DISTRICT COURT OF QUEENSLAND

CITATION:	*Bilson v Vatsonic Communications Pty Ltd (ACN 093 786 004)* [2024] QDC 42
PARTIES:	**LEIGH BILSON** (Plaintiff) **v** **VATSONIC COMMUNICATIONS PTY LTD (ACN 093 786 004)** (First Defendant) AND **TOWNSVILLE CITY COUNCIL** (Second Defendant)
FILE NO:	130/21
DIVISION:	District Court of Queensland
PROCEEDING:	Trial
ORIGINATING COURT:	District Court
DELIVERED ON:	5 April 2024
DELIVERED AT:	Townsville
HEARING DATE:	25-28 July 2022
JUDGE:	Coker DCJ
ORDER:	**1. Judgement for the Plaintiff against the first Defendant in the sum of $359,689.84.** **2. That the first Defendant pay the costs of the Plaintiff and the second Defendant upon the standard basis.**
CATCHWORDS:	PERSONAL INJURY – WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PARTIES LIABLE TO PAY COMPENSATION – LIABILITY FOR INDEMNITY – ASSESSMENT OF DAMAGES – where the plaintiff worked for a company the first Defendant providing services to a local authority the second Defendant – where the Plaintiff suffered injury whilst working for the first Defendant in the provision of those services – where the nature of the injury is accepted – where the cause of injury is in dispute – where liability is in dispute as between the first and second Defendants – where pursuant to an

agreement the first Defendant indemnified the second Defendant in respect of any loss arising from the provision of services – whether s 236B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) is in play – where assessment of damages is required

LEGISLATION: *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 236B, 300, 305B(1)(b), 305B(c), 305B(2), 305D(1)(a)

Law Reform Act 1995 (Qld) ss 6(c), 7

Acts Interpretation Act 1954 (Qld) s 14A

Workers' Compensation and Rehabilitation Regulation 2014 (Qld) ss 2, 5, 8, 9, 10, 306N(3)

CASES: *Czatyko v Edith Cowan University* (2005) 79 ALJR 839
Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2013] 1 Qd R 319
Thompson v Bankstown Corporation (1953) 87 CLR 619
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317
Laybutt v Glover Gibbs Pty Limited t/as Balfours NSW Pty Ltd [2005] HCA 56
Robinson v Fig Tree Pocket Equestrian Club Inc [2005] QCA 271
James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516
Erect Safe Scaffolding (Australia) Pty Ltd v Sutton (2008) 173 IR 412
State Government Insurance Office v Brisbane Stevedoring Pty Ltd (1969) 123 CLR 228
Byrne v People Resourcing (Qld) Pty Ltd & Anor [2014] QSC 269
Medlin v State Government Insurance Commission (1995) 182 CLR 1
Sutton v Hunter [2021] QCS 249
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638
Koven v Hail Creek Coal Pty Ltd [2011] QSC 51

COUNSEL: J A Greggery QC and R J Armstrong for the Plaintiff
G W Diehm QC and M Rothery for the first Defendant
D De Jersey QC for the second Defendant
R M Flores for the first Defendant (Third Party Claim)

SOLICITORS: Purcell Taylor Lawyers for the Plaintiff
McDonald Leong Lawyers for the first Defendant

King & Company Solicitors for the second Defendant

Introduction

[1] On Monday 28th August 2017, Leigh Bilson, hereinafter referred to as 'the Plaintiff', went to work as a vacuum truck operator for his employer, Vatsonic Communications Pty Ltd, hereinafter referred to as 'the first Defendant'. A short time after he commenced work, that day, the Plaintiff was injured in the course of his employment, suffering a blow to his face from a vacuum hose, rupturing the eyelids and leaving him functionally blind in his left eye.

[2] At the time that the injury was suffered, the Plaintiff was working with employees of the Townsville City Council, hereinafter referred to as the second Defendant. The first Defendant had contracted with the second Defendant to provide services which would effectively clean concrete pits which form part of the Townsville City Council's storm and waste water system. The concrete pits are described as gross pollutant traps ('GPTs').

[3] To complete the contracted task, the first Defendant provided a vacuum truck with accompanying equipment, hoses and the like and an operator, the Plaintiff. The second Defendant provided equipment and staff as well, including a truck, with an inbuilt Palfinger crane and 3 council employees, Colin Phillips, the leading hand and crane rigger , John Jenson, a labourer, and Ed Savage, the crane operator.

[4] The Plaintiff and the second Defendant's employees were not instructed in relation to their working together, or of any system put in place. Rather, the Plaintiff and the second Defendant's employees were left to determine their own system of work, though there does seem to have been some prior occasions where such tasks were undertaken and systems of work put in place, by the employees.

[5] According to the Plaintiff, he had performed this task, the draining of the GPTs, on previous occasions, including at the GPT where the incident occurred, for the whole of the preceding week. His evidence was that a system was in place in the preceding week, that the repetitive task of draining water from the GPT, until the tank on his truck was full and then emptied into an adjoining garden area, had been done 8 to 10 times per day or the preceding 5 days. In other words, 40 to 50 occasions without issue.

[6] However, on the morning of the 28th August 2017, on the first occasion that the process was resumed after the weekend break, the system which had been formulated between the Plaintiff and the second Defendant' employees was, he says, not followed and, as a result of that failure to follow the agreed system, the Plaintiff says he suffered his injuries.

[7] Obviously, the evidence of the Plaintiff and the second Defendant's employees is significant in the determination of this matter, but, also as has been identified by all parties, a major area of contention is the source of stored energy which it is suggested caused the hose, being manipulated from the outlet valve to the inlet valve of the vacuum truck, to move violently out of the Plaintiffs hand and to move upwards in a circular fashion, striking the Plaintiff on the nose and, most significantly, to the left eye. As such, there is also a need to consider the expert evidence called for the Plaintiff and the Second Defendant.

The Evidence as to the Incident

[8] The preliminary evidence of the Plaintiff is summarized in the outline of submissions provided by the first Defendant in paragraphs 10 – 15:

> *The Plaintiff*
>
> 10. The Plaintiff commenced employment with the First Defendant on 5 June 2016. He was shown how to operate the hydro vac truck involved in the incident on of his first day of employment with the First Defendant. He operated that same truck through until the time of the incident on 28 August 2017.
>
> 11. The tank of the vacuum truck had an inlet and an outlet valve at its rear. The outlet valve is situated on the right and the inlet situated on the left (as you look at the rear of the truck). The vacuum hose was 11.5 m long.
>
> 12. The Plaintiff had manufactured a grey section of hose to deal with an issue which arose whilst the hose was under pressure from the vacuum sucking function in emptying the GPT. However, the Plaintiff confirmed that section had remained connected to the inlet valve in the time of its

use and he would disconnect the "bumblebee" hose from it to connect the bumblebee hose to the outlet valve.

13. Accordingly, the grey section was not involved in the section of hose dealt with at the time of the incident and has no relevance in this claim.

14. The incident occurred on Monday 28 August 2017. The Plaintiff was involved in the task of cleaning a gross pollutant trap ("GPT") for the Second Defendant. The Plaintiff had been working on the task of cleaning that GPT for about 1 week prior to the incident.

15. Four or five months prior to the incident, the Plaintiff had also been involved in cleaning out storm water drains and pits for the Second Defendant in his employment with the First Defendant for about a month period. He worked with Colin Phillips and Ed Savage on that job.

[9] The Plaintiff gave oral evidence thereafter on a wide ranging number of matters, including the system of work used and how it came about, what all parties present on the day were required to do and did do, as well as his observations, both prior to and subsequent to the incident.

[10] In respect of the system of work, the Plaintiff described his initial interaction with the second Defendant's employees as follows:

> MR BILSON:…to that week I-I did probably a month or - or more with them, cleaning out stormwater pits, drains all over Townsville.
>
> MR GREGGERY: And were you given any direction by your employer about how that work was to be conducted?
>
> MR BILSON: We used to sign their- their paperwork, and they would pretty much tell you how - how to go about it.
>
> MR GREGGERY: Who's they?
>
> MR BILSON: The council employees.
>
> MR GREGGERY: All right. I was asking you about Vatsonic and whether they gave you any - - -?
>
> MR BILSON:---Sorry.

MR GREGGERY: - - - direction, but- yes?

MR BILSON:---I-I would just get the job sheet and just go for that job, and then once you' re there, you worked out what the job is, how to go about it.

MR GREGGERY: And who did you meet- or how many employees of the council did you meet on that job?

MR BILSON:---Three.

MR GREGGERY: Okay. And you said once you got there you worked out how to do it?-

MR BILSON:--Yeah.

MR GREGGERY: And do you recall the process on that occasion?

MR BILSON:---Different pits - some had cages that they used their crane to lift out. Some just had lifts that they lifted. I used the vac truck and did all that myself, and they just used what they needed to open pits, pull grates out and- to do the job.

MR GREGGERY: And do you recall whether a crane was used or not on those jobs?

MR BILSON:---One particular job there I rocked up on, that was a deep drain, and I went to put the hose in there and they said, "The previous truck, we just hold the hose in the sling on the crane." So I said all right. Like, they'd already come up with that idea of how they'd been doing it previously, so that's what we did.

MR GREGGERY: And when you say a deep pit, how many metres are you describing?

MR BILSON:---The deep ones, we're only working three and a-half to 4.2 metres deep.

MR GREGGERY: The ones where you weren't using a cane and you say you were operating the hose yourself, what - - -?

MR BILSON:-----Yeah.

MR GREGGERY:---were the depth of those pits?

MR BILSON:---Some of them were only a metre - metre/metre and a-half deep - --

MR GREGGERY: Right?-

MR BILSON:-With concrete floors on them.

[11] The Plaintiff in that exchange mentioned the varying depths of the GPTs and noted that the one he was dealing with at the time was a 4.2 metre drop into a big pit under metal covers. The Plaintiff later described the job and each person's role as follows:

> MR GREGGERY: Okay. And what was the nature of the job that you were involved in at that pit?
>
> MR BILSON:---I was in – I had to vac the water out. Once we vacced all the water out, got down to the silt, it was then extract the silt out of the pit.
>
> MR GREGGERY: Okay. And what equipment did you have for the task?
>
> MR BILSON:---There was the vac truck, a hose and a gurney, a four-metre gurney extension to reach the bottom.
>
> MR GREGGERY: And what role does the extended gurney play in the job?
>
> MR BILSON:---At the bottom the silt can be compacted and leaves and sticks - it just breaks it up so it's easier to slurry it up to be vacced up by the hose.
>
> MR GREGGERY: Right. So the week before- let's go back to when you started on the job---?
>
> MR BILSON:---Yeah.
>
> MR GREGGERY:- - -and you were working on that pit to get the water out. What was the process that was involved?
>
> MR BILSON:---I would turn up. They would have their truck set up where they wanted it for the crane. I'd run my hose out, connect it up and put the other end over for them to hook up to their crane. They would lift it up and lower it down a bit, then I would go and start the truck and engage the vac side of it, then come back to the pit and they'd lower it down while I was there to guide the hose into the pit. Once the wat - vac truck was full of water, I would then return to the truck, disengage the PTO, then come back. We- they'd lift it up, slewed the crane around to the right, lower it down to the ground so the sling could be disconnected from the crane, hook. Sometimes one, most times two of us would drag the hose out into the open. Once that was done, I'd return to the truck, take the hose off the inlet and put it on to the outlet, open the valve. Then I'd return to the truck, engaged the PTO again to lift the tank up to decanter the water better, then I would return to the truck and shut the truck down, as that took about five minutes or so to decanter the water and then hook it all back up again.
>
> MR GREGGERY: And when you say "decanter the water", you mean empty the tank ---?
>
> MR BILSON:---Release it out of the tank, yeah.

MR GREGGERY:--- through the hose?--- Yep.

[12] The Plaintiff gave evidence specifically in relation to the discussions he had with the second Defendant's employees regarding the movement of the hose connected to the vacuum truck. He had indicated that the unattached end of the hose, when he moved to the other end from the outlet to the inlet valve, was 'out in the open where the water was being let – out'. The Plaintiff specifically confirmed his discussions with the second Defendant's employees and what was expected, when he gave this evidence:

> MR GREGGERY: All right. Now, was that something that was discussed between you and the workers ---?
>
> MR BILSON:---Yeah.
>
> MR GREGGERY: - - -from the council?
>
> MR BILSON:---It was, yeah.
>
> MR GREGGERY: Do you recall when you discussed that?
>
> MR BILSON:---When - the very first time we did it, that no one was to be near the hose when it was being changed over.
>
> MR GREGGERY: Was there any discussion about who operated the crane?
>
> MR BILSON:---No. They - Colin and Ed took it in turns operating the crane at different times.

[13] The entire process leading to the incident is conveniently and I think accurately summarized in the first Defendant's outline at paragraph 20(I)-(XIII) as follows:

> 20. The Plaintiff described the system of work involving the use of the crane to be:
>
> i. The Plaintiff would arrive at the drain or pit that the Second Defendant had directed him to through his employer;
>
> ii. He would "*run [the] hose out, connect it up and put the other end over for them to hook up to their crane*";
>
> iii. The Second Defendant workers would lift the hose up with the crane and lower it down a bit;

iv. The Plaintiff would go and start the truck and engage the vacuum function;

v. He would then return to the pit and the Second Defendant workers would use the crane to lower the hose down while the Plaintiff was there to guide the hose into the pit;

vi. Once the vac truck was full of water, the Plaintiff would then return to the truck, disengage the PTO (vacuum function), then return to the pit;

vii. Ed or Colin would then lift the hose up with the crane, slew the crane around to the right, lower it down to the ground so the sling could be disconnected from the crane hook.

viii. "*Sometimes one, most times two of us would [then] drag the hose out into the open*."

ix. The Plaintiff would then return to the truck, take the hose off the inlet and put it on to the outlet, open the valve.

x. He'd then return to the truck, engage the PTO again to lift the tank up to decanter the water;

xi. He would the shut the truck down, as it took about five minutes or so to decant the water;

xii. Once the tank on the Hydro Vac Truck was empty, and the Plaintiff had lowered the tank down, he would change the hose over at the back of the Hydro Vac Truck from the "outlet" valve to the "inlet" valve;

xiii. That would be done when the hose was still out in the location where it had been taken to drain the tank.

[14] The Plaintiff was at pains to confirm that he had instructed the second Defendant's employees not to touch or move the hose, after discharge, until he had disconnected the hose from the outlet valve and reconnected it to the inlet valve. More

particularly, he confirmed that this procedure had been followed on each of the 40 to 50 occasions the process had been gone through on the previous week.

[15] The Plaintiff was adamant that this procedure was discussed previously and that he had said, '…no one was to be near the hose when it is being changed over'. The Plaintiff went on to confirm that the hoses, and in fact the operation of the vacuum truck, was his job. As he said, '…I'm in charge of that truck and that hose and I don't want people playing with it while I'm doing my job'. He went on to explain his reasoning as '…you do your jobs, I'll do mine'.

[16] The Plaintiff confirmed that his had occurred during the preceding week and that there had been no occasion during that week, or in fact anytime previously, when there had been any violent or unexpected movement in the hose. This is despite the fact that, as he acknowledged, there could be other issues, such as the connection between the hose and the tank on the vacuum being 'sticky'. He explained that sometimes there may be a grain of sand that make it a little bit more sticky.

[17] He noted consistency in this happening, especially when the hose was, as he requested, 'laid out flat'. He indicated in Cross-examination by Counsel for the second Defendant the following:

> MR DE JERSEY: But you didn't really know what to expect, did you, when you disconnected the yellow hose from either of the inlet or the outlet valves; correct?
>
> MR BILSON: ---I- yes.
>
> MR DE JERSEY: You did know?
>
> MR BILSON:---Yes.
>
> MR DE JERSEY: And how did you know what to expect on any particular occasion when you disconnected the yellow hose?
>
> MR BILSON:---Because usually, the hose is laid out flat.
>
> MR DE JERSEY: Well, no, I'm asking you to focus on the particular connection between the yellow hose and the inlet or the outlet of the truck?
>
> MR BILSON:---Yeah.
>
> MR DE JERSEY: And I'm asking you to assume that the hose is laid flat and nobody's touched it?

