SUPREME COURT OF QUEENSLAND

CITATION:	*Paskins v Hail Creek Coal Pty Ltd & Anor* [2017] QSC 190
PARTIES:	**CLINT JOSEPH PASKINS** (Plaintiff) **v** **HAIL CREEK COAL PTY LTD (ACN 080 002 008)** (First Defendant) And **WORKPAC PTY LTD (ACN 111 076 012)** (Second Defendant)
FILE NO/S:	S756 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	1 September 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	6, 7, 8 June 2017.
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff against the first defendant in the sum of $709,408.26.** **Judgment for the plaintiff against the second defendant in the sum of $966,991.38.**
CATCHWORDS:	TORTS – NEGLIGENCE – GENERALLY – where plaintiff claims damages for injuries suffered in the course of employment with first defendant — where labour was hired to first defendant pursuant to a contract between second defendant and a third party – where the plaintiff alleges the second defendant is vicariously liable – where in the alternative the plaintiff alleges the first defendant is liable by way of unsafe system of work – whether second defendant is vicariously liable – whether employee of second defendant was employed by first defendant *pro hac vice*. TORTS – NEGLIGENCE – CAUSATION – where defendants argue the incident occurred because of the

plaintiff's negligence – where plaintiff alleges that the injuries sustained were caused by the negligence of an employee of the second defendant whether the incident was caused because of the plaintiff's negligence – whether the incident was caused by the negligence of an employee of the second defendant.

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the defendants claim the plaintiff was contributorily negligent – whether the plaintiff was contributorily negligent and what apportionment should be allotted.

TORTS – NEGLIGENCE – THIRD PARTY CLAIM – where within the clause of the contract the second defendant agreed to indemnify and keep indemnified the first defendant – where the argument by the second defendant that the clause did not apply was predicated on a finding that the employee of the second defendant did not commit a negligent act or omission – where the second defendant argued that the general conditions of the contract applied – whether second defendant was obliged under its contract with third party to indemnify first defendant in respect of the plaintiff's claim.

TORTS – NEGLIGENCE – DAMAGE – GENERAL DAMAGES – where the defendants admit that as a consequence of the incident the plaintiff sustained a series of injuries – where the surgery including the subsequent surgery has been unsuccessful in relieving the plaintiff of all symptoms – where there are physical complaints that are not in accord with objective evidence nor explicable anatomically – where the defendants express concern with respect to the plaintiff's ability to reliably report symptoms and level of disability – whether the plaintiff suffers from the level of symptoms and disability so claimed.

TORTS – NEGLIGENCE – DAMAGE – FUTURE ECONOMIC LOSS – where the plaintiff and defendants differ on the assessment of future economic loss – whether the plaintiff would have maintained employment in the mining industry – whether the plaintiff has the capacity to return to work and what kind of work can the plaintiff engage in.

Civil Proceedings Act 2011 (Qld) s 61

Coal Mining Safety and Health Act 1999 (Qld) s 37, s 38 and s 41

Superannuation Guarantee (Administration) Act 1992 (Cth)

s19

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 305B, s 305C, s 305D, s 305F, s 305H, s 306C, s 306D, s 306E, s306F, s306G, s306H, s 306J, s 306L, s 306N,

Workers' Compensation and Rehabilitation Regulation 2014 (Qld) s 130, schedule 8 and schedule 9

Workplace Relations Act 1996 (Cth)

Adsett v Noosa Nursing Home Pty Ltd [1996] QCA 491, followed

Bankstown Foundry Pty Ltd v Braistina [1986] HCA 20; 160 CLR 301, cited

Barrett v Drake Personnel Limited (Unreported, District Court of Queensland, McLauchlan DCJ, 20 April 1998), cited

Bugge v REB Egineering Pty Ltd [1999] 2 Qd R 227; [1998] QSC 185, distinguished

Canadian Pacific Railway Co v Lockhart (1942) AC 591, cited

Coleman v Anodising and Aluminium Finishes of Queensland Pty Ltd [2002] 1 Qd R 141; [1999] QCA 467, distinguished

