said that he and his employer had a number of discussions on the subject. At the meeting on 4 February 2022, Mr Paetzold says that he was told by the managing director of the company that the body corporate had complained about the weeding not being done. He says that he was told that if “I can’t do it or I don’t want to do it”, then he had better look for another job. Mr Paetzold said that he accordingly resigned; saying, in addition, that he knew that from months before the Hotel Group wanted him out of there. There was no suggestion from Mr Paetzold that his attitude to the weeding was as a result of the condition of his knee.

[90] He has been unemployed since that time. He says his knee and Achilles pain would not allow him to undertake any of the same forms of work that he had performed in his lifetime, including truck driving. He says his medical history is such that he is commercially unemployable, though he also complained in the course of his evidence that it was difficult for anyone, such as him, to get employment after the age of 65 years.

[91] I accept the oral evidence from Mr Paetzold that it can be difficult for people over 65 years of age to obtain commercial employment; particularly if they have resigned their position and are looking afresh.

[92] The rest of his evidence must be treated with some caution.

[93] It is true that there is some support from Dr Cook as to Mr Paetzold's difficulties being able to work in the same way as he had previously as a result of the condition of his knee. Dr Cook, in his report dated 8 March 2022, considers that Mr Paetzold would be able to continue to work half days provided that he was able to put up with persisting knee pain and that Mr Paetzold would be fit for only light part-time work where he could sit, stand and move about as comfort required and not be required to climb steps, stairs or ladders or carry out work that was a very heavy to hard nature or work in awkward or confined spaces. These comments are followed, however, by this rather alarming statement:

> "It seems as if this gentleman decided that as long as he was fit and well enough [he] would not go on any form of Aged pension especially while he felt that he was fit enough to be productive in some form or other."

[94] Mr Paetzold had been on the age pension since 2015 and remained on the pension despite receiving income from At Beach; both before and after the incident in question.

[95] The notes from his general practitioner of a consultation on 19 January 2021 record that Mr Paetzold was doing well, there was no knee discomfort, a full range of movement and no need for further review. This predates the medico-legal reports, which are largely contrary to this scenario, but the evidence further complicates treating what Mr Paetzold says about his condition at face value.

[96] Mr Paetzold gave evidence that he would have worked until the age of 75, a further 3 years, but for his injuries. He stated that he planned to work until his son finished university as that could be expensive and that he wished to be his son's mentor and helper. He elaborated that he was going to move his caravan to wherever the university was located, mentioning Brisbane, Townsville or Sydney, so that his son could stay in the caravan with him.

[97] As outlined previously, Mr Paetzold had an extended period where he was not working. It would appear that his working at At Beach only arose from a family relationship.

[98] I have already mentioned that during the periods of his employment he was also in receipt of a pension. The receipt of his pension, as well as his earnings from his employment, were disclosed in his taxation returns for the financial years ended 30 June 2018, 2019, 2021 and 2022, but Mr Paetzold's taxation returns for the financial years ending 30 June 2018 onwards were not filed with the Australian Taxation Office until July 2021. He eventually accepted in cross-examination that the reason for filing the taxation returns was associated with the pursuit of this claim and following his lawyers advice that he had to declare it.

[99] The receipt of earnings was not disclosed to Centrelink. Mr Paetzold was asked questions in examination-in-chief regarding his failure to disclose his earnings to Centrelink. Initially Mr Paetzold said he did not think he had to because he could earn a certain amount, subsequently saying that he knew that because when he googled it, the Centrelink website said he could earn up to the amount he thought was, being $16,000. When it was put to him in cross-examination that the amount he earned in 2018 was roughly $24,000 and the amount he earned in 2020 was $34,863, he reverted to saying that he did not know as he had never been on a pension in his life.

[100] The amount of rent allowed in Centrelink payments was also inflated. As at 1 June 2021, Centrelink still believed that he was paying an amount of $200 per week for rent, when in fact he had been paying an amount of $150 per week, since moving to live at At Beach in October 2019.

[101] Interestingly, when Mr Paetzold ceased residing at At Beach and returned to live at the Caravan Park he very quickly informed Centrelink. It is clear in Centrelink correspondence that they had received notification of the change in rent on 18 March 2022, Mr Paetzold having resigned his position in February 2022.

[102] The inference is compelling that if it were not for this claim Mr Paetzold would not have lodged any income tax returns, that he would have failed to declare his income to the Australian Taxation Officer and that he knew he ought to have declared the income he earned from personal exertion to Centrelink.