MR BILSON:--- Well, then, yes, it was pretty much the same every time.

MR DE JERSEY: Be pretty much the same every time?

MR BILSON:---Yep.

MR DE JERSEY: You didn't say that it was different a moment ago, sometimes easy to sometimes hard to remove?

MR BILSON:---The connection.

MR DE JERSEY: Yeah. You said that but for this particular occasion, in your experience, Mr Savage and the other two gentlemen never touched the hose between when the tank was drained and when the hose was moved back to the GPT other than on this particular occasion. That never happened, you said?--- That they never touched it? Yes?

MR BILSON:---Incorrect.

MR DE JERSEY: No, no, no. I'm talking about until the incident, to your knowledge, they' d never touched the hose?

MR BILSON:---Are you meaning just that one time or ---

MR DE JERSEY: Yes?

MR BILSON:------ for the rest of the time?

MR DE JERSEY: Correct?--- For that one time. Yes?

MR BILSON:--No, and to my knowledge they hadn't touched it.

MR DE JERSEY: They had not, yes. So all of the times, the 50 odd times that it happened prior to them touching it--?

MR BILSON:--Yeah.

MR DE JERSEY:- - - are you with me, you'd experienced the connection sometimes being easy to remove and sometimes being difficult to remove, correct?

MR BILSON:--- NO.

MR DE JERSEY: And it's the case, isn't it, that when it was difficult to remove sometimes it would come off in unpredictable ways, correct?

HIS HONOUR: I thought he said no.

MR DIEHM: I object. He said no.

HIS HONOUR: Yes. I think everybody's of the same mind. I think the answer was
no.

MR DE JERSEY: Thank you, your Honour. Now, can I ask you, in relation to the – you said that there was a point in time, I think early in the job, when you told Mr Savage that he wasn't to touch the hose, correct?

MR BILSON:---Correct.

MR DE JERSEY: And was that because you' d been told that by somebody else at Vatsonic?

MR BILSON:---No. That was my rule all the time.

MR DE JERSEY: Right. And why was that your rule? What did you know that motivated you to tell Mr Savage that he wasn't to touch the hose?

MR BILSON:---Because I'm in charge of that truck and that hose and I don't want people playing with it while I'm doing my job.

MR DE JERSEY: And did you fear that something might happen if somebody did touch it?

MR BILSON:---I don't know.

MR DE JERSEY: Well, you plainly thought that this was something that warranted bringing up with Mr Savage?

MR BILSON:---That was always my thing to everyone, don't touch my hoses, don't touch the gurney, it's my job. You do your job. I'll do my job.

MR DE JERSEY: Can I suggest to you that you told him not to touch it because you'd previously had these experiences where the hose operated unexpectedly - - -?

MR BILSON:---Incorrect.

MR DE JERSEY: - - - when you connected and disconnected it?

MR BILSON:---Incorrect.

[18] The Plaintiff was adamant that there was, at the time of the incident, a system of work in place, that it reflected some of what he had been trained to do by the first Defendant, though refined by him, and, most importantly, reflected what had been discussed and, at least by acquiescence, agreed between he and the employees of the second Defendant.

[19] For completeness, it should be noted that this agreed system of work also involved tasks specifically attributed to the second Defendant's employees. It was they who attached a sling to the hose using a knot that, depending upon the way it was pulled, choked the hose, so that it could not slip or pull through the sling knot, with the other end of the sling hooked to the crane. In the Plaintiff's evidence, he confirmed that he did not operate the crane, but, that that was done by '…Colin and Ed…', who '…took it in turns operating the crane at different times'.

[20] It was clear, however, from the Plaintiff's evidence that these tasks, performed by the second Defendant's employees, were not to occur whilst any transition of the hose was taking place, and that that practice had been adhered to in the previous week, as well as on earlier occasions.

[21] On the 28th August 2018, the Plaintiff says that this agreed procedure was not followed. After the pumping from the GPT had occurred, and the decanting of the vacuum truck had been completed, the Plaintiff lowered the tank, and then proceeded to change the hose from the outlet to the inlet valve. He gave it, as he described, 'a little wiggle' and it then flung out of his hand, moving to his right, but, then came back around, 'like 180 in the air' such that the coupling at the end of the hose hit him on the bridge of his nose as well as striking him in the eye.

[22] The Plaintiff's evidence as to the removal of the hose from the outlet valve was that, apart from a 'little wiggle', there was little force required to remove the hose and that the procedure to do so, pulling the hose downwards and parallel with the outlet valve was the same as was used on previous occasions.

[23] The Plaintiff went on to describe the situation after the hose 'flung out' of his hand and did 'a 180 in the air'. In Evidence in Chief, the following was said:

> MR GREGGERY: When you described that if fling out of your hand to the right, you moved your right hand in a semi-circular motion. Is that - - -?
>
> MR BILSON: Yeah, it sort of went around like that…did a – like, a 180 in the air and come down on my – on my no – the bridge of my nose and eye.
>
> MR GREGGERY: What were you wearing at the time?
>
> MR BILSON:---I had safety glasses on. I noticed when it was hitting the bridge they were handing down here…when I went to feel for them.

MR GREGGERY: Was that before or after - - -?

MR BILSON:---That was after I had the impact.

MR GREGGERY: Okay. Well, after the impact of the end of the nodes with your face, what did you do?

MR BILSON:---Following my eye, Ed come running over and then realised that - that there was something wrong or that I was hurt, and then he told Colin. They got me some gauze to put over my eye to stop the bleeding. Then I went and sat down on that second pit that you can see in the photo - sat on there.

MR GREGGERY: Yes?

MR BILSON:---While I was sitting there, I rang my boss to let him know, and then I rang my wife to let her know. And John was sitting there with me. He– and then -I don't know where the other two were. And then when I was sitting there, I happened to look up and the hose was hanging three and a-half, four metres in the air, with the end of the hose dangling over the pit, which I then went off at Colin and Ed. Like, "Why is the hose in the air?" And that was, sort of, it. Then I sat there waiting for the ambulance to arrive.

MR GREGGERY: Do you remember the words that you spoke when you went off?

MR BILSON:--- There were probably not the kindest words, but that - yeah. Like, pretty much like, "The frigging hose is in the air. What – what are you doing," like- yeah.

MR GREGGERY: You were taken to the hospital?

MR BILSON:---Yes.

MR GREGGERY: By ambulance?

MR BILSON:---By ambulance, yes.

[24] The Plaintiff confirmed in Cross-examination that he was angry as a result of the hose being moved back to the pit and elevated contrary to the discussions that had been had between he and the employees of the second Defendant. The Plaintiff said:

MR DIEHM: And you were angry about that because you understood before then that, whilst you were engaged or about to be engaged in this process of disconnecting the hose from the outlet and putting it back onto the inlet valve, that the hose should be flat on the ground and straight?

MR BILSON:--- Correct.

MR DIEHM: And so from what you saw, after you'd suffered your eye injury, you could see that that hadn't happened?

MR BILSON:--- Correct.

MR DIEHM: Now, I suggest to you that you knew those two things should be the case because that's what you had understood from your training by Vatsonic as to how the hose should be positioned when you were moving it from one valve to another?

MR BILSON:---Correct.

MR DIEHM: But on top of that, it was also - what you had come to understand was what
everybody expected to happen on that job site?

MR BILSON:--- That's right.

MR DIEHM: Because apart from the training that you had got from Vatsonic in general terms about the use of this hydro vac truck, it's right to say, isn't it, that when you first came to work with the council, the Townsville City Council, doing this work with these gross pollutant traps, that there was discussion between you and the employees of the council that you were going to work with in which they told you about what the plan was about how this work was to be done?

MR BILSON:---Correct.

[25] The Plaintiff's evidence was clear on this matter, as well as other matters surrounding the incident that morning. The Plaintiff was clear, believable and precise in so far as the previous practices and as to the change that occurred prior to him sustaining this injury.

[26] I found the Plaintiff to be a reliable and accurate historian, and I accept his evidence with respect to his prior experience with the hose and couplings, as well as, most specifically, the fact that in his past work on the truck, he had not had any experience of the hose behaving violently, as it did on the morning of the incident.

[27] Additionally, the Plaintiff provided evidence as to his various recreational activities and past employment history. He was not evasive in any way in providing his evidence, and, in particular, did not downplay or minimize his continued participation in various activities. It again reflected his honesty and reliability as a witness of both accuracy and truth.

[28] Also called for the Plaintiff was his wife, Melissa Bilson. She gave evidence, generally corroborative of the Plaintiff's described physical and psychological situation. This was detailed in a statement that was prepared and signed on Thursday 21st July 2022, and admitted as Exhibit 16. She was not cross-examined in respect of this statement and I accept her evidence entirely, but, most specifically, in respect of post-accident observations she makes as to the Plaintiff's physical and psychological wellbeing.

[29] The Plaintiff also called Phillip Tolley, an underground mining superintendent. He was called primarily to address issues regarding any limitations and loss of opportunities that the Plaintiff may have suffered as a result of his injuries. The Plaintiff had previously worked in a mining environment and an approach was made by Mr Tolley to the Plaintiff regarding further work. When he was advised about the Plaintiff only having sight in his right eye, he indicated that work in the mines 'could be tricky'. Mr Tolley then indicated that his conversation did not go any further.

[30] Mr Tolley also provided evidence as to various pay scales and, at least roughly, was able to provide some indication of the pay scale for a 'truck driver leading hand, which equated to the role that the Plaintiff had been approached about. Mr Tolley's evidence was of limited compass, but, did provide some context in relation to this matter.

[31] Additional witnesses were also called for the Plaintiff, but, their evidence generally related to the other matters, including medical, occupational therapy and engineering issues. I shall come back to those shortly, but, first I think it appropriate to address the evidence of the others present at the work site at the time of the accident. Those included Edward Savage, and also statements made under the hand of Colin Phillips, another worker present at the time of the accident, but, ill and unable to attend the court.

[32] I turn firstly then to the statements of Mr Phillips. The first is Exhibit 31, a statement given to Workcover on Friday 1st September 2017, and the second statement is a statement give to the solicitor for the second Defendant on Tuesday 7th June 2022 and signed by Mr Phillips, in the presence of Mr Savage, the other

witness for the second Defendant on Monday 13th June 2022. I note the statement purports to be signed in 2018. That is clearly a typographical error.

[33] The two statements by Mr Phillips are different in many respects and give rise to considerable uncertainty as to their reliability and accuracy. The first statement is helpful in some respects, however, being more immediate in time, given only a few days after the incident. It notes, particularly, that Mr Phillips was 'not completely sure how the vacuum hose got from it's (sic) discharge point back into the pit'.

[34] What that confirms is that, at the time of the incident, the hose was back at the pit and not, as had been discussed between the Plaintiff and the second Defendant's employees, still at the discharge point pending transfer from the outlet to the inlet valve.

[35] Mr Phillips also indicates that the vacuum hose was on the ground and was not raised in the air, though I struggle a little with that description, noting that Mr Phillips also indicates that 'the sling was attached to the hose and it was attached to the crane hook – the hose was in the pit just above the liquid level'.

[36] In the second statement, taken nearly 4 years later, Mr Phillips says the following at paragraphs 40 to 43:

> 40. To my recollection the vac truck had been filled with a load of decanted water.
>
> Eddie lifted the pipe up out of the GPT using the crane and Leigh went to the
>
> back of the vac truck and shut everything down. The pipe had been laid on the
>
> ground beside the GPT and the sling detached from the crane. The pipe was then dragged over to a nearby discharge point and the pipe then removed from the vacuum attachment on the back of the vac truck to the gravity feed attachment. The tank is raised and the vac tank emptied using the gravity feed. All work to do with the vac truck was performed by Leigh. None of the Council staff were ever involved in connecting or disconnecting the pipe on the vac truck or with any operating of the vac truck.

41. I don't know who moved the pipe back over to beside the GPT ready to be secured to the crane. Leigh normally stays at the back of the vac truck so that
he can disconnect the pipe from the gravity feed and reattach it to the vacuum.
This process is done after the pipe is dragged back over to beside the GPT and before the crane is used to lift the other end and lower it back down into the GPT.

42. There is no rush to perform our task and we operate on a slow sequence so that no-one rushes and the job is completed as safely as possible.

43. The end of the pipe is not lowered down to water level in the GPT until the pipe is removed from the gravity feed and reattached to the vacuum end of the
vac truck by Leigh.

[37] Further, at paragraphs 50 and 51, Mr Phillips notes the following:

50. I recall seeing the crane up and over the top of the GPT. Whenever the crane is not in use it is raised so that it is up and out of the way. It was not connected
to the sling which was attached to the pipe.

51. The pipe was laying on the ground with the end that goes into the GPT laying
near the GPT and the other end which connects to the vac truck laying on the
ground near the vac truck.

[38] These statements do not accord with the more contemporaneous record of the 1st September 2017, and with Mr Phillips so unwell that he could not be called for Cross-examination, I am not inclined to accept the second statement as having any real weight. Rather, I am of the view that the first statement in many ways is corroborative of the Plaintiff's evidence.

[39] Also called for the second Defendant was Edward Albert Savage. Mr Savage was, in my assessment, a most unreliable witness. He gave varying versions of what he saw at the time of the incident and I gained, unfortunately, an impression that his evidence had developed over time to accord with a more positive version, supportive of the position of the second Defendant.

[40] This is clear from a number of inconsistencies in his evidence over time. His evidence developed and changed between his statements of Wednesday 6th September 2017 and Wednesday 13th June 2018, and his oral testimony from the trial. In his statement of Wednesday 6th September 2017, Mr Savage said 'when the incident occurred to Leigh the vacuum hose was hooked back onto the crane hook...the crane hook was raised by crane about 1.5 to 2 metres off the ground. I did not see who put the hose back on the hook and into the pit'.

[41] This accords with the evidence of the Plaintiff and Mr Phillips in respect of the hose being moved back to the pit at the time of the incident. It also conflicts with his oral testimony to the effect that the crane was down at the time of the incident and that the hose was still at the garden area where it was drained.

[42] Mr Savage's evidence was inconsistent even during his testimony, and when challenged about such inconsistencies and the differences between that evidence and his previous statements, he became defensive and argumentative. His denials in relation to even signing the statements or acknowledging that it was his signature did not ring true and gave real concern as to the reliability or even truthfulness of his evidence.

[43] Except where the evidence of Mr Savage accords with that evidence of the Plaintiff, which I accept, I give no weight to his evidence and find that it is entirely unreliable.

[44] Insofar as the evidence of those present at the time of the incident is concerned, I find the Plaintiff's evidence and recall entirely reliable, and other than where there is agreement as to general matters of evidence, I am not assisted by the evidence of the second Defendant's employees.

The Evidence as to the movement of the hose

[45] I shall, in due course, address the Plaintiff's injuries and medical evidence and consequences of those injuries, but, first, it is necessary to address 'the elephant in the room', being the cause of the incident. It does appear that there is agreement that somehow there was stored energy in the inlet/outlet hose, but, the source of that energy is in dispute. Two experts were called, Bill Contoyannis, forensic engineer for the Plaintiff, and Roger John Kahler, engineering consultant for the Defence.

[46] Both Mr Contoyannis and Mr Kahler have provided initial and supplementary reports and also gave evidence during the trial. These reports and oral evidence address the primary issues, the source of the energy and the methods by which any risk posed by stored energy might be removed, and also addressed the significant question as to whether the release of energy, when the Plaintiff uncoupled the hose, included torsional strain, and, if torsional strain was included, how it was introduced.