Czatyrko v Edith Cowan University (2005) 214 ALR 349, cited

Deatons Pty Ltd v Flew (1949) 79 CLR 370, considered

De Domenico v Marshall (1997) 75 IR 182, cited

Deutz Australia Pty Ltd v Skilled Engineering and Anor [2001] VSC 194, distinguished

Donovan v Laing, Wharton & Down Construction Syndicate Ltd [1893] 1 QB 629, cited

Eagles v Orth [1976] Qd R 313, cited

Froom v Butcher [1976] QB 286, cited

Hallowell v Nominal Defendant (Qld) [1983] 2 Qd R 266, cited

Heywood v Commercial Electrical Pty Ltd [2013] QCA 270, followed

Hollis v Vabu Pty Ltd (2001) 207 CLR 21, cited

Hughes v Tucaby Engineering Pty Ltd [2011] QSC 256, considered

Husband v Hikari (No 42) Pty Ltd [2010] QSC 398, considered

Joslyn v Berryman [2003] HCA 34; (2003) 214 CLR 552, cited

Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90, distinguished

Kondis v State Transport Authority (1984) 154 CLR 672, cited

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20, applied

McDonald v Commonwealth (1945) 46 SR (NSW) 129, considered

Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd [1947] AC 1, considered

Munzer v Johnston and Anor [2009] QCA 190, considered

Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd (1986) 160 CLR 626, cited

Queensland University of Technology v Davis [1997] QCA 437, followed

Scott v Davis (2000) 204 CLR 333, considered

Shaw v Menzies [2011] QCA 197, cited

State of New South Wales v Lepore [2003] HCA 4; (2003) 212 CLR 511, cited

State of New South Wales v Mikhael [2012] NSWCA 338, cited

Thomas v O'Shea (1989) Aust Torts Reports 80-251, distinguished

TNT v Australia Pty Ltd v Christie [2003] 65 NSWLR 1, distinguished

Wilton and Cumberland v Coal and Allied Operations Pty Ltd [2007] FCA 725, distinguished

COUNSEL:	GF Crow QC with M Holmes for the Plaintiff
	PT Cullinane for the First Defendant
	MT Hickey for the Second Defendant
SOLICITORS:	Taylors Solicitors for the Plaintiff
	DibbsBarker Lawyers for the First Defendant
	Meridian Lawyers for the Second Defendant

[1] **McMEEKIN J:** Clint Paskins claims damages for injuries that he suffered on 16 August 2013 in the course of his employment with the first defendant, Hail Creek Coal Pty Ltd ("Hail Creek"). The injury occurred while he was operating a Terex T4400 haul truck at a mine operated by Hail Creek. He alleges that his injuries were caused, inter alia, by the negligence of an employee of the second defendant Workpac Pty Ltd ("Workpac"), one Anthony Phillips. Mr Phillips' labour was hired to Hail Creek pursuant to a contract between Workpac and a third party, Rio Tinto Services Limited.

[2] By the conclusion of the trial it was not in issue that a collision occurred between the tray of the truck operated by Mr Paskins and the bucket of an excavator operated by Mr Phillips shortly after midnight ("the incident") and that as a result Mr Paskins suffered injury.

[3] The issues are:

(a) What was the cause of the incident? The defendants argue the incident occurred because of the plaintiff's negligence. The plaintiff argues that the incident was caused by Mr Phillip's negligence, for whose negligence he says Workpac is vicariously liable, or by an unsafe system of work for which Hail Creek is liable;
(b) If Mr Phillips was negligent, whether Workpac is vicariously liable for Mr Phillip's negligence. Workpac argues that Hail Creek was his employer *pro hac vice*;
(c) If the defendants or either of them were in breach of duty, whether the plaintiff was contributorily negligent and if so what apportionment should be made;
(d) Whether Workpac was obliged under its contract with Rio Tinto Services to indemnify Hail Creek in respect of the plaintiff's claim;
(e) What damages should be assessed.