[103] There is no difficulty with the claim for loss of earnings relating to the Achilles tendon. That was repaired in March 2020, shortly after the injury. By August 2020, it was said that he no longer had any difficulties arising from it. In the four months immediately preceding the injury, Mr Paetzold was receiving an income from his employer of $1,451 net per fortnight.

[104] In ordinary circumstances, Mr Paetzold would accordingly be entitled to a loss of income at $1,451 net per fortnight for the period between March and August 2020.

[105] The matter is complicated, however, by the receipt by Mr Paetzold of a pension, and his failure to disclose it. If this sum were awarded, Mr Paetzold would end up receiving a higher income to that which he was entitled.

[106] This feature has applicability even if I had found that the injury to the knee was caused by the negligence of At Beach, and hence that the condition of Mr Paetzold's knee was the primary cause of his not working.

Consideration of economic loss claim

[107] It is accordingly necessary to consider whether there is some alternative to such an award.

[108] On behalf of At Beach, it was argued that the damages payable to Mr Paetzold should be limited, as a starting point, to the amount able to be earned before the amount of the age pension is reduced. Reliance was placed, by analogy, to two authorities where the courts declined to award damages for loss of income derived

or likely to be derived from an unlawful enterprise: *Sami v Roads Corporation*[5] and *Brownbill v Kenworth Truck Sales (NSW) Pty Ltd.* [6] In the former, Vickery J stated at [143]:

> "Damages are not recoverable in circumstances where the compensable losses claimed are in respect of profits that the plaintiff made by operating a business or are in respect of future profits which would be made by conducting a business illegally."

[109] The difficulty with applying this formulation to the present case is that no part of the work that Mr Paetzold was performing was illegal, nor was it illegal for him to receive the income derived from that personal exertion. The illegality lies in his failure to inform Centrelink about his employment and receipt of income.[7] A similar distinction applies to other authorities dealing with the enforcement of contracts contrary to, or alleged to be contrary to, statute.

[110] The authorities dealing with assessment of economic loss in personal injuries proceedings in circumstances where the plaintiff claims or has proved that they have earned income, in addition to that disclosed in their tax returns, is of limited assistance as well. In general, it would seem that provided the court can be confident about the level of the undisclosed income, the assessment should be done on the basis of the total income lost; not just that disclosed to the Australian Taxation office.[8] If the court cannot be so confident, it might be permissible to rely solely on the returns.[9]

[111] The critical principle underlying this approach is that, in Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings.[10] The loss is conveniently assessed by reference to the actual loss of income to trial,[11] but that is only an evidentiary aid to assessing loss.[12]

[112] In this case, the injury to the Archilles heal for a short time diminished the earning capacity of Mr Paetzold and it was productive of financial loss.

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[5] *Sami v Roads Corporation* [2008] VSC 377.
[6] *Brownbill v Kenworth Truck Sales (NSW) Pty Ltd* [1982] FCA 7; 39 ALR 191.
[7] *Social Security (Administration) Act 1999* (Cth) s 66A; *Criminal Code Act 1995* (Cth) s134, s 135.
[8] *Giorginis v Kastrati* (1988) 49 SASR 371; *Trajkovski v Ken's Painting & Decorating Services Pty Limited* [2002] NSWSC 568 at [52]; *AAI Ltd v Marinkovic* [2017] QCA 54.
[9] *Giorginis v Kastrati* (1988) 49 SASR 371; *Morvatjou v Moradkhani* [2013] NSWCA 157 at [55].
[10] *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1 at [4], [16].
[11] *Graham v Baker* [1961] HCA 48; (1961) 106 CLR 340 at 346-347.
[12] *New South Wales v Moss* [2000] NSWCA 133 at [71].

[113] It was submitted on behalf of At Beach, consistently with comments made by von Dousa J in *Giorginis v Kastrati,*[13] that the court was not obliged to assume that Mr Paetzold's non-compliance with his statutory obligations would continue, and that he would, at some point, have decided that what he was doing was wrong and that he ought to declare his change of circumstances with the result that his pension was reduced, or that he decided to reduce his work hours so that his income fell under the reportable limit. It is obviously also possible that, at some point, the change of circumstances would have become evident to the authorities and they would have forced Mr Paetzold to declare his income or to reduce his hours (and hence income).