[47] Both the Plaintiff and the first Defendant submit that the evidence of Mr Contoyannis should be preferred to that of Mr Kahler. The outline provided on behalf of the first Defendant provides a helpful summary of the evidence/opinion of Mr Contoyannis at paragraphs 59 to 66, where the following is said:

> 59. Mr Contoyannis' opinion as to the cause of the source of the stored energy might be summarised as follows:
>
> a. The hose had been repositioned from the garden back to the pit, slung from the crane and then lifted up;
>
> b. Torsional energy accrued in the hose in moving it from the garden bed back to the pit;
>
> c. Stored energy was trapped between the outlet connection and the point where the hose was slung on the crane;
>
> d. Between the point in the time where the hose was being dragged and being slung on the crane, the torsional energy was stored because one end was fixed to the truck and the other fixed by being held (i.e. to drag it/sling it);

e. The weight of the hose hanging down either side of where the sling was attached, once the hose was lifted by the crane, contributed to the trapping of the energy in the hose;

f. Bending in the hose, between the point at which it is affixed to the crane and the truck end, caused by the lifting of the crane, will significantly increase the stored energy in the hose;

g. When the hose was disconnected from the outlet valve but fixed at the other end (being attached to the sling and hung on the crane), the energy was released at the outlet end, causing the hose to spin and release from the Plaintiff's grip; and

h. The stored energy arose both because of the "memory" of the hose to curl from the manner in which it was stored on the truck when not in use, and due to torsion of the hose from it twisting when dragged from the garden bed and being lifted by the sling and crane.

60. From the experiments conducted by Mr Contoyannis and documented in his Supplementary Report, he was of the opinion that *"movements of the hose have a consequential effect at the point of connection to the truck, causing the hose to turn, displace laterally, or a combination of the two*."

61. However, he also noted that "*connecting the hose on the outlet after positioning results in almost no strain energy at the outlet.*" This is consistent with the Plaintiff's evidence noted above that he had never experienced any unexpected or violent movement in the hose; that he always knew what to expect from the hose when disconnecting the hose, "*because usually. the hose is laid out flat*."

62. He confirmed under cross-examination the purpose of his testing:

Part of the difficulty with taking these things too far, I suggest, Mr Contoyannis, is, as you frankly said on at least one occasion in your written reports, that it is actually impossible to know that you are replicating the actual situation that applied on the ground on the day in question?---Yes, that's correct.

But what you can do, as you 've sought to do, is to bring to bear an understanding of the physics and how the movement of the hose in various different ways and in various different circumstances can create stored energy of the kind that apparently was present when Mr Bilson had the misfortune to suffer his injury. Would that be right?---That's correct, yes.

63. Regarding the control methods, relevant to the First Defendant, which might be introduced to deal with the risk of harm, Mr Contoyannis, confirmed under cross examination:

    a. Regarding the recommendation that a risk assessment by the First Defendant which communicated what the correct process for performing this task was, he confirmed the audit is intended to lead to actions that manage the risk, rather than being the actual action that manages the risk and the purpose is to share communication so that workers know the steps and procedures to follow;

    b. Further to that, that what he would expect to see (so the steps to be followed) would be that nobody was to touch the hose without the say-so of the driver – the operator of the vac truck- and that the hose was to be laid out flat and straight before it was to be disconnected from the valve;

    c. Regarding having "whip-checks", being small cable ties on the hoses, connected to the truck, to prevent unintended movement of the hose when coming off either of the valves, he ultimately confirmed he "*was not sure if that's something that can be done. That would require a fair bit of inspection directly of the particular truck we 're talking about*". In any event, it was a risk reduction method which was fairly low in the hierarchy of control;

    d. In relation to placing the camlock coupling on the outlet/inlet hardware (i.e. swapping the male and female connections), he agreed that there would still be a material risk of causing physical injury to the operators;

e. He further agreed that using a small step-ladder to move the hose so the task is performed at waist height would be to introduce a further risk of injury, namely falling off the ladder if the hose moved;

f. In relation to the final risk reduction measure of wearing safety glasses or a face shield when disconnecting the hose, he confirmed that was not directed at protection from the relevant risk of harm and if the Plaintiff was wearing safety glasses at the time of the incident (as he was), whilst he would still prefer he wear them, it did not protect against the risk of harm.

64. Mr Contoyannis, under cross-examination, talking of the materials referred to in his first report of 17 June 2022, confirmed:

a. The Mines Safety Bulletin and Safe Work Australia "Use of Restraining Devices on Hoses" guide was not the sort of document that he thought an employer, directing their mind to the risk that we are concerned with here, would be having recourse to in terms of identifying risks and coming up with solutions to manage the risk;

b. The Guide to Machinery & Equipment Safety, whilst it refers to identifying sources of stored energy, provides no assistance in relation to dealing with stored energy relevant to this case. The fact that a system of work was in place, had been followed and no sign of stored energy had been detected meant this Guide would not have provided guidance to the employer in the case.

c. The Safe Work Australia, The Guide For Managing Risks From High Pressure Water Jetting was a document to look at generally for tasks involving powered or energised hoses but that was not the case with the task we are concerned with in the present case.

65. Mr Contoyannis confirmed he provided his opinions in this matter based upon the understanding the Plaintiff had performed this task on many occasions and he had no unexpected movement.

66. He confirmed the two things different on the occasion of the incident which stood to make a material and significant difference was the hose being moved back to the pit and also being slung and lifted by the crane prior to the hose being disconnected.

[48] Importantly, the evidence/opinion of Mr Contoyannis accords with the evidence of the Plaintiff, which I accept. Mr Kahler accepted that if torsional strain energy was introduced between the two fixed points of the truck and the sling, it would be released when the hose was uncoupled. Notwithstanding this acknowledgement, however, Mr Kahler in his reports, but, more so in his oral evidence, was clearly of the opinion, especially after conducting further enquiry, that whilst torsional energy was possible, it was not the situation in this incident. In Mr Kahler's evidence, he said:

> MR GREGGERY: Mr Kahler, Mr Bilson has given evidence about the manner in which the hose moved as he uncoupled it, leading to it striking him on the nose and in – near his left eye. I'll just describe that to you. At page - day 1, page 35, line 29. He said this - sorry, 36, "I went to uncouple it. It was a little bit tight. I gave it a tiny little wiggle, which the couplings are both aluminium and alloy, and at times, they bind. I gave it a little wiggle and it flung out of my hand around to the right. I sort of pulled back and it struck me on the bridge of the nose and got hit this side of my eye." Question: "When you describe that it flung out of your hand to your right, you moved your right hand in a semi-circular motion. Is that - -" Answer: "Yeah, it sort of went around like that, did a 180 in the air and came down on my – on my - the bridge of my nose and eye". So – and the hand motion which he described was a movement that went around like that, consistent with his description of a 180 degree. Now, does that movement upon an uncoupling, is it consistent with the release of stored energy within the pipe?
>
> MR KAHLER:---Yes, most definitely.
>
> MR GREGGERY: And is it consistent with at least the release of torsional energy – that's twisting energy contained - - -?---The way you
>
> MR KAHLER:- - - --- in the pipe?

MR GREGGERY:---The way you describe it, it's consistent with torsional energy.

MR KAHLER: Yes?---But I have studied this incident in fine detail, and I do not consider there was any significant torsional energy present, so all I can go to – when I consider that hypothesis of torsional energy, Mr Bilson's recollection is the supporting observation for it. But I think there is also a lot of information on the rejecting side. I also think these situations unfold very quickly. And as people try to recollect what happens, my career has been very much about dealing with the evidence that I see and trying to reconcile what people are telling me. So yes, the description you give is consistent with torsional energy, but I just don't think the circumstances of the work on that day were consistent with torsional energy. By torsional energy, I mean an induced twist.

MR GREGGERY: Yes?---

MR KAHLER:-- - into the hose.

[49] Mr Kahler's assessment, however, was, I thought, dismissive of the evidence of the Plaintiff, and failed to appreciate and consider that evidence in his assessment. As put on the part of the Plaintiff and I accept:

> 72. The evidence of Mr Contoyannis should be preferred to that of Mr Kahler on the two causal questions for the following reasons.
>
> …
>
> (e) Mr Kahler's alternative hypothesis is logically unattractive as:
>
> (i) Mr Bilson was an experienced hose operator and had repetitively connected and disconnected the hose while working for Vatsonic including between 40 and 50 times in the
>
> preceding week;

(ii) Mr Bilson described the use of force to wriggle the hose free from the outlet valve in very modest terms and he is credible and reliable;

(iii) The supposition that Mr Bilson connected the hose using force to do so against its natural lay and then applied force in an upward pulling motion is inconsistent with his experience, practice and the positioning of his hands on the end of the hose and the counter effect of gravity;

(iv) The experiments he conducted commenced with removing all stored energy in the hose and did not involve fixing one end of the hose to the truck. The shortcomings in those experiments compared to those conducted by Mr Contoyannis is set out in his file note;

(v) The facts assumed by Mr Kahler about the position of the hose on the ground and in the pit and not raised by the sling such that no strain energy was introduced to the hose is inconsistent with the evidence of the plaintiff and the first recorded account of Mr Savage in his statement to Work Health and Safety.

[50] Mr Kahler also acknowledged in his first report, Exhibit 20(a), that the incident was extraordinary and could not have been anticipated. Specifically, he said, 'the author has completed a literature search and cannot find an incident that replicates the circumstances of this incident'. Understandably, therefore, without prior experience himself, or literature to assist, Mr Kahler initially considered that the stored torsional energy in the hose, accrued by dragging the hose from the garden to the pit, might have been a contributor to the incident and noted as much in his first report. He said:

There is also the possibility that, in pulling the hose back from the garden to the GPT, the hose rolled and stored elastic torsional stored energy.

[51] Mr Kahler then explained that he had done further tests and, as a result of those, prepared his file note and supplementary report. In those reports and further in his oral evidence, he then discounted that hypothesis, and, if anything, dismissed the possibility for there to be stored torsional energy, which contributed to the unexpected movement of the hose. This is notwithstanding the unchallenged evidence of the Plaintiff and untested assumptions used by him to base his report.

[52] He suggested that if there were stored energy, it would arise as a result of the hose being connected 'against' the stored memory curve in the hose, and the force applied by the Plaintiff to disconnect the coupling . Again, contrary to the Plaintiff's unchallenged evidence in respect of the uncoupling.

[53] Mr Kahler seemed determined to rely upon his own testing and the results of that, again, without acknowledging numerous differences between his testing regime and what the Plaintiff said occurred on the day.

[54] Both Mr Contoyannis and Mr Kahler were experienced and impressive witnesses. However, I would without hesitation find that I was more satisfied and assisted by the evidence of Mr Contoyannis. His evidence was far more convincing in respect of the assessment as to stored torsional energy, especially when considered in conjunction with the unchallenged evidence of the Plaintiff.

[55] The difference on the occasion leading to the Plaintiff's injury was clear. It involved the hose being moved back to the GPT whilst still connected to the truck, as well as the hose being slung and lifted by the crane operator. Mr Kahler's opinions were, to a significant degree, borne out of his assumptions which in part were contrary to the accepted evidence of the Plaintiff. As submitted in the outline of the first Defendant, the opinion of Mr Contoyannis presents as a more plausible source of the stored energy. There it was noted:

84. Conversely, the opinion of Mr Contoyannis:

a. Is based upon assumptions consistent with the evidence of the Plaintiff;

b. Presents a more plausible source of the stored energy, having regard to:

i. if the source of the energy was from the memory curve/bend in the house and the force of the Plaintiff removing the hose, those two things being or potentially being present on many if not all occasions the Plaintiff had performed the task previously, it is surprising the Plaintiff had not experienced any sign of unexpected movement before;

ii. the Plaintiff's evidence, (consistent in that respect with Mr Savage's initial account of the incident of 6 September 2017 and his agreement the hose was never touched or moved back until the Plaintiff instructed), is accepted:

(1) the time of the incident was the first time the hose had ever been dragged back to the pit, slung to the crane and lifted prior to the disconnection of the hose from the outlet valve;

(2) the Plaintiff had never previously experienced any unexpected movement in the hose prior to the incident;

and, those things in combination, allow for an inference that it was the movement of the hose back to the pit and it being lifted by the crane which created a source of stored energy which released when the Plaintiff disconnected the hose from the outlet valve, causing the violent movement.

iii. the Plaintiff's (uncontested) evidence the hose moved upwards (not downwards as Mr Kahler would have it) and in a circular fashion, is consistent with a release of torsional (twisting) energy.

[56] Ultimately, the accepted evidence of the Plaintiff, in combination with the expert evidence of Mr Contoyannis, leads me to the finding that the release of stored

torsional energy led to the behaviour of the hose, as described by the Plaintiff, and the injury sustained.

Liability

[57] That then leads to the necessary assessment of liability in respect of the Plaintiff's injuries. This then gives rise to the most significant contest within the matter, whether either the first Defendant or second Defendant is liable and, if so, the extent of that liability, specifically considering contractual arrangements between the first and second Defendant.

[58] Helpfully, the Plaintiff's submissions in this matter, detailed the statutory framework to follow in respect of the claims made by the Plaintiff in paragraph 23 to 32, and I repeat and rely upon them here:

> 23 The claim against the first defendant is subject to the provisions of the *Workers' Compensation and Rehabilitation Act 2003* (WCRA) in respect of liability, causation and assessment of damages.
>
> 24 The WCRA does not apply to the claim against the second defendant as it was not the plaintiff's employer.
>
> *Civil Liability Act 2003*
>
> 25 The common law applies to liability for and the assessment of the plaintiffs claim for damages against the second defendant. It is not regulated by the *Civil Liability Act 2003* (CLA) and the Civil Liability Regulation.
>
> *Work Health and Safety Act 2011*
>
> 26 Section 267 of the Work Health and Safety Act 2011 (WHSA) provides that nothing in "this Act" confers a right of action in civil proceedings. This means that the plaintiff does not have any private right of action for breach of statutory duty.

27 However, the statutory framework effected by the WHSA remains relevant to inform the content of the common law duty of care in negligence.

28 In *Koehler v Cerebos (Australia) Ltd* McHugh, Gummow, Hayne and Heydon JJ said:

> 24 …As Lord Rodger of Earlsferry pointed out in his speech in the House of Lords in the appeal in one of the cases considered in Hatton v Sutherland, Barber v Somerset County Council, it is only when the contractual position between the parties (including the implied duty of trust and confidence between them) "is explored fully along with the relevant statutory framework" that it would be possible to give appropriate content to the duty of reasonable care upon which an employee claiming damages for negligent infliction of psychiatric injury at work would seek to rely.

29 Consistently with these comments, the principle is noted in recent Queensland cases even where s 267 of the WHSA is raised in bar to the plaintiffs claim. In *Leighton Contractors v Fox*, there was a similar bar on a claim for breach of statutory duty, but this bar of itself did not defeat the plaintiffs claim which was pleaded in negligence.

30 Under the WHSA and Regulation, each of the defendants owed statutory obligations to workers at the site including the plaintiff.

31 The statutory framework, admitted by the defendants, included the following provisions relevant to the content of the duty owed by the defendants and the Council's employees, pleaded in paragraph 6 of the Amended Statement of Claim that:

(a) required the first defendant to:

(i) ensure, so far as was reasonably practicable, the health and safety of the plaintiff while he was engaged in his work activities (WHS Act, s 19(1)(a));

(ii) ensure, so far as was reasonably practicable the provision and maintenance of a work environment without risks to health and safety (WHS Act, s 19(3)(a));

(iii) ensure, so far as was reasonably practicable the provision and maintenance of safe plant and structures (WHS Act, s 19(3)(b));

(iv) ensure, so far as was reasonably practicable the provision and maintenance of safe systems of work (WHS Act, s 19(3)(c));

(v) ensure, so far as was reasonably practicable the safe use, handling and storage of plant, structures and substances (WHS Act, s 19(3)(d));

(vi) ensure, so far as was reasonably practicable the provision of any information, training. instruction or supervision that was necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking (WHS Act, s 19(3)(f)):

(vii) ensure, so far as was reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace were without risks to the health and safety of any person (WHS Act, s 20(2)):

(viii) ensure, so far as was reasonably practicable, that the fixtures, fittings and plant were without risks to the health and safety of any person (WHS Act, s 21(2));

(ix) identify reasonably foreseeable hazards that could give rise to risks to health and safety (Reg., s 34);

(x) eliminate risks to health and safety so far as was reasonably practicable (Reg., s 35(a));

(xi) if it was not reasonably practicable to eliminate risks to health and safety–minimise those risks so far as was reasonably practicable (Reg., s 35(b));

(xii) implement risk control measures (Reg., 36);

(xiii) maintain control measures (Reg., 37):

(xiv) Review control measures (Reg., 38).