LIABILITY

The Witnesses

[4] Mr Paskins and Mr Phillips are the only witnesses to the incident. The accounts of the two men differ as to what happened. While there are a number of differences in their recollections of the lead up to the incident, there are three significant distinctions in relation to the incident itself. The first is that Mr Phillips says that the truck rode up on spillage. Mr Paskins says that he avoided it. The second is the speed of approach of the truck. Mr Phillips has the truck travelling significantly faster than Mr Paskins. The

third is that Mr Paskins says that his vehicle was struck by the bucket of the excavator after, or as, it became stationary and Mr Phillips says that the truck ran into the bucket of the excavator.[1]

[5] As will be seen I think the probabilities favour some aspects of one witnesses' account and some aspects of the other's. To the extent the assessment of the reliability of the witnesses is concerned I found Mr Phillips to be more creditable, at least in a general sense. Mr Phillips was in a much better position to see what occurred. He was a much more experienced operator. And he was an impressive witness. Mr Paskins was not. Mr Phillips appeared to have a good recall of events, he conceded points appropriately, and he was generally consistent. As well he has no evident financial interest in the outcome of the case, albeit there is no doubt some pride involved in defending his work.

[6] Mr Paskins was unimpressive. Quite apart from his manner of giving evidence, and there could be number of explanations for that, there were two problems with his evidence. First, his account of the seatbelt coming undone seemed to me to be inherently improbable. Secondly, his evidence as to the impact on him of his injuries seemed to me to exaggerate his condition.

[7] I will detail the damages issues later, but as to the seatbelt issue Mr Paskins' account requires that the seatbelt came out of its restraining clip thereby allowing his head to strike the steering wheel of the truck. The alternative possibility is that Mr Paskins failed to put the seatbelt on, or failed to adjust it appropriately so that it was ineffective.

[8] I cannot be certain which of those possibilities pertained but there are significant difficulties with Mr Paskins' claims. The first is that he made no mention of the seatbelt coming adrift in his initial report to his supervisor, Mr Bosma[2] or in an early email to another supervisor a Mr Newberry. That is a surprising omission. I am conscious that he had a head injury but he spent many hours with Mr Bosma and had time to reflect by the time he wrote the email. It was hardly a circumstance that he was likely to overlook.

[9] The second problem lies in the improbabilities involved. Apart from the difficulty in having the seatbelt come out of its restraining clip – it must necessarily slide out of a very narrow opening – is the difficulty in how it came to get back in again. There is no prior report of any belt ever having come out of the opening. The highest the evidence reaches is that there is a report of a seatbelt catching on a guide loop on 11 September 2013.[3] Nor is there a report by any driver of having replaced the seat belt in its restraining clip after the incident. Whoever next used the truck was obliged to report such a defect as an inoperable seatbelt and stand the truck down. It would be in the operator's interests to report it to keep himself or herself safe. There is a report of the belt being examined several hours after the incident and then being in its normal condition. So while it may be possible for the belt to come out of its clip, and it is possible that an operator replaced the belt without reporting the very obvious defect and in complete disregard of his own safety, both events are improbable. So is Mr

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[1] Most clearly at T2-72/45-46; his evidence in chief: T2-70/17-18 and 72/6-7.
[2] T2-17/41-2; T2-19/17-30.
[3] T2-31/15-45.

Paskins' failure to report the issue at an early stage. So there seems to be improbability piled on improbability for this account to be accurate.

[10] The third issue is not necessarily of great significance but potentially explains matters. In a reconstruction Mr Paskins has positioned the seatbelt inappropriately - over his right bicep.[4] A Mr Spreadborough assisted in the reconstruction. He thought that the placing there was not mere inadvertence (as Mr Paskins would have it) but deliberate.[5] If it was deliberate then the seatbelt was worn too loosely to be effective, at least in restraining the driver to ensure the head was not brought into contact with the steering wheel should there be a forceful impact. That would explain the failure to report, the lack of any evidence of any defect being observed following the incident and the striking of the head on the steering wheel. I note that Mr Paskin's complaint that the defendants had been selective in their choice of photographs with the effect of misrepresenting the reconstruction was not followed up by his counsel in seeking to obtain or tender any further photographs.

[11] Having said that, so far as the liability issue is concerned, I do not see that it matters greatly whose version is preferred.