[114] There was, however, no sign that the authorities intervened after Mr Paetzold finally did his income tax returns and I can have no confidence that Mr Paetzold would have decided to suddenly become honest. In my view he knew what he was doing and he knew it was dishonest, and the status quo would have remained absent some significant intervention by the authorities.

[115] Refusal of an award of damages on public policy grounds is unusual. The reluctance of the courts to refuse to enforce legal or equitable rights simply because they arose out of or were associated with illegality is palpable.[14] Public policy can be an unruly beast, and reflect the times rather than some objective analysis.[15] There does not appear to be any authorities from which guidance may be given in circumstances where a plaintiff has received social benefits to which he was not entitled, and wishes to compound that situation by having a court order an employer or, more accurately, a public compulsory insurer to pay monies based on the same anti-social and illegal act.

[116] Fortunately, in this case I have concluded that Mr Paetzold is only entitled to a very short period of economic loss for the period between 18 March and 17 August 2020. This is because the injury for which damages are to be awarded are only with respect to the Achilles heel. Based on a net fortnightly income of $1,451, that is a total of $15,961. As Mr Paetzold has been paid statutory wage payments by WorkCover in excess of this amount, no interest is payable.

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[13] *Giorginis v Kastrati* (1988) 49 SASR 371; (1989) Aust. Torts Report 80-233, 68464.
[14] Cf *Nelson* v *Nelson* [1995] HCA 25; (1995) 184 CLR 538.
[15] Harold Luntz and Sirko Harder, *Assessment of Damages for Personal Injury and Death* (5th ed, 2021), [6.3.7].

[117] Even if I had found that the condition of his knee was caused by the incident in question, there is no real basis for making any award for economic loss after Mr Paetzold ceased work, let alone for the future.

[118] The hours of work were reduced because of economic conditions facing the employer and, whilst Mr Paetzold says he could not be gainfully employed because of the condition of his knee, it is clear that more significant factors were at play. Mr Paetzold was 73 at the relevant time.

[119] Evidently, there was a different view held by him and his employer as to the way he should perform one of the tasks allocated to him. His employer considered the weeds should be removed. Mr Paetzold considered that it was sufficient to poison them. He accordingly resigned.

[120] Mr Paetzold had long periods of unemployment before he obtained his first employment with one of the subsidiaries of the Hotel Group, and he was unemployed for a significant period between finishing that employment and his subsequent employment and then starting with At Beach. He says that he would have left the region in any event when his son left to go to university. At the time of his resignation, his son was on a gap year.

[121] Mr Paetzold spoke of the difficulty of him performing tasks to which he was suited by reason of his past employment and skills. I accept that his knee would make the performance of those tasks difficult. I am not satisfied, however, that after his resignation over a disagreement about his method of performing his work, Mr Paetzold would have actively sought work in the workforce, nor am I satisfied that it was the condition of his knee that would have prevented him from doing so. The more likely scenario, as he stated, is that his age would have meant that he was effectively unemployable in the forms of work which he had performed in the past and, consistently with his past conduct, his contentment with receipt of the pension as his sole source of income.

[122] Finally, despite my misgivings as to what the authorities might have done to the present time if Mr Paetzold had continued to receive an income without disclosing it to Centrelink, there is no basis for considering that this would have lasted indefinitely. It is always possible that Mr Paetzold might have decided either that he

should disclose them or that he should limit his income to an amount that would not affect his pension. In that event, if I had been inclined to award damages for loss of future earnings, the starting point for any assessment would have been only that amount which he was entitled to earn without his earnings affecting his pension. From that starting point, account would need to be taken of the vicissitudes of life, the difficulty of him finding employment at his age, the limited duration which he contended that he would have tried to work and my doubt that he would have tried anyway.

Summary and Orders

[123] In summary, damages are assessed in the total amount of $41,076.88; calculated as follows:

General damages	$4,470.00
Past special damages	$13,842.43
Interest on pharmaceutical and travel expenses	$154.15
Past economic loss	$15,961.00
Loss of superannuation (calculated at 9.5%)	$1,516.30
Fox v Wood amount (as agreed)	$5,133.00

[124] An order will be made for the defendant to pay to the plaintiff the sum of $41,076.88 less the statutory refund to WorkCover having regard to these reasons.

[125] I will make orders for the parties to make submissions as to that amount and/or as to costs, unless that amount and/or costs can be otherwise agreed between the parties. Unless there is a reason to do otherwise, I will make my final form of order consequent upon those submissions, in chambers.