(b) required the second defendant to:

(i) ensure, so far as was reasonably practicable, the health and safety of the plaintiff while he was engaged in his work activities (WHS Act, s 19(1)(b));

(ii) ensure, SO far as was reasonably practicable, the health and safety of the plaintiff was not put at risk from work carried out as part of the conduct of the business or undertaking (WHS Act, s 19(2));

(iii) ensure, so far as was reasonably practicable the provision
and maintenance of a work environment without risks to
health and safety (WHS Act, s 19(3)(a));

(iv) ensure, so far as was reasonably practicable the provision
and maintenance of safe plant and structures (WHS Act, s 19(3)(b));

(v) ensure, so far as was reasonably practicable the provision
and maintenance of safe systems of work (WHS Act, s 19(3)(c));

(vi) ensure, so far as was reasonably practicable the safe use,
handling and storage of plant, structures and substances (WHS Act, s 19(3)(d));

(vii) ensure, so far as was reasonably practicable the provision of any information, training, instruction or supervision that was necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking (WHS Act, s 19(3)(f));

(viii) ensure, so far as was reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace were without risks to the health and safety of any person
(WHS Act, s 20(2);

(ix) identify reasonably foreseeable hazards that could give rise to risks to health and safety (Reg., s 34);

(x) eliminate risks to health and safety so far as was reasonably practicable (Reg., s 35(a);

(xi) if it was not reasonably practicable to eliminate risks to health and safety–minimise those risks so far as was reasonably practicable (Reg., s 35(b));

(xii) implement risk control measures (Reg., 36);

(xiii) maintain control measures (Reg., 37);

(xiv) review control measures (Reg., 38).

(c) required the second defendant's workers to take reasonable care that their acts or omissions did not adversely affect the health and safety of other persons (WHS Act, s 28(b)).

32 The statutory obligations relevant to the content of the duty of care do not impose a more stringent or onerous burden:

"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."'

[59] Notwithstanding those matters that are admitted, there is still the requirement for the plaintiff to demonstrate that the risk of harm was foreseeable, not insignificant and, in the circumstances, a reasonable person in the position of the first Defendant and second Defendant would have taken precautions that would like have avoided the injury. In paragraph 7 of the Further Amended Statement of Claim, the Plaintiff sets out what is suggested as the nature, scope and contents of the duty of care owed by the first Defendant:

7. By reason of:

…

the first defendant owed a non-delegable duty of care to the plaintiff and there were terms implied into the contract of employment by law, which required the first defendant to:

(d) comply with the statutory obligations set out in paragraph 6(a) hereof;

(e) take reasonable precautions for the plaintiff's safety while he was carrying out his assigned work;

(f) not expose the plaintiff to any risk of damage or injury of which it knew or ought to have known;

(g) take reasonable care that the places at which the plaintiff carried out his assigned work was safe;

(h) instruct the plaintiff in correct and safe methods of carrying out his work;

(i) devise, establish, maintain and enforce safe methods and systems for
the plaintiff to carry out his work;

(j) provide for the plaintiff sufficient assistance to enable him to carry out his employment safely;

(k) supervise the plaintiff to ensure he carried out his work safely;

(l) warn the plaintiff of the possibility of injury to him in the carrying out of his work and instruct him in methods of work to avoid the possibility of such injury;

(m) provide to the plaintiff safe and suitable equipment to enable him to
safely carry out his work;

(n) not require the plaintiff to perform work where the defendant knew or ought to have known that the carrying out of that work may cause injury to the plaintiff;

(o) ensure the workplace and any activities performed at the workplace were as safe for the plaintiff as reasonable care and skill could make them.

[60] Clearly, the first Defendant owed the Plaintiff a non-delegable duty of care at common law. In *Czatyko v Edith Cowan University* (2005) 79 ALJR 839, the High Court Summarized the duty 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 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.

[61] As submitted by the Plaintiff:

> 35 Vatsonic could not delegate or abdicate its responsibilities and duty to the plaintiff merely by instructing him to work in accordance with the second defendant's work system. Vatsonic retained a duty of care to the plaintiff that was personal and non- delegable. The nature of the personal non-delegable duty meant that if Vatsonic "...require[d] [its] employee to work according to an unsafe system [Vatsonic] should bear the consequences".
>
> 36 It remained Vatsonic's duty to assess and control the risks of harm while the plaintiff was working in cooperation with and under the Council's system of work. There is no evidence that Vatsonic prescribed any system of work for this job. There was no evidence of Vatsonic's "...[participation] in the formulation of a work method statement in conjunction with the Site Supervisor" with a plan which "…will identify hazards and the methods of control, and safe guard measures for site/non-site personnel..." which was required of it under its contract with the Council. Vatsonic was on notice to do so and failed in its duty not only under the contact with the Council but also its duty of care to the plaintiff.

[62] As submitted, the common law duty of care is not modified by statute and that duty of care, owed to the Plaintiff in contract and tort law by the first Defendant included:

> 40 The common law duty of care owed to the plaintiff in contract and in tort by Vatsonic as his employer included duties as follows:
>
> (a) Duty to take precautions;
>
> (b) Duty to not expose the plaintiff to a risk of injury that the employer
>
> knew or ought to have known about;
>
> (c) Duty to provide safe plant and machinery;
>
> (d) Duty to provide a safe system of work;
>
> (e) Duty to provide a safe place of work.

[63] Similar to the position in respect of the first Defendant, the Plaintiff in paragraph 8 of the Further Amended Statement of Claim sets out what the Plaintiff submits is the nature, scope and context of the duty of care owed to the Plaintiff by the second Defendant. It is as follows:

> the second defendant owed a duty of care to the plaintiff which required the second defendant to:
>
> (j) comply with the obligations set out in paragraph 6(b) hereof;
>
> (k) exercise reasonable care that its system of work, employees and its plant did not expose the plaintiff to an unreasonable risk of injury;
>
> (l) train, instruct and supervise the second defendant's employees so that they would take reasonable care in avoiding causing injury to the plaintiff;
>
> (m) take reasonable precautions to avoid causing injury to the plaintiff.

[64] Reference in paragraph 8 of the Further Amended Statement of Claim to the duties owed by the second Defendant to the Plaintiff required, it is submitted, compliance

with the obligations detailed in paragraph 6(b) of the Further Amended Statement of Claim. Those obligations, it was submitted, included in particular the following:

> 6. The statutory framework:
>
> (b) required the second defendant to:
>
> …
>
> (vii) ensure, so far as was reasonably practicable the provision of any information, training, instruction or supervision that was necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking (WHS Act, s 19(3)(f)):
>
> (viii) …
>
> (ix) identify reasonably foreseeable hazards that could give rise to risks to health and safety (Reg., s 34);
>
> (x) …
>
> (xi) if it was not reasonably practicable to eliminate risks to health and safety–minimise those risks so far as was reasonably practicable (Reg., s 35(b)):

[65] The specific acknowledgement here of the need for the meeting of the obligations to be reasonably practicable is also reflective of the need for the identification of the risk of harm, and, therefore, the evaluation of the reasonableness of the Defendant's response to that risk. In that respect, it is necessary to consider the guidance provided in *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[66] In *Leighton Contractors Pty Ltd v Fox*, it was said:

> 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. The principles were explained by Brennan J in *Stevens v Brodribb Sawmilling Co Pty Ltd*...

[67] In *Stevens v Brodribb Sawmilling Co Pty Ltd*, Mason J said at paragraph 26:

> If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to coordinate the various activities, he has an obligation to prescribe a safe system of work.

[68] In that same Judgment, Brennan J said at paragraph 2 of his reasons:

> An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry
>
> out that activity. The entrepreneur's duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an 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. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

[69] Here, the Plaintiff says that the wider expression of the duty of care, expanded by Mason J, should be adopted, particularly in circumstances that existed at this work site, where the Plaintiff was required to carry out his work in cooperation with workers employed by the second Defendant and in accordance with the second Defendant's system of work and site rules.

[70] The Plaintiff submits that this meant that there was a need for the second Defendant to give direction as to when and where the work was to be done, and to coordinate the various activities. However, I do not accept that this was the case.

[71] The second Defendant, as best as I understand the evidence, merely contracted with the first Defendant for the provision of the services offered by the first Defendant. They did not 'give directions as to when and where work was to be done', and did not 'coordinate the various activities'. The second Defendant's workers were available to assist the Plaintiff to carry out his tasks, but, as he made clear in his evidence, the operation of the vacuum truck was 'his thing'. The second Defendant's workers were to follow his directions.

[72] The narrower approach, reflective of Brennan J's reasoning, then needs to be considered. The duty that was owed by the second Defendant was 'to use reasonable care to avoid unnecessary risks of injury and to minimise other risk of injury'. Here, it is argued that the second Defendant should have contemplated the Plaintiff as a person who may be put at risk by the acts and omissions of its workers, in moving the end of the hose, slinging it in and out of the GPT and raising it with the crane when the Plaintiff was still performing his tasks.

[73] Here, I have found that the second Defendant's workers have acted contrary to the direction of the Plaintiff putting him, as is obvious, at risk and, therefore, failed in their duty to take reasonable care in carrying out their functions so as to avoid causing foreseeable injury to the other persons and this, of course, includes the Plaintiff.

[74] There was, I find, negligence on the part of the second Defendant's workers in carrying out their duties in the course of their employment, and the second Defendant is vicariously liable for that negligence.

[75] That then leads to the obvious consideration of the foreseeability and identification of the risk of harm. The *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the 'WCRA') section 305B(1)(b) sets out the test 'whether the risk of harm is not insignificant'. In *Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD* [2013] 1 Qd R 319, Fraser JA said:

> [26] The respondent referred to Chesterman J's statement in *Pollard v Trude* that the replacement in s 9(1)(b) of "not insignificant" for the common law formulation of "not far fetched or fanciful" added little in clarity. Nevertheless, the provision was designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable. I think that it did produce some slight increase in the necessary degree of probability. A far-fetched or fanciful risk is necessarily so glaringly improbable as to be insignificant, but the obverse proposition may not necessarily be true. The generality of these descriptions makes it difficult to be dogmatic about this, but the statutory language does seem to convey a different shade of meaning. The difference is a subtle one. The increase in the necessary degree of probability is not quantifiable and it might be so minor as to make no difference to the result in most cases. Nevertheless, in deciding claims to which the Act applies the "not insignificant" test must be applied instead of the somewhat less demanding test of "not far-fetched or fanciful".

[76] What then was the risk to be assessed? The Plaintiff submits that, as pleaded, it required an assessment of the risk of harm to a person in the position of the Plaintiff handling the vacuum hose at the back of the Hydro vacuum truck by another person

or persons moving or lifting the other end of the hose without the Plaintiff's knowledge.

[77] Not surprisingly, both Defendant's deny the foreseeability of the risk of harm as pleaded. But, as was emphasised on behalf of the Plaintiff, the risk to be considered is generalised, not specific. Understandably, the Plaintiff relies on the High Courts comments, in paragraphs 15 and 16 of *Thompson v Bankstown Corporation* (1953) 87 CLR 619, where the following is said:

> 15. In a passage in his opinion in *Bourhill v. Young* [1942] UKHL 5; (1943) AC 92, at p 104, Lord Macmillan says "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is wed to those to whom injury may reasonably and probably be anticipated if the duty is not observed." This passage was cited and used as the test by Lord Thankerton and by Lord Macmillan himself in *Glasgow Corporation v. Muir* [1 943] UKHL 2; (1943) AC 448, at pp 454, 457. Lord Macmillan's phrase "the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed", has, as the opinions in the two cases seem to show, no meaning very different from Lord Atkin's description in *M'Alister (or Donoghue) v. Stevenson* [1931] UKHL 3; (1932) AC 562, at p 580, viz. "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".
>
> 16. In the application of these formulas it is important to avoid the error of confusing the precise chain of circumstances by which the plaintiff incurs the injuries or damage of which he complains with the question whether he, acting as he did, falls within the general description of persons likely to be affected. The exact course which events take can seldom be foreseen in detail. But it is another thing to treat it as reasonable to foresee in a general way the kind of harm that may ensue from acts and omissions and, under wide and indefinite categories, the sorts of situation men must occupy for the harm to be likely to reach them.

[78] The Plaintiff argues that the precise events leading to the injury need not be foreseeable for liability to be established. Reference is then specifically made to more recent determinations of the High Court in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 and *Laybutt v Glover Gibbs Pty Limited t/as Balfours NSW Pty Ltd* [2005] HCA 56. In *Dovuro Pty Ltd v Wilkins*, the following was noted:

> 60. A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable; it is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected. Nevertheless, at bottom, the criterion remains one of "reasonable foreseeability"; liability is to be imposed for consequences which Dovuro, judged by the standard of the reasonable man, ought to have foreseen.

[79] Further, in *Laybutt v Glover Gibbs Pty Limited t/as Balfours NSW Pty Ltd*, McHugh J said:

> 9. Nearly 50 years ago, this Court pointed out that, in a negligence action, a jury does not have to determine whether the defendant should reasonably have foreseen "the precise manner" in which an injury occurred. The jury "ha[s] to consider only whether it was reasonable to foresee in a general way the kind of thing that occurred" [*Caledonian Collieries Ltd v Speirs*].
>
> 10. However, as I pointed out in *Swain v Waverley Council*, to succeed in a negligence action, the plaintiff must do more than prove a reasonably foreseeable risk of injury. To succeed, the plaintiff must also show that the exercise of reasonable care by the defendant would have avoided, or reduced the extent of, the injury. In cases concerned with operations, processes, systems and machinery that are complex, the jury will seldom be able to find for the plaintiff unless the plaintiff tenders evidence as to the precautions that were reasonably available to the defendant and which would have avoided the plaintiffs injury. As Barwick CJ pointed out in *Maloney v Commissioner for Railways (NSW)*, evidence of the

practicability of a proposed alternative course or safeguard "is essential except to the extent that [it is] within the common knowledge of the ordinary man."

[80] The Plaintiff argues the risk was clear and should have been considered. At paragraphs 68, 69 and 70, the following is put:

> 68 There was no risk assessment undertaken by the first defendant to consider the risk of harm to Mr Bilson, when the first defendant knew that the second defendant's workers were also involved in moving, slinging and lifting the hose, and knowing that the plaintiff was required to work in cooperation with the second defendant's workers.
>
> 69 The hose was a heavy industrial hose with metal camlocks on it. It was owned by the first defendant company. It knew of the characteristics of the hose. It is reasonably foreseeable, without hindsight bias, that moving or lifting the hose could cause harm to Mr Bilson as he was handling it in several ways:
>
> - The hose twisting or pulling against Mr Bilson's body could cause a strain injury.
> - The hose twisting or pulling against Mr Bilson's body could cause is body to be pinched by the camlocks.
> - The hose twisting with the camlocks spinning in Mr Bilson's hands could cause an injury to any part of his body within range. As it happened here, the eye was unfortunately the part injured.
>
> 70 *A guide to machinery and equipment safety* was available before the injury under the *Work Health and Safety Act 2011*. It refers to identifying, de-energising and isolation procedures for stored energy.

[81] I have already in these reasons addressed the matters arising regarding the expert evidence of Mr Contoyannis and Mr Kahler, and have indicated my preference for the opinions of Mr Contoyannis. Only his opinions answered the question that arose

from the evidence which I accepted, in respect of the Plaintiff and what he said happened with the hose upon uncoupling, and his subsequent observations.