The Incident

[12] Mr Paskins was required to drive a haul truck along a mine road to a loading point and then reverse the truck into the loading point. Mr Phillips operated an excavator. His task was to load ore into the tray of the haul truck. Mr Phillips' machine was situated on what is called a "bench" and his operating position was some 12 meters above the ground level[6] and six to seven meters above the tray of the waiting truck.[7] The area was well lit. Mr Phillips had a very good view of the loading area.[8] He was in control of it.

[13] The men were using what was called a self-spotting procedure whereby the truck driver aligned his truck in the appropriate position to be loaded. Mr Phillips succinctly explained that process: "the trucks know to come at a slight angle to the bench and have their tray in line with the front idler, which is the front of the track of an excavator."[9] The truck driver uses his side mirror to sight the front of the track idler of the excavator.[10] His task is to align his tray with the front idler.[11] He cannot see the bucket of the excavator.[12]

[14] It is common ground that Mr Phillips had the better view, that he had control over his pit, and that he had the responsibility of signalling (by sounding the horn of the excavator) to stop Mr Paskins reversing. It is common ground that Mr Phillips failed to sound the horn of the excavator in a timely way.

[15] It is also common ground that there was spillage of material present on the ground in the vicinity of where the trucks travelled to the loading point from a previous loading

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[4] See the photographs at pp11-15 in Ex 1.
[5] T2-35/46 – 36/11.
[6] T2-62/46-47.
[7] T2-62/5-6 and 62/44.
[8] T2-63/5-10.
[9] T2-67/21-23.
[10] T2-68/45.
[11] T2-69/9.
[12] T1-45/25.

operation. Mr Phillips said that the material was just outside the line of travel of the previous trucks but it is clear that such spillages could cause problems and had to be cleaned up from time to time. Mr Phillips had a tractor available that he could direct to perform the clean-up.

[16] The defendants pleaded that the truck collided with the bench but there is no evidence of that. If there was any contact with the bench there is no evidence that involved any force or had any consequences. Such contact was not out of the ordinary.[13]

[17] I am satisfied that the presence of this material caused the truck to rise up higher than it normally would as Mr Phillips says he observed. In doing so it collided with the loaded bucket of the excavator.[14] The collision involved significant force which caused Mr Paskins to be severely jolted. As mentioned he struck his head on the steering wheel. It is common ground that he suffered a back injury in the incident.

[18] Both men were aware of the presence of the material on the ground. Mr Paskins said that he did his best to angle his truck to avoid the spillage on his second try. Whether there were two attempts to position the vehicle is in issue and, I think, immaterial. The probabilities favour that there were two attempts. He gave that version immediately after the event when reporting to his supervisor and I cannot see that he had any reason to mislead his supervisor then. But absent some signal from Mr Phillips he was entitled to think it safe that he reverse.

What was the Cause of the Incident?

[19] In my view there were three operative causes of the incident. The first was the positioning of the bucket. The second was the presence of spillage of material. The third was the lack of any signal to stop.

[20] The essential cause of the incident was that Mr Phillips had the bucket of the excavator so located that the truck could collide with it. It should not have been there. That the bucket should be kept clear of the tray of the reversing truck seems a self-evident precaution to take. Mr Paskins' ability to see the location of the bucket was very limited or non-existent. As I have explained he was obliged to use his side mirrors to position his vehicle relative to the front idler of the excavator. He relied on Mr Phillips to have the bucket clear of the tray. It wasn't on this occasion.

[21] Senior counsel for Mr Paskins drew comfort from Hail Creek's own operating procedure designated HCM-06-MAN-001 and headed "Excavator Operating Procedures – Training Manual".[15] Clause 5.15 describes the usual "self-spotting" procedure the men followed. Clause 5.16 Part 2 of that document is headed "Procedures for Excavators". Clause 5.16.1.2 deals with what is called "Exclusions" which, from the context, is apparently intended to set out the procedures that an operator should adopt when the usual procedure of "self-spotting" is inappropriate. The exclusions are said to depend on certain pre-conditions. Whether the pre-conditions applied on this occasion was not explored in evidence. They seem to be satisfied. One such pre-condition is said to be "when operations require each truck to be positioned."

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[13] See the evidence of Mr Phillips: T2-70/39 – 71/5.