[82] These findings combined with the opinions expressed by Mr Contoyannis lead to the obvious need to consider the risks associated with the work conducted by the Plaintiff in conjunction with the assistance provided by the second Defendant's workers that a safe work method statement ('SWMS') was required for the task of clearing the GPT.

[83] The risk of injury from the tasks required to be performed was evident and foreseeable. The need for a SWMS was apparent, but, no SWMS existed. Notwithstanding this need, no person undertook a site assessment or considered an assessment of the task necessary to identify what risks might arise to workers in the course of performing the informal system of work that had developed and how those risks might be addressed.

[84] Both the first and second Defendant, and the second Defendant's workers, ought to have foreseen the risk of harm to the Plaintiff, as that risk was not insignificant not far fetched or fanciful. The first and second Defendant's and the second Defendant's workers breached their duties by failing to take proper precautions, and the second Defendant is vicariously liable for the breach of its workers.

[85] The pleadings relied upon by the Plaintiff detail what are said to be the breaches by the first Defendant, the second Defendant and the second Defendant's workers. They refer directly to the earlier pleadings and to the precautions that the first Defendant, the second Defendant and the second Defendant's workers should have taken. Those breaches are as follows:

Negligence and breach of contract of first defendant

18. The first defendant breached its non-delegable duty of care to the plaintiff and the terms implied into the contract of employment by:

    (a) failing to take the reasonable precautions referred to in paragraph 15 for the plaintiff's safety while he was carrying out his work;

(b) exposing the plaintiff to a risk of harm of which it knew or ought to have known when he handled the vacuum hose at the back of the Hydro Vac Truck as another person moved or lifted the other end of the hose without the plaintiffs knowledge;

(c) exposing the plaintiff to a risk of damage or injury from stored energy in the vacuum hose of which it knew or ought to have known;

(d) failing to take reasonable care that the places at which the plaintiff carried out his assigned work was safe;

(e) failing to instruct the plaintiff in correct and safe methods of carrying out his work;

(f) failing to devise, establish, maintain and enforce safe methods and systems for the plaintiff to carry out his work;

(g) failing to warn the plaintiff of a risk of harm of which it knew or ought to have known when handling the vacuum hose at the back of the Hydro Vac Truck at the same time as another person moves or lifts the other end of the hose;

(h) failing to warn the plaintiff of the possibility of injury to him from stored energy in the vacuum hose and instruct him in methods of work to avoid the possibility of such injury;

(i) failing to provide to the plaintiff safe and suitable equipment to enable him to safely carry out his work;

(j) requiring the plaintiff to perform work where the defendant knew or
ought to have known that the carrying out of that work may cause injury to the plaintiff;

(k) failing to ensure the workplace and any activities performed at the workplace were as safe for the plaintiff as reasonable care and skill could make them;

(l) failing to enquire with and/or ensure that the second defendant took reasonable precautions to avoid or eliminate the risk of harm;

(m) failing to comply with the obligations set out in paragraph 6(a) hereof.

Negligence and vicarious liability of the second defendant

19. The second defendant breached its duty of care to the plaintiff by:

(a) failing to take reasonable precautions referred to in paragraph 16 for the plaintiff's safety while he was carrying out his work;

(b) failing to take reasonable care to provide Council workers who were fully trained and instructed in the risks of harm from moving or lifting the vacuum hose so that they would not subject foreseeable users of the hose to an unreasonable risk of injury in relation to the uses to which it was reasonably foreseeable that it might be put;

(c) failing to instruct its workers to take reasonable care in carrying out their functions so as to avoid causing injury to others in the vicinity who could have foreseeably suffered injury from moving or lifting a vacuum hose, such as the plaintiff;

(d) failing to comply with the obligations set out in paragraph 6(b) hereof.

20. The second defendant's workers (for whose negligence the second defendant is vicariously liable) breached their duty of care to the plaintiff by:

(a) failing to take reasonable precautions referred to in paragraph 17 for the plaintiffs' safety while he was uncoupling the hose;

(b) lifting the vacuum hose up and/or placing it in the sling before it was
safe to do so;

(c) moving or lifting the hose when it was unsafe to do so and they were
not adequately trained to move or lift the hose.

[86] I note the argument put on behalf of both the first and second Defendants with respect to the question as to whether the risk of harm, pursuant to section 305B of the WCRA, was foreseeable, not insignificant and, in the circumstances, whether a reasonable person in the position of the first or second Defendant would have taken precautions that would likely have avoided the injury.

[87] Each submit that the Plaintiff's claim should therefore be dismissed as the risk of harm was unforeseeable and/or insignificant. It is not, however, simply a case of there being no evidence of unexpected movement in the hose or no evidence of movement which may have been capable of causing harm, occurring previously.

[88] The duty to assess the risk is much wider than being alert to something that has occurred before. It requires a wider view including as to the place an activity occurs, the equipment involved and those participating in the task at hand.

[89] Section 305B(c) requires consideration to be given to what, if any, precautions a reasonable person in the position of either the first or second Defendant would have undertaken in respect of the risk of harm, and section 305B(2) provides guidance with regard to the courts consideration of such precautions. Section 305B(2) of the WCRA is as follows:

305B General Principles

(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.

[90] Each of those considerations weigh in my assessment, when considering the place, equipment and task involved in requiring precautions against the risk of harm being taken. Such precautions, as identified in the Further Amended Statement of Claim were not taken and give rise to the breach of duty by both defendants.

[91] In light of those findings, it is necessary to turn to causation. Section 305D(1)(a) of the WCRA is, it has been said, a statutory statement of the 'but for' test of causation. Here, there is a finding of breach by more than one defendant, but, that does not preclude satisfaction of the 'but for' test.

[92] As submitted for the Plaintiff and I should say, accepted by me, 'but for the failure by the first Defendant to take the precautions alleged against it, the incident would not have occurred, and the plaintiff would not have suffered his injuries'. In a similar vein, the Plaintiff submits, in respect of the second Defendant, in accordance with the common law, that, 'it is more probable than not the injuries the Plaintiff sustained would have been prevented or minimised if the Council and its workers had taken the precautions alleged against them'.

[93] Being satisfied, as I am, that there are multiple tortfeasors contributing to the harm caused to the Plaintiff, two further matters need to be addressed before turning to an assessment of damages. Firstly, there is the question arising from there being more than one defendant responsible for the injuries sustained by the Plaintiff, and so the need for an apportionment of liability. Additionally, however, there is the second Defendant's claim to be indemnified by the first Defendant in light of the agreement executed between the first and second Defendants.

Apportionment of Liability

[94] Turning firstly to the apportionment of liability in respect of the incident, consideration must first be given to the statutory right of contribution and apportionment as between tortfeasors, created by the *Law Reform Act 1995* (Qld) (the 'LR Act'). Sections 6(c) and 7 are relevant, and provide:

> **6 Proceedings against, and contribution between, joint and several tortfeasors**
>
> Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—

…

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

7 Amount of contribution and power of the court

In any proceedings for contribution under this division the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[95] Notice has been given by the first Defendant to the second Defendant pursuant to section 300 of the WCRA, claiming contribution which then leads to the necessary assessment by the court of the respective contributions by each of the Defendants. The Court of Appeal in *Robinson v Fig Tree Pocket Equestrian Club Inc* [2005] QCA 271 explained that the apportionment of liability between defendants 'proceeds by reference to the extent to which each defendant's misconduct contributed to the damage suffered by the Plaintiff, and the comparative culpability of the defendants.

[96] As such, there first needs to be an assessment of the cause of the incident, I have found, in that respect, that the only logical cause for the hose to act as described by the Plaintiff was due to stored energy in the hose becoming trapped in the hose, as suggested by Mr Contoyannis between the connection of the hose to the outlet of the Hydro vacuum truck and the point it was slung to and lifted by the crane, as well as the stored energy generated by the movement of the hose from the garden bed to the GPT and then being slung and lifted.

[97] The first Defendant argues that this situation arose because the second Defendant's workers, Phillips, Savage and Jensen or some combination of them, moved the hose and then slung and lifted it by the crane to the position as observed by the Plaintiff subsequent to the incident, and prior to the Plaintiff changing the hose from the outlet to the inlet valve. The first Defendant submits that those actions by the second Defendant's workers:

1. were contrary to the system (and sequence) of work which had been discussed and utilized on about 40–50 occasions, in the week prior to the incident;

2. disregarded the express instructions of the Plaintiff, that they not touch the hose without his permissions; and

3. were done without the Plaintiff's knowledge.

[98] Additionally, the first Defendant says that those actions were out of the control of the first Defendant. I agree with the submissions of the first Defendant in respect of those three initial actions, but, am not satisfied that they were out of the control of the first Defendant in circumstances where there was no SWMS in place or even contemplated.

[99] Also submitted on the part of the first Defendant was that the system of work, at least insofar as the use of a crane and a sling was one implemented by or on behalf of the second Defendant through the suggestion of Mr Phillips.

[100] Mr Contoyannis identified what he described in Cross-examination as the most appropriate preventative measures as:

1. laying the hose flat and straight before disconnecting the hose from the outlet valve; and

2. preventing the second Defendant's workers from touching the hose, particularly without the Plaintiff's knowledge.

[101] Though not part of any SWMS, it is noteworthy that the Plaintiff detailed particularly his expectation that the hose not be handled or moved whilst he was attending to connections upon the Hydro vacuum truck, and that such an

expectation was abided by the second Defendant's workers in the first week of work being done. As was submitted, '…it was only the departure by the…workers from the system the Plaintiff require be utilized, without his knowledge, that led to the incident occurring'.

[102] As a result of these actions by the second Defendant's workers, it is argued that the first Defendant was not in a position to otherwise control or prevent the actions of the second Defendant's workers. The first Defendant therefore argues, that whilst it owed the Plaintiff a non-delegable duty of care, the acts or omissions causally related to the incident are more properly that of the second Defendant. The first Defendant therefore argues that the second Defendant ought to bear the predominant share of the liability to the Plaintiff, in fact 100%.

[103] Reliance for that position is placed upon the decision of *James Thane Pty Ltd v Conrad International Hotels Corp* [1999] QCA 516. There most findings of negligence were with respect to the conduct of the servants of Conrad. Williams J said the following at paragraphs 42–46:

> [42] The only other pertinent comment made by the learned trial judge which indicates the basis of the finding of negligence against Thane is the statement: "As Thane had engaged Key Largo and in particular Mort Clark, to assume responsibility for their mechanical aspects of the show, the failure to ensure that the equipment used by the trapeze artist was safe was an abrogation of Mr Clark's proper responsibilities for which Thane is liable to its employees."
>
> [43] Having regard to all the findings and the whole of the evidence it is clear that the active negligence was on the part of Conrad and those for whom it was responsible. Any contributory negligence on the part of Thane was predicated on the fact that it failed to fulfil its obligation to ensure that the equipment was safe for use by its employees. The finding against Thane is effectively that it assumed that Conrad had rendered the lifting apparatus safe and that it should have taken more steps to ensure that such was in fact the case.

[44] Counsel for Thane relied heavily on the reasoning of Thomas J in *Evans v Port of Brisbane Authority & Ors* (1992) Aust Torts Reports 81-169. On the facts in that case it was held that the employer of the injured plaintiff should recover 100 per cent contribution from the active tortfeasors. It is not necessary to refer to the facts of that case in detail. There is no doubt as to the correctness of the decision of Thomas J on the facts then before him. But the facts here are not identical. Here were clear known dangers associated with the use of the trapeze apparatus and those dangers were, or should have been, clearly appreciated by Thane and those for whom it was responsible. In the circumstances they were not entitled to abrogate their responsibility by saying they trusted and believed in Conrad's employees. In hindsight it is obvious that simple checks would have revealed at an early stage at least some of the defects which were found to have contributed to the incident.

[45] However, the findings make it clear that Conrad was responsible for the construction, operation and maintenance of the apparatus and it was the negligence of Venker and Bowker, particularly the latter, which was the immediate cause of the accident.

[46] Given all the findings by the learned trial judge I have come to the conclusion that an apportionment of 30 per cent cannot be supported. However, as noted above Thane remained liable to some extent because of its failure to carry out an inspection which would have revealed defects in the system. In the circumstances an apportionment of 90 per cent against Conrad and 10 per cent against Thane more accurately reflects responsibility for the negligence as found.

[104] In this case, the first Defendant says that it had no reason to apprehend a risk to the Plaintiff as the equipment being used did not have any history then involving the relevant risk of injury. However, that argument fails to take into consideration the actions of the Plaintiff himself, in setting out a system and sequence of work. If he appreciated a risk, at least of a generalised nature, then so should the first Defendant acting as a reasonable employer.

[105] The position of the second defendant in respect of apportionment relies significantly on the evidence of Mr Savage and I have already commented on that evidence and my concerns regarding the reliability of that evidence. In any event, I have made my findings in respect of the incident and what brought it about. However, it is true that the first Defendant, as the Plaintiff's employer, was a specialist contractor engaged to apply its expertise in operating the Hydro vacuum truck and its attachments. There is a clearly acknowledged distinction between the obligation of employers to their employees and of principals to independent contractors.

[106] Here, it is accepted, that the connecting and disconnecting of the hose from the Hydro vac truck was performed solely by the Plaintiff. It was a 'specialised task' as identified in *Leighton Contractors Pty Ltd v Fox*. However, the task was conducted in combination with the second Defendant's workers, and, as such, both the first and second Defendants had real obligations, especially in regard to the preparation of a SWMS.

[107] The second Defendant argues that any claim against the Council should be dismissed, but, if found that some liability attaches to the second Defendant, or it's employees, it is insufficient to overwhelm the non-delegable duty of care, owed by the first Defendant to the Plaintiff. As such, the second Defendant says that the primary liability for the injury must attach to the first Defendant. However, that position seems to some extent to fly in the face of the finding in *James Thane Pty Ltd v Conrad International Hotels Corp*.

[108] Ultimately, I am satisfied that an appropriate appointment of liability would rest between the first and second Defendant of 70/30, noting the findings regarding the actions of the second Defendant's workers and the responsibilities of the first Defendant. I would therefore apportion liability as between the first and second Defendants at 70% to the first Defendant and 30% to the second Defendant

[109] Having then reached that position as regards an apportionment of liability between the first and second Defendants, it is necessary to consider the question as to any indemnity claimed by the second Defendant against the first Defendant. In that respect, the second Defendant filed a Third Party Notice against the first Defendant on Wednesday 31 July 2019. The claim was in these terms:

The Second Defendant claims against the First Defendant the following:

1. An indemnity pursuant to, or alternatively damages for breach of, the agreement between the First Defendant and the Second Defendant;
2. In the alternative, contribution in whole or in part pursuant to section 6(c) of the *Law Reform Act 1995 (Qld)* for any amount that the Second Defendant is required to pay the Plaintiff for the claim, damages or interest;
3. Costs;
4. Interest.

[110] Thereafter, in the Notice of Claim, the Second Defendant notes:

> 4(b) solely for the purpose of this Third Party Statement of Claim, without derogating from such defence of the Plaintiff's claim, the second Defendants adopts the allegations of fact made by the Plaintiff against the first Defendant.

[111] and continues:

> On or about 13 September 2016, the first Defendant and the second Defendant entered into an agreement whereby the first Defendant offered to provide the second Defendant with wet hire of earthmoving plant, trucks and associated construction services, namely Vacuum trucks & Hydro Vacuum Excavation trucks, (the 'Agreement').

[112] The Third Party Notice then confirms the Agreement was in writing, and was in effect on Monday 28 August 2017. The document, entitled 'ACL00012 Approved Contractor List' is Document C to Exhibit 33 in the proceedings. The Agreement itself is an extensive document, seeking to address, no doubt, all possible circumstances that might arise in dealings between, 'The Principal', which means that Townsville City Council and a contractor. Relevant in respect of the dispute in regard to any claimed indemnity are numerous clauses, including,

1.4.12; 1.7.2; 1.7.3; 1.7.13; 1.10.1; 1.39.1; 1.39.2; 2.3.2; 2.10.1(b); 2.13.1(a),(d) (e) (f) (g) (q) (r); 2.19.1; 2.19.2; 2.19.3 (a) (c) (d) (i) (ii) (iii); 2.55; 3.4.1; 3.14.1 (f) & (i).

[113] They are in these terms:

…

1.4.12 This document outlines the conditions for this offer; do not propose alternative conditions as they will not be considered. *Contractors* not satisfied with the conditions in this offer should not submit a response.

…

1.7.2 *You* must perform the *Work Under the Contract* in a diligent manner and with all necessary skill and care expected in accordance with the provision of this *Work Under the Contract* and in accordance with all representations and warranties as to your experience and ability expressly or implicitly made by reference to its proposal and this agreement, or by law.

1.7.3 *You* must provide at your own expense all labour, materials, vehicles, *Powered Mobile Plant*, trucks and *Equipment* and everything necessary for the proper and complete performance of each part of this *Contract*.

…

1.7.13 *You* must not use *The Principal's* Work Sites to train your personnel, all Drivers and Operators MUST be competent to operate/ drive when sent to *The Principal's* Work Sites.

…

1.10.1 Where *You* find any ambiguity, discrepancy, error or deficiency in the *Contract* documents, or have any other doubt as to the meaning of any portion of the *Contract* documents, *You* must, prior to accepting the *Contract*, submit the particulars in writing to *The Principal*, in order for the doubt to be clarified.

…

1.39.1 *You* agree to indemnify *The Principal* and keep *The Principal* indemnified against all claims for injury loss or damage suffered by any

person or property arising out of your performance of the *Contract* and all liability for costs, charges and expenses incurred by *The Principal* in respect of the claim of any person or body.

1.39.2 *You* are responsible for making good all damage caused as a result of any actions or works carried out by *You* or arising from your negligence or dishonesty at our cost.

…

2.3.2 *Contractors* are to work on the *Principal's* sites, follow *The Principal's* directions and use *The Principle's* safety systems and paperwork. At no time under this *Contract* is a *Contractor* expected to undertake the role of *Site Controller* or coordinator.

…

2.10.1 *The Principal's* responsibilities under the *Contract* are as follows. *The Principal* will:

…

(b) Take all reasonable care to protect and keep safe the Operator and the Equipment during the period of Hire; and

…

2.13.1 The *Contractor's* responsibilities under the *Contract* are as follows:-

(a) Satisfy themself that the work which the *Equipment* is to undertake is not beyond the capacity of the *Equipment* or of its Operators; and

…

(d) Allow the *Equipment* to be operated under the direction of *The Principal*;

(e) Supply the Operator(s) necessary for the safe *Hire* of *Equipment*; and

(f) Supply any required additional personnel for the safe, effective operation of the *Equipment*; and

(g) Acknowledge that at all times, however, the Operator(s) of such *Equipment* is deemed to be the employee or agent of the owner and not of *The Principal*; and

…

(q) Warrant that the Operator (if provided by the owner) is fully and competently trained in the use of the *Equipment*, and that the Operator is sufficiently competent to operate the *Equipment* and will do so at all times in a safe method; and

(r) Ensure that any Operator provided with the *Equipment* will not do anything inconsistent with a safe system of work and hereby indemnifies *The Principal* should the Operator not do so; and

…

2.19.1 *Contractors* are to work within the boundaries of *The Principal's* Workplace Health and Safety system.

2.19.2 Without limiting the provisions of Sub-Clause 2.19.1 *You* are responsible for compliance with all provisions of the Work Health and Safety Act 2011 (in this Clause the Act) and all subordinate legislation within the area so required for the performance of the *Contract*.

2.19.3 *You* must as a minimum:

(a) Ensure that the provisions of the Work Health and Safety Act are complied with, or as the case may be, are not contravened;

…

(c) Provide other safeguards and take such other safety measures as are prescribed;

(d) Ensure that all *Equipment* used, or to be used in, or for work:

(i) is suitably designed for safety in the use made or to be made of it;

(ii) is maintained in a safe and serviceable condition, this includes (but is not limited to) ensuring all safety signage, locking pins, struts, stays and guards, flashing lights, reversing/ motion alarms, horns on Equipment and vehicles are correctly fitted and operational, and

(iii) is used and operated safely and competently.

…

2.55 Specific Conditions - Vacuum and Hydro Trucks

2.55.1 All Vacuum Truck *Hires* are to include a minimal of (10) metres of Vacuum hose.

2.55.2 All Vacuum Truck *Hires* are to include a minimum of ten (10) metres of High Pressure Water Jetting Systems hose.

…

3.4.1 *Contractors* are to supply their full contact details. NOTE: Primary Contact is either the owner or company representative with full authority to act on behalf of the Company or Firm. The primary contact will be the person with whom *The Principal* will liaise regarding future *Contract*ual issues. Completion of this is Mandatory.

…

3.14.1 I declare that I have trained my existing staff in *The Principal's* Policies, Procedures and Administrative Directives listed below.

…

f) (Draft) Work Health and Safety Policy.

…

i) TCC General Site Rules.

[114] As is clear from the extensive nature of the terms of agreement, contingencies are sought to be dealt with in the most exhaustive of manners. However, the first Defendant argues that the indemnity, in particular arising from the terms of clause 1.39, 'only applies to claims made against the second Defendant 'arising out of' the first Defendant's performance of the contract'. The first defendant therefore argues that the plain and ordinary meaning of the words in the clause expressly limits the extent of the indemnity to losses accruing to the second Defendant from the negligence or wrongful act of the first Defendant in undertaking the contracted works. As such, the first Defendant says that it cannot extend to liability arising from the negligence of the second Defendant or its workers.

[115] In this instance specifically, the first Defendant contends that the situation is one where, if there is liability of the second Defendant to the Plaintiff, as I have found exists, then any breach will have arisen from its own default, or that of its workers, and not because it was solely fixed with liability by reason of any default on the part of the first Defendant. Reliance there is placed on the decision of the New South Wales Court of Appeal in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* (2008) 173 IR 412. There the Court noted the wording of the clause said to provide the basis for the indemnity, and considered that, as is argued here, it related only to the contractor's performance of the contract.

[116] As such, the first Defendant says that any claim for indemnity must fail. The second Defendant, however, says that the indemnity provided is comprehensive, such that the first Defendant is obligated to indemnify the second Defendant for any damages, as well as costs.

[117] In this matter, I am satisfied, in any event, that the decision in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* is distinguishable. In that matter, the Court found that the actual liability of the Principal contractor arose from its independent act of negligence, and not from the performance of the subcontract work. What is argued on the part of the first Defendant, however, is detailed as follows:

18 For the indemnity clause to be enlivened, the Court must be satisfied that, on the proper construction of the clause, it was intended to apply in the situations where TCC was found to be negligent.

19 Such an indemnity clause falls to be construed strictly, and any doubt as to the construction should be resolved in favour of the indemnifier. Effect should be given to the ordinary meaning of the language used so as to provide certainty as to where responsibility may lie, against which insurance may be obtained.

20 In *Ellington v Heinrich Constructions Pty Ltd & Ors* the Court of Appeal had occasion to consider whether an indemnity clause would indemnify a principal contractor for negligence in circumstances where both the principal contractor and the sub-contractor were found to have been negligent. The respondent in that matter, Watpac Australia Pty Ltd ("Watpac"), was a principal contractor engaged to build new grandstands for the Brisbane Cricket Ground. Watpac had engaged a contractor, Dumareq Constructions Pty Ltd ("Dumareq"), to supply and fit reinforcing steel for the grandstands. The plaintiff was employed by Dumareq when he fell from a partly constructed grandstand onto the ground, some four meters below. The plaintiff sued for damages alleging negligence against both parties and another contractor. At trial, Muir J gave judgment for the plaintiff against both Dumareq and Watpac. One of the issues on Appeal was whether, by way of an indemnity clause contained in the contract between them, Dumareq was required to indemnify Watpac for its liability to pay the plaintiff. Watpac relied on Clause 16 of the contract which provided:

> "the Subcontractor shall not commit any act of trespass or commit any nuisance or be guilty of any negligence and shall effectually protect and hereby indemnifies the builder and the builders employees against all loss, damage, injury or liability whatsoever that may occur in respect of the works for through the execution of the works and in case of any such loss, damage, injury or liability occur in the subcontractor shall make full compensation and shall

> make good all such loss, damage, injury or liability and it the Builder is required to pay any damages for such loss, damage, injury or liability the amount of such damages made together with all costs which the Builder may have incurred in defending or settling the claim for such damages may be deducted from any money due becoming due to the Subcontractor under this contract or may be recovered from the subcontract as liquidated damages…"

21 In considering the proper construction of the indemnity clause, Chesterman J referred to a similarly worded indemnity clause in *Canberra Formwork Pty Ltd v Civil and Civic Ltd and Anor* and concluded that the clause did not require the Dumareq to indemnify Watpac against its liability to the plaintiff arising from Watpac's own negligence. In reaching that conclusion, the Court had regard to the structure of Clause 16 in particular, the punctuation, which, as it read, the indemnity followed hard on the expression of the Durameq's promise not to commit any act of trespass, nuisance or act of negligence and liability to make good any damage or loss through the execution of Durameq's performance of the contract.

22 In *Erect Safe Scaffolding (Australia) Pty Limited v Sutton* the plaintiff sustained injuries when his head struck a crossbar tie which extended across a walkway on a scaffold put up by a scaffolding company on a construction site. The plaintiff claimed damages from his employer, the principal contractor, Australand, and the contractor scaffolding company which erected the scaffold, Erect Safe. The trial judge found that Australand and Erect Safe had been negligent. He also found that Erect Safe was bound to indemnify Australand pursuant to the clauses in the sub-contract between them. The indemnity clause Australand sought to rely on was contained in clause 11 of the agreement and was in the following terms:

> "the sub-contractor must indemnify Australand against all damages, expense (including lawyers fees and expenses on a solicitor/client

> basis), loss (including financial loss) or liability of any nature suffered or incurred by Australand arising out of the performance of the sub-contract works and its other obligations under the sub-contract."

23 In allowing the appeal, the New South Wales Court of Appeal, held that the clause only imposed a liability on Erect Safe to indemnify Australand for any damages occasioned by any acts or omissions commissioned by Erect Safe. McClellan CJ expressed it at paras [154] to [157] as follows:

> "The question in the present dispute is whether cl 11 confines the liability of Erect Safe to indemnify Australand for liabilities arising from Erect Safe's performance in the sub-contract works or whether it extends to a liability of Australand which arises in relation to those works. To my mind the indemnity is confined. Although the appropriate meaning may have been more obvious if the word 'its' had been included before the words 'performance of the sub-contract works', I do not believe the clause lacks clarity. However, if the clause is ambiguous, it would have to be construed in favour of the surety, Erect Safe…
>
> …
>
> In the present case the liability of Australand does not 'arise' out of the performance of Erect Safe of any of its contractual obligations. Although it is true that the occasion for the liability of Australand was the erection by Erect Safe of the faulty scaffolds, the liability of Australand arises from its own independent act of negligence in failing to maintain the appropriate safety regime for the site."

24 Accordingly, where damage was caused, in part, by the negligence of a sub-contractor bound by an indemnity clause and in part by an independent act of negligence by its head-contractor, rather than arising out of the performance of the works by sub-contractor, the indemnity clause will not be engaged.

25 In the present case, clause 1.39 of the Agreement is not ambiguous and clearly provides for the indemnity to apply to any injury or loss which arises specifically from VCPL's performance of the contract or negligent act. It is not an indemnity which covers TCC for negligent acts arising from TCC, or its employees, performance of the contract. If it was intended to do cover such acts, then clause 1.39 should have specifically provided for the indemnity to extend to any negligence committed by TCC in its performance of the work under the contract. Such a clause should have read:

> **"1.39 Contractor to Indemnify the Principal**
> 1.39.1 You agree to indemnify [TCC] and keep [TCC] indemnified against all claims for injury or loss suffered by any person or property arising out of **[TCC]** performance of the contract at all liability for costs, charges and expenses incurred by TCC in respect to the claim of any person or body.
>
> 1.39.2 [VCPL] are responsible for making good all damage caused as a result of any actions or works carried out by [TCC] or arising from (TCC] negligence or dishonest at [VCPL] cost.

26 Further, in the present case, the cause of the plaintiff's injury did not arise solely from VCPL's performance of the contract work but arose out of independent act of negligence of TCC and its employees.

27 Accordingly, the indemnity is not enlivened and cannot be relied upon by TCC.

[118] Here, however, the injuries sustained by the Plaintiff arose directly from the performance of the task, the subject of the contractual arrangements between the first and second Defendants. As such, the injury of the Plaintiff arose directly out of the performance of the contract.

[119] In any event, in my assessment, were this not to be the case, liability of the first Defendant would, in any event, arise as a result of other terms of the Agreement. In that regard, I note, specifically, Clause 2.13 'Contractor Responsibilities' contained within the Agreement. Subclauses 2.13.1(e), (f) and (g) of the Agreement envisages

other persons being required to ensure the task at hand is able to be performed. In particular, Clause 2.13.1(f) recognises that the operators of equipment, and that is what was being done by the second Defendant's workers, are deemed to be, 'the employee or agent of the owner and not of the Principal'.

[120] It is not necessary, in light of my determination to further address this matter, but, I note those clauses of the Agreement reflect the clear intent of the second Defendant in its dealings with its contractors.

Finally then, in respect of liability, I turn to the provisions of section 6(c) of the *Law Reform Act 1995* (Qld)(the 'LRA') and section 236B of the WCRA. As is relevant to this matter, section 6(C) of the LRA and section 236B of the WCRA are in these terms:

> **6 Proceedings against, and contribution between, joint and several tortfeasors**
>
> Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

> **236B Liability of contributors**
>
> (1) This section applies to an agreement between an employer and another person under which the employer indemnifies the other person for any legal liability of the person to pay damages for injury sustained by a worker.

(2) The agreement does not prevent the insurer from adding the other person as a contributor under section 278A in relation to the employer's liability or the insurer's liability for the worker's injury.

(3) The agreement is void to the extent it provides for the employer, or has the effect of requiring the employer, to indemnify the other person for any contribution claim made by the insurer against the other person.

(4) In this section—

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10.

[121] The first Defendant contends that WorkCover has an interest with respect to the third Party Claim and relies upon that to address the provisions of section 236B of the WCRA. This arises in the sense that the first Defendant claims that it is not liable to pay any damages in circumstances where WorkCover are authorised and obliged to indemnify employers against any amount for which they become legally liable to pay by way of damages to a worker employed by that employer. As noted on the part of the first Defendant:

29 Section 300 of the WCRA provides WorkCover with an entitlement to conduct the proceedings for damages on behalf of the employer. This is so because WorkCover is required to indemnify the employer with respect to not only any damages the plaintiff seeks, but all damages the employer may become legally liable, for an injury sustained by a worker.

…

31 The terms of the statutory policy of insurance are to be derived from the following provisions of the WCRA:

29.1 Section 48 relevant provides:

"48 Employer's obligation to insure

(1) Every employer must, for each worker employed by the employer, insure and remain insured, that is, be covered to the extent of accident insurance, against injury sustained by the worker for—

(a) the employer's legal liability for compensation; and

(b) the employer's legal liability for damages.

(2) The obligation to insure under subsection (1) (b) does not include an obligation to insure for an employer's legal liability for damages for which WorkCover is not authorised to indemnify the employer.

(3) The employer's liability must be provided for—

(a) under a licence as a self-insurer under part 4; or

(b) under a WorkCover policy.

(4) WorkCover must not issue more than 1 policy for each employer.

(5) However, if the employer is the State, WorkCover may issue 1 policy for each department of government."

29.2 Section 8, which defines "accident insurance" relevantly as:

"8 Meaning of accident insurance

Accident insurance is insurance by which an employer is indemnified

against all amounts for which the employer may become legally liable. for injury sustained by a worker employed by the employer for

(a) compensation; and

(b) damages."

29.3 Section 10, which defines "damages" as:

"10 Meaning of *damages*

(1) ***Damages*** is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to—

(a) the worker; or

(b) if the injury results in the worker's death—a dependant of the deceased worker.

(2) A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under—

(a) another Act; or

(b) a law of another State, the Commonwealth or of another country.

(3) Also, a reference in subsection (1) to the liability of an employer does not include a liability to pay damages for loss of consortium resulting from injury sustained by a worker.

[122] It is not necessary here to repeat the case history leading to the insertion of section 236B of the WCRA, other than to note the obvious progression from *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228, followed in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269, and the attempts by the legislative amendments to ensure that the contractual indemnity does not extinguish a claim for contribution pursuant to section 6(c) of the LRA. The WCRA still provides coverage for the employer, in this case the first Defendant, in respect of its legal liability for damages to the Plaintiff, but, the real issue here is whether the provisions of section 236B have removed the limitation previously recognised upon the insurer to exercise its right of subrogation to pursue a contribution from, in this instance, the second Defendant, who seeks to enforce its contractual indemnity.

[123] WorkCover's argument, albeit put on the part of the first Defendant, is that section 300 of the WCRA provides WorkCover with the entitlement to conduct the proceedings for damages on behalf of the employer, in this case, the first Defendant. This is so because, WorkCover is required to indemnify the employer with respect to not only any damages the Plaintiff seeks, but all damages the employer may become legally liable for, for any injury sustained by a worker. Quite simply, WorkCover argues that if it is liable to indemnify the first Defendant under the statutory insurance policy, it is entitled to exercise a right of subrogation and pursue a claim against the second Defendant.

[124] WorkCover relies upon section 236B of the WCRA to say that any argument for indemnity, as between the first and second Defendant is void to the extent that it prevents WorkCover from pursuing a contribution claim, because to find otherwise would render section 6(c) of the LRA ineffective.

[125] To all intents and purposes, the determination in respect of section 236B of the WCRA and its application at all here rises or falls on a consideration of statutory interpretation. The second Defendant argues that section 236B of the WCRA is not even relevant in this case because the Plaintiff here has claimed directly against the second Defendant, and all that the second Defendant seeks to do is rely upon the contractual indemnity arising from the agreement entered into between the first and second Defendants.

[126] The second Defendant says that in a proper interpretation of section 236B of the WCRA, it applies to a contribution claim brought by WorkCover. Here, it is argued that WorkCover is not a party to the proceeding. It has not made a contribution claim against the second Defendant, that has been made by the first Defendant and therefore the 'voiding' of section 236B of the WCRA does not apply.

[127] Whilst not conceded otherwise, it is argued, in any event, 'that the damages which are the subject of the indemnity between the first Defendant and the Council include contractual damages which are not the nature of "damages for injury sustained by a worker"'. Reliance upon that argument arises from the terms of Clause 1.7.2 of the agreement which obliged the first Defendant to act in a diligent manner and with all necessary care and skill. As I have already found, the first Defendant has failed in that regard, thus leading the second Defendant to the argument that the first

Defendant is liable to the second Defendant for damages for breach of contract, and this is not a legal liability that arises for injury sustained by a worker. This leads, it is submitted, to an inevitable conclusion that section 236B of the WCRA does not apply to such damages.

[128] Quite simply, the considerations regarding the interpretation of section 236B of the WCRA come down to a determination between a plain reading of the words of the section and a wider interpretation. As already noted, the second Defendant contends for the plain and restricted reading of the section.

[129] The first Defendant, and through them WorkCover, argue that the section includes a context reflecting the general purpose and policy of the section. WorkCover argues that the provisions of section 14A of the *Acts Interpretation Act 1954* (Qld) (the 'AIA') requires an interpretation which best achieves the Act's purpose. Reliance there is then placed upon the explanatory notes which accompanied the introduction of the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* (Qld)(the 'WCRA Bill'). There, relevantly, it was said:

> ## Policy objectives and the reasons for them
>
> ***Implementing the National Injury Insurance Scheme***
>
> In 2011, the Productivity Commission recommended a National Injury Insurance Scheme ("NIIS") alongside the National Disability Insurance Scheme ("NDIS"). The NIIS is intended to establish no-fault lifetime care and support arrangements for persons who sustain serious personal injuries across four main streams: motor vehicle accidents, workplace accidents, medical treatment injury and general (accidents at home and in the community, or assaults).
>
> …
>
> The purpose of this Bill is to ensure that workers who suffer particular serious personal injuries as a result of work-related events in Queensland, receive necessary and reasonable treatment, care and support payments, regardless of fault.

…

Legislative amendments to maintain the status quo in the workers' compensation scheme

The Bill amends the Act to restore the original policy intent and intended interpretation of various provisions that have been or could be called into question by various recent Queensland court decisions, to provide certainty for insurers, employers, workers and the courts.

The Bill reverses the effect of the judgement in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 by prohibiting the contractual transfer of liability for injury costs from principal contractors or host employers to employers with a workers' compensation insurance policy (such as subcontractors or labour hire employers) and providing that an insurer is not liable to indemnify an employer for a liability to pay damages incurred by a third party contractor under a contractual arrangement.

…

Achievement of policy objectives

…

The Bill will achieve its objective of re-establishing the original policy intent of the Act and reversing the effects of the Supreme Court decision in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 by amending the Act to expressly exclude from coverage under an employer's workers' compensation policy that employer's liability flowing from an indemnity granted to a third party in respect of that third party's liability to pay damages to a worker and ensure that liability is retained by a contributing third party.

…

Consistency with fundamental legislative principles

…

> The Bill conforms with fundamental legislative principles by having sufficient regard to the rights and liberties of individuals, as the purpose of the amendments is to re-establish the Act's original policy intent and status quo concerning the indemnity provided to employers under workers' compensation insurance policies. The amendments will also result in savings to scheme, where otherwise scheme costs as a result of the Byrne decision may have potentially flowed to employers through increases to premium.
>
> …
>
> **Insertion of new s 236B (Liability of contributors)**
>
> Clause 31 inserts new section 236B dealing with liability of contributors in relation to damages. The amendment ensures that an agreement between an employer and a third party, under which the employer indemnifies the third party as indicated, does not prevent the insurer from adding the third party as a contributor. Further it provides that the agreement is void and that the third party cannot recover the amount of an award or settlement, made against them from the employer.
>
> The effect is to restore the common law principle that an insurer will not be liable to indemnify an employer for a liability to pay damages incurred by a third party contributor under a contractual arrangement. This principle was overturned by the Queensland Supreme Court's decision in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269.

[130] What the first Defendant argues therefore is that the wider and correct interpretation of section 236B of the WCRA is clear, that is, to reduce the totality of WorkCover contribution to damages claims by ensuring that co-tortfeasors remain responsible for their share and cannot pass it onto an employer and WorkCover through contractual indemnity arrangements.

[131] However, in this matter, there is more than simply the indemnity said to arise from Clause 1.39 of the Agreement. There are those additional contractual obligations in the agreement to which I have already made reference. Clause 1.7.2 required the first Defendant to perform works in a diligent manner and with all necessary care

and skill. Clause 2.13.1(f) required the first Defendant to supply any required additional personnel, in this instance, the second Defendant's workers and, though not supplied by the first Defendant, certainly utilised by the first Defendant, with the expectation that they would facilitate the safe, effective operation of the equipment.

[132] Finally, Clause 2.13.1(g) confirmed that the first Defendant acknowledged that the operators of the equipment, here the second Defendant's workers, were deemed to be the employee/s of the first Defendant, and not of the Principal, defined in the Agreement as the second Defendant.

[133] This agreement between the employers (the first Defendant) and Principal (the second Defendant) is far more than an indemnity as considered in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* where the indemnity clause arose out of 'the performance of the subcontract works…'. Here, the second Defendant's workers were, pursuant to the expectations within the agreement, deemed to be the employees of the first Defendant. They could not be considered otherwise in circumstances where they were performing tasks directly related to the work required to be done pursuant to the contractual arrangements between the first and second Defendants.

[134] Accordingly, and upon two bases, I am not satisfied that the provisions of section 236B of the WCRA are applicable in this matter. Firstly, this is not a matter where, the second Defendant is seeking to rely upon the indemnity to defeat a claim by WorkCover in relation to a contribution claim brought against it. Rather, it is a situation where the Plaintiff has claimed directly against the second Defendant and the second Defendant seeks to rely on the terms of the Agreement, the first Defendant's failure to comply with those terms and the contractual indemnity that follows. It is not a case where WorkCover has made a contribution claim against the second Defendant.

[135] Additionally, though perhaps not absolute necessary, it is clear that the indemnity claimed arises from the first Defendant's failure to meet its contractual obligations to perform works in a diligent and careful manner, to manage and protect it's employees and to ensure a safe system of work for those employees, including workers, deemed under the Agreement to be employees.

[136] As such, damages sought by the second Defendant to be indemnified for, arise from the breach of contract, as detailed in the Agreement and are not a legal liability of the person, here the second Defendant, to pay damages for injury sustained by a worker, the Plaintiff. Section 236B of the WCRA is not applicable in this case.

The Medical and Allied Heath Evidence

[137] I turn then finally to matters relating to an assessment of damages, in respect of the Plaintiff's injuries. Though having found some degree of liability on the part of the second Defendant, in light of the determination with respect to section 236B of the WCRA, and the limitations in respect of the assessment of damages pursuant to the WCRA, I have determined damages only against the first Defendant.

[138] At the outset, it should be noted that there is no dispute in respect of the nature of the Plaintiff's injuries. Doctor Stephen O'Hagan, Ophthalmic Surgeon, examined the Plaintiff on Monday 14 May 2018 and assessed an impairment of central visual acuity of 99%. On assessing the Plaintiff's binocular single vision field, the defect was 13%, and using the Combined Values Table, the Plaintiff's overall visual system impairment was calculated at 25%, which was equivalent to a whole person impairment of 24%.

[139] Doctor Alan Hilton, Consultant Ophthalmologist, examined the Plaintiff on Friday 7 September 2018 and assessed a visual acuity of light perception only, which represented 95% loss of visual acuity in the left eye, which represented a 24% visual system impairment for both eyes, and a whole person impairment of 23%. Doctor Hilton described the injury as a 'rupture of his left eye, traumatic loss of the iris and traumatic loss off (sic) the lens and vitreous haemorrhage.

[140] Neither Doctor Hilton or Doctor O'Hagan suggested any visual defect in the right eye subject to the Plaintiff wearing a contact lens. However, the Plaintiff's treating ophthalmologist, Doctor Reddie did suggest that there was an ongoing need for monitoring for ophthalmia. Such a situation arising, however, was extremely low and considered by Doctor Hilton to be low.

[141] The Plaintiff clearly has set out to deal with his life. As he indicated, he sought as soon as he was able to 'look for something to pay the bills' and to support his family. This is the case notwithstanding that he, to all intents and purposes, has no

vision in his left eye, except as he described it, 'able to see a faint shadow if there is a bright light'. The Plaintiff also described suffering pain, burning and throbbing in the left eye, leading to headaches which he treats with over the counter medication.

[142] The Plaintiff, as I have previously noted, is an impressive man, stoic in his character, such that he has gotten on with life and does not report interference with his family and social life. He has also gotten on with life, as he had to, in respect of employment, continuing to hold his commercial driver's licence and returning to working in his pre-injury occupation. However, I accept that the injury has had obvious effects upon his future expectations. He had hoped, reasonably I would find, to obtain higher paid employment as a plant operator or truck driver in the mining industry. These hopes have been significantly curtailed as a result of his current situation.

[143] The Plaintiff explained his hopes and expectations for the future. He explained that were it not for his injury he would have sought higher paying work in the mining industry as opportunities presented. The evidence of Mr Tolley clearly shows both the interest that the Plaintiff had in such works and in the benefit that it would bring to he and his family, as well as the limitations that the injury presented. Positions were applied for as described by the Plaintiff and he was not successful. One could properly assess, particularly with the benefit of Mr Tolley's evidence, that work would have been offered but for the injury sustained. Competition for such positions, of course, exists, but the nature of the Plaintiff and the skills he brings lead me to the conclusion that, but for his injuries, further opportunities for employment with higher pay rates were available to the Plaintiff.

[144] As described by the Plaintiff, he feels stuck working as a vacuum truck operator and that his visual impairment means that he would not be able to carry out the requirements associated with underground truck driving. At paragraph 144 and 145 of the submissions on the part of the Plaintiff, Counsel conveniently outlined the evidence showing the Plaintiff's unsuitability for the mining roles. Those submissions were:

> 144 His unsuitability for the role, viewed only from the point of his capacity is demonstrated by:

(a) The Austroads criteria require the treating ophthalmologist to provide information about the "nature of the driving task";

(b) The Department of Transport and Main Roads exercise a discretion to issue a licence (or decline to issue a licence) irrespective of the ophthalmologist's opinion and information;

(c) Dr Reddie is of the view that work in a mining environment seems to be "a specialised type of driving both in terms of the environment and the vehicle characteristics";

(d) Evelyn Ross described work in an open cut mine in detailed terms which are plainly inconsistent with Mr Bilson's unchallenged evidence about the slow, careful manner in which he currently drives;

(e) Ms Ross identified safety concerns arising from the visual impairment;

(f) It was not suggested to Mr Tolley, by either defendant, that he would offer Mr Bilson a job as a truck driver or machine operator at New Century mine or that he would recommend Mr Bilson be employed if he applied;

(g) Mr Tolley has many years of experience in the industry and has never heard of a person with monocular vision working underground;

(h) Mr Tolley is familiar with the machines operated in the mining industry;

(i) Dr Hilton cannot recall any person he has treated returning to operating
vehicles or machinery on a mine site;

(j) Dr Hilton's opinion that Mr Bilson would require an ongoing assessment under the conditions in which he would perform the duties to determine whether he could perform the duties of an

underground operator. Further, that riding a mountain bike "doesn't really equate with actually driving a truck in a mine" and operating a vac truck in a mine compared to his current operation of a vac truck "is really a different proposition and he would have to be assessed on that";

(k) Dr Hilton's opinion that the assessment is required in the conditions of the role because performance of those duties does not relate to visual acuity alone:

(l) Dr Hilton's opinion that Mr Bilson's visual impairment equates to the disability in the role of a truck driver in a mine.

145 In addition to his incapacity to perform the role, Ms Ross identified that:

(a) In her experience, employers are reticent to employ workers with injuries;

(b) That Mr Bilson is at a disadvantage when applying for work compared to a pool of uninjured applicants; and

(c) That Mr Bilson has reduced productivity which goes to the heart of the question of his employability.

[145] I was assisted particularly by the evidence of the occupational therapist, Ms Evelyn Ross. She took what I might describe as the dimmer view of the Plaintiff's prospects into the future. She had less confidence even than the Plaintiff in respect of future prospects. She explained why she had those views in her reports and, though vigorously challenged as to her position, remained firm in her resolve that the Plaintiff's future opportunities would be considerably reduced. She noted this as stemming from a number of actual consequences of the Plaintiff's injuries, but, also noted her professional observations with respect to employment/employers. She said at paragraph 25 of her first report, dated 19 November 2018, the following:

[25] It is my unequivocal experience that employers are reticent to employ a worker with an injury (predominantly for fear that they will become a worker's compensation liability). Contrary to anti-

discrimination statute, employers continue to ask workers of their injury or compensation history (and use the results as a screening tool). Mr Bilson is now a disadvantaged job seeker resultant of this phenomenon (as evidenced in his failed attempts at applying for work post incident).

[146] In her supplementary report of the 4 February 2022, Ms Ross indicated she considered the Plaintiff's eye injury to be '…likely causative of labour market disadvantage' and went on to confirm again her experience with employers including those in the mining industry. She said at paragraph 14:

> [14] In my work as an occupational therapist, I spend much time with employers from various industries, including mining. The strong undercurrent of employer views, or those in hiring positions, is that workers who have an injury, particularly an injury associated with a worker's compensation claim, will be viewed dimly; that is, a history of injury and/or compensation, will often be used as a screening device in choosing those who will not be engaged for employment. The claimant's belief that he is disadvantaged on the labour market, because of his eye injury (his self-report to me during the course of two interviews, as well as his statement of November 2018) is consistent with my experience as an occupational therapist.

[147] I am satisfied that the injury the Plaintiff has sustained has significantly curtailed the opportunities that would have been available to him, through his qualifications, skills and experience. As such, both flexibility and profitability through the exploitation of his skills and experience has been lost with real consequences for the Plaintiff now and into the future.

[148] I would note here that I have also considered the evidence of Doctor Reddie, the Plaintiff's treating ophthalmologist, and Doctor Burke, who provided an assessment by telehealth. Doctor Reddie recognised the Plaintiff's desire and intention to keep working and had repeatedly issued him with the necessary approvals to obtain a commercial driver's license, however, Doctor Reddie noted, as did Ms Ross, limitations in respect of that license. Doctor Burke, though not directly attending with the Plaintiff, assessed little impact upon the Plaintiff's employment and '…he

has the capacity to continue working as a truck driver or a plant operator if he so desires'.

[149] With respect to Doctor Burke, however, I note the attendance was by telehealth and, in any event, there was no physical assessment, but, I think even more importantly, there was also no considerations of the Plaintiff's identified imperatives to get to work and provide for his family.

Damages

[150] Having considered those matters, and, of course, their influence upon my assessment, I turn then to damages. In respect of general damages, I note that there is an admission on the part of the first defendant that the injury falls within item 26 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld)(the 'WC Regulations'). The Plaintiff's submissions in respect of general damages sets out the sections of Schedule 8 of the WC Regulations that are relevant to the allocation of an ISV. They include sections 2, 5, 8, 9 and 10, and, in particular, the requirement to consider the range of injury scale values stated in schedule 9 for the injury.

[151] Schedule 9 provides, in Part 4 Division 2, 'Injuries affecting the eyes', and at item 26 'Complete sight impairment in 1 eye or total loss of 1 eye' factors which might affect an ISV assessment. These include an assessment of the extent to which the injured worker's activities are adversely affected by the impairment of loss, specifically associated scarring or cosmetic damage.

[152] Further, it notes that an ISV at/or near the top of the range will be appropriate if there is a minor risk of sympathetic ophthalmia. Such a risk is identified by Doctor Reddie in his report of 1 November 2017 as well as being touched upon in his report of 21 March 2018. Doctor Hilton also notes such a risk in his report of 21 September 2018, though, he certainly stresses the remoteness of such a possibility. Those comments of Doctors Reddie and Hilton are relevant in respect of the comment in item 26 regarding the appropriate level of the ISV.

[153] The Plaintiff has effectively lost the complete sight in his left eye. He has compensated as best he can, but, difficulties abound and future risks and consequences are apparent. There are also clearly identified psychological

consequences as are shown in the unchallenged evidence of the Plaintiff and his wife as to the changes in the Plaintiff's demeanour and family relationships.

[154] I would assess an appropriate ISV at the upper range, in this instance 30, and would assess general damages at $63,950.00.

[155] Insofar as past economic loss is concerned, a calculation is done on the basis of a loss proven on the balance of probabilities as actual loss. It must be an actual loss and not a loss of chance. As was noted in *Nichols v Curtis & Another* (2010) QCA 303 by, as His Honour then was, Fraser JA:

> What the respondent had to prove here, on the balance of probabilities, was that her earning capacity had been diminished because of the negligently caused injury…

[156] The first Defendant argues here for an amount of $20,237.60 for the period the Plaintiff was unable to work from 28 August 2017 until 15 January 2018 (20 weeks), being his average earnings in the preceding financial year, being 1 July 2016 to 30 June 2017. It is argued that this reflects a fair calculation averaged across the year including overtime worked. The Plaintiff, however, seeks a sum of $28,610.80, being for the same 20 week period, but, based on averages relating to the period of 11 weeks immediately preceding the accident.

[157] In my assessment, the more recent indications of income are applicable, reflecting the earnings more closely aligned to the time of the accident. I fix that sum, therefore, as the income lost during the period immediately following the accident. A similar weekly rate, $1430.54, is appropriate when considering the 2 week period following immediately upon the Plaintiff's return to work in mid-January 2018. His overtime was then restricted, and, as such, I find a loss equivalent to the difference between this weekly rate and what was actually received, as $871.32.

[158] Thereafter, the calculation of past economic loss becomes more difficult because of the suggested loss of opportunity arising from the injury. The evidence is clear in respect of the Plaintiff's desire to further his employment opportunities and, correspondingly, his income. He had the skills and desire to take such opportunities, particularly in the mining industry, as evidenced by the approach made by Mr

Tolley. He expressed a desire to do such work, but, also disclosed his eye injury to Mr Tolley.

[159] Mr Tolley was asked specifically about the consequences of an eye injury in employment within the mining industry. He could not be specific as to conversations had, but, did say, 'I think it would be pretty hard to operate underground', and, when asked specifically not to speculate, added, 'yeah, that could be tricky', speaking of machine operation with that injury. Mr Tolley's evidence, though limited, was reflective of that of the Occupational Therapist, Ms Ross, insofar as the difficulties that would be experienced by the Plaintiff following his injury.

[160] Mr Tolley did not further approach the Plaintiff after given this advice about an eye injury. I accept that the position that was discussed was a temporary one, but, a 'foot in the door' would no doubt have assisted in further employment opportunities and, just as clearly, not having had such opportunity noted on the Plaintiff's work history, along with his injury must be seen as an impediment. The Plaintiff did not have that opportunity and indicated that at least part of the difficulty with his work at a mining site stemmed from his eye injury.

[161] I find that the Plaintiff would have sought and, in all likelihood, would have obtained more remunerative employment in the mining industry had he not been injured in the accident of 28 August 2017. The probability of that occurring is so significant in the assessment of damages in this matter that it is a relevant consideration in the assessment of the Plaintiff's past economic loss. That is so where, as a result of his injury, he no longer has the qualities necessarily expected in the mining industry, and, as identified by Ms Ross, to undertake higher paying work either as a truck driver or plant operator.

[162] Mr Tolley provided evidence which I allowed and accepted in respect of income reasonably able to be expected in the employment of the nature of that which the Plaintiff was qualified for, within the mining industry. His own experience accorded with the expected renumeration available in respect of an underground truck operator level 4 or as a plant operator as shown in Exhibits 17 and 18 to this matter. Helpfully, the outline provided on behalf of the Plaintiff sets out the calculations that would be relevant in respect of those two different categories of employment.

The Plaintiff contends for a calculation of possible income upon the basis that the Plaintiff could have expected work in percentages of 50:50 as between underground truck driver and plant operator.

[163] The first Defendant's position is simply to say that the evidence does not come up to proof such that there could not be a finding nor even an inference, that but for the eye injury, the Plaintiff would have obtained other work, including, specifically, work in the mining industry that would have flown from the offer indicated by Mr Tolley.

[164] As I have already found, however, I am satisfied that, but for the injury, such opportunities were not only offered but were available, particularly in consideration of the Plaintiff's expertise and ambition. However, I am not satisfied that there could or should be the leap from the offer of work as a truck driver, specifically for a casual period of 6 months, to working half the time as a plant operator at a higher rate of pay. As such, I have made my calculations as to past economic loss based upon the best evidence available in respect of employment as an underground truck operator level 4. That gross income would have been $92,000.00 per annum in the financial year 2019 and without any figures to adjust for, utilise that figure for the period of 1 July 2019 to 8 July 2022, being the last date upon which an actual pay slip is available from the Plaintiff's current employment. Using the figures able to be drawn from pay calculator.com.au, the nett figure that would have been available to the Plaintiff would have been $277,981.00 during that period. Discounting for contingencies at 10% would then have resulted in figure of $250,182.90 nett.

[165] The Plaintiff's actual nett income during that period, including to 8 July 2022, was $217,835.00 which would mean an amount for past economic loss of $32,347.90 during that period. Thereafter, to judgment, a calculation as best it can be done, needs to be made between 8 July 2022 and 5 April 2024, a period of 91 weeks based upon the difference in nett incomes subject to a 10% discount for contingencies as between an underground trick driver and in the Plaintiff's current employment. That is, $158.00 per week or an amount of $14,378.00.

[166] As such, the total for past economic loss is $28,610.80 plus $871.32 plus $32,347.90 plus $14,378.00 totalling an amount of $76,208.02.

[167] Past loss of superannuation entitlements as best as it can be calculated upon the figures assessed and based upon a statutory rate of 10% is $7,620.80.

[168] Loss of future earning capacity must be determined by reference to the facts of the case in question. As stated by McHugh J in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1:

> …Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post-accident incomes are comparable, no loss has occurred.

[169] Here, the Plaintiff relies very clearly upon a consideration of a capacity to earn that was not, to all intents and purposes, exploited before the accident. He has subsequent to the accident been offered work by Mr Tolley which did not eventuate as well as seeking other, more lucrative opportunities without success. Interestingly, one of those jobs sought by the Plaintiff was with the Townsville City Council, the second Defendant. He reached the shortlist and was asked to attend for a medical examination. He was not successful and no reason has been provided. As submitted on behalf of the Plaintiff, a reasonable inference may be drawn that, in the circumstances, there is no evidence which would assist the Defendant's.

[170] As previously found, the Plaintiff is a man with clear abilities and determination. This, combined with his stoicism leads to a proper assessment of him being a man who would continue to work well into his sixties. He is currently aged 47. His future employment is limited to the type of work he currently does, driving a vacuum truck. He is unable to utilise the abilities that he had prior to the injury being sustained. It is submitted for the Plaintiff that he has therefore 'lost his trade' to a substantial degree. In my assessment, however, he has not lost his trade but has lost his opportunity for more lucrative employment as evident from the commentary which precedes.

[171] As such, it is necessary to consider the nature of the loss experienced by the Plaintiff. I note in that regard the guidance provided by the Supreme Court in *Sutton v Hunter* [2021] QCS 249 where Freeburn J noted that a judge is required to state both the methodology and the assumptions on which an award of future loss of earning capacity is based, and that the court is required, as His Honour put it, to adopt 'a transparent and reasoned approach based on the evidence.'.

[172] There are a number of elements relevant for consideration in respect of the claim for future loss of earning capacity. They include:

a) the ongoing weekly loss representing the loss of ability to pursue work in the mining industry or otherwise in work more lucrative than that of a vacuum truck operator rounded up to $160.00 per week being derived from the past economic loss calculation;

b) the real risk that the Plaintiff may not see out his working life in his late sixties, considering that he may not be able to continue to hold a commercial drivers license; and

c) the reduction in the Plaintiff's attractiveness as an employee within the labour market, especially when required to disclose his injury. This takes into consideration the concerns expressed by the Occupation Therapist, Ms Ross.

[173] In particular, there is uncertainty with respect to the Plaintiff's continued entitlements to hold a Commercial Drivers license. He is currently required to obtain a two year license held on a conditional basis. The license is issued for each period through the exercise of a discretion, requiring ongoing medical review and over time, as identified by Doctor Reddie, possible occupational therapy assessment.

[174] There are no guarantees as to the outcome of medical review of occupational therapy assessments and, as identified for the Plaintiff, the possibility of changes in requirements to meet qualification criteria over time.

[175] As such, the Plaintiff argues that applying the principles identified in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, so considering the degree of probability that

the Plaintiff would have taken up such opportunities as presented themselves, that there is a 50% chance that the Plaintiff's future earning capacity, even as it currently is, will be diminished before his desired/expected retirement age.

[176] In those circumstances, the Plaintiff argues that there should be a component representing between 25 and 33⅓% of the Plaintiff's future earning capacity as assessable as the Plaintiff's future loss of earning capacity. I accept that such a component should properly be considered here, but, would find that in light of the findings already made in respect of the Plaintiff's stoicism, that the appropriate component is 25%.

[177] Accordingly, the relevant calculations are:

a) For the loss of chance that the Plaintiff could have worked as a truck driver:

- $160.00 per week over 12.5 years to age 60 (multiplier 488) = $78,080.00, less 10% for contingencies is $70,272.00.

- $160.00 per week over 8 years from age 60–68 (multiplier 346) deferred for 12 years (deferred multiplier 0.557) = $30,836.00, less 50% for contingencies is $15,417.00. For the reduction for contingencies, I rely upon the guidance of the Supreme Court, McMeekin J in *Koven v Hail Creek Coal Pty Ltd* [2011] QSC 51.

b) For the long term diminution based on 25% of the Plaintiff's current earning capacity:

- $1,049.00 per week over 12.5 years (multiplier 488) to age 60 times 25% = $127,978.00, less 10% for contingencies is $115,180.00.

c) $1,049.00 per week over 8 years from age 60-68 (multiplier 346) x 25% = $90,738.50.00, less 50% for contingencies is $45,369.25.

[178] I find therefore that the future loss of earning capacity is $246,238.25. I am satisfied, however, that there are also real prospects that the Plaintiff will require further eye surgery and that this will lead to further periods off work and

corresponding losses to income. To account for that reasonable expectation I will round up the figure for future loss of earning capacity at $250,000.00.

[179] Future loss of superannuation on that sum, calculated at 11.77% to account for changes in the statutory requirement, is therefore $29,425.00.

[180] Past special damages is agreed in the amount of $82,783.23 and it is noted that WorkCover has already paid a sum of $80,138.63.

[181] Future special damages also arise for calculation. That is difficult of course, in circumstances where there is not precise evidence available in respect of the future expenses required to be met, but, the expectation is that a conservative approach should be followed.

[182] The Plaintiff's claim includes ongoing requirements for analgesia, at present over the counter medications, as well as the ongoing attention of his treating specialist, at this time Doctor Reddie. The claim is made for $12 per week to cover the recurring costs for the Plaintiff's life expectancy of 37 years. I accept that as reasonable and, applying the appropriate multiplier (894), it equates to $10,728.00 less 15% for contingencies is $9,119.00.

[183] Additionally, the specialist notes the chance of further difficulties for the Plaintiff including enucleation, and Doctor Reddie opines a future cost of $4,600.00. Certainly, repair surgery of some nature is to be expected and I would find that it would be reasonable to allow a ⅔ chance of future surgery, deferred for 3 years at this time. That, with a multiplier of 0.864, equates to $2,650.00.

[184] Finally, in relation to future special damages, is necessary consideration of the costs of an occupational therapy driving assessment costing presently $1,760.00, and required each 2 years. Presuming the cost at $17 per week and required for the next 20 years (multiplier 666) equates to $11,322.00, but, considering the many possibilities now and into the future, reduced for contingencies by ⅓ equates to $7,548.00.

[185] The total, therefore, for future special damages is fixed at $19,317.00.

[186] There then remains for calculation the interest on past loss of earning capacity/economic loss, calculated in accordance with the formula set out in section 306N(3) of the WC Regulations is rounded to $6,000.00. Further, there is the claim for interest on past monetary loss for medical, pharmaceutical, rehabilitation and travel expenses not otherwise covered. The Plaintiff has calculated and I accept such a claim at $233.00.

[187] The damages and interest payable by the first Defendant are:

- General Damages: $63,950.00
- Past loss of earning capacity/past economic loss: $76,208.02
- Past loss of Superannuation: $7,620.80
- Future loss of Earning Capacity: $50,000.00
- Future loss of Superannuation: $29,425.00
- Past Special damages: $82,783.23
- Future Special damages: $19,317.00
- *Fox v Wood*: $3,910.00
- Interest on past economic loss: $6,000.00
- Interest on past Special damages: $233.00
- **Total:** **$539,447.05**
- Less Statutory refund to WorkCover: $179,757.21
- **Balance:** **$359,689.84**