[14] T2-67/1-5.

[15] The paginating and index on the exhibit is confusing. The index to volume 3 of Ex 1 shows this document as document No 56 and consisting of pages 653-803 of the bound volume. In fact it is document No 55 and runs from p499 to p652.

Mr Paskins was endeavouring to position his vehicle on this occasion and the precautions that are said to be necessary would seem to be applicable. Step 2 under "Exclusions" is headed "Present bucket while slewing material into Truck tray." That describes what Mr Phillips was doing at the time.[16]

[22] Whatever be the case, there appears a "Note" under "Step 1" which by its terms applies when self-spotting: "Taking the bucket away from the loading bay prevents spillage from rolling out blocking the Trucks entry and ***must*** be followed while Trucks are self spotting".[17]

[23] Under the heading of "Step 2" there appears the following cautionary notes:

> "*Note:*
>
> *There may be a need to slow down the slew or even pause during this process to give the Truck time to position back far enough.*
>
> - *Keep bucket tucked in to maintain control of material until the tray is within reach.*
>
> *Caution:*
>
> - *Watch not to slew over loading bay till the tray is back far enough as the spillage from the bucket may fall and block access for Trucks causing costly delays.*
>
> - *Be mindful that the combination of slewing of the Excavator and the Truck's reversing speed may cause the tray to arrive sooner than expected.* ***The bucket should be raised high enough to clear the tray well in advance of Truck arriving in loading bay.***
>
> *STEP 3 - Sound the horn when the truck is in the correct position.*"[18]

[24] Whether the safe operating procedure applied by its terms or not the precaution mentioned in the procedure to have the bucket clear the tray seems to be a common sense one. Mr Phillips accepted that he was trained to raise the bucket enough to clear the tray of the truck, well in advance of the truck arriving in the loading bay.[19]

[25] Spillage was common place and there was a system in place to deal with it. Either operator could have called for it to be removed before proceeding. But Mr Phillips had the overall control[20] and the better view. Knowing of the presence of the spillage – and so at least the possibility of the truck travelling over it and so rising up to some extent - it was incumbent on Mr Phillips to have his bucket high enough to ensure that there could be no impact with the truck. The possibility of a forceful impact sufficient to cause injury should have been obvious.

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[16] Mr Phillips gave a number of descriptions but see T2-76/29-37.
[17] See Ex 1 vol 3 p 634 – emphasis in the original.
[18] See Ex 1 vol 3 p 635 – my emphasis.
[19] T2-77/8-10.
[20] See Ex 1 vol 3 p 518 cl 2.12.

[26] Mr Phillips says that Mr Paskins reversed too quickly for him to sound the signal to stop. In his evidence in chief he described the speed as a "little bit quicker than you would normally back a truck to the digger".[21] In re-examination he had the speed as equivalent to a "swift run".[22] However Mr Phillips drew no distinction between the time he would expect a truck would take to reverse in the normal course[23] and the time that it took Mr Paskins to reverse on this occasion.[24] I appreciate that these can only be estimates, and I appreciate that Mr Phillips' account could still be more or less accurate, that is that the truck did come back more quickly than he was used to and expected, however it is difficult to see how the speed could have been so great as to deprive Mr Phillips, if he was appropriately alert, of the chance to direct Mr Paskins to stop.[25] As well, Mr Paskins' point that there was only a limited distance in which to gather any speed[26] was not challenged by any countervailing evidence and seemed to reflect the realities of the situation. While that is sufficient to decide the point I note that Mr Paskins gave uncontested evidence that the speed of travel of his truck was monitored at all times, even the rate of reversing into place for loading.[27] No evidence was led by Hail Creek from their records to show that his reversing speed on this occasion was out of the ordinary. An inference can be drawn that the records would not have helped Hail Creek.

[27] I am satisfied that the incident occurred as a result of an error of judgment by Mr Phillips in assessing the height of the bucket, the likely effect of the mound of spoil on the height of the tray, and in failing to sound a timely signal to Mr Paskins to stop. In my view Mr Phillips' errors, particularly the first and third, amounted to negligence – he fell below the standard of reasonable care that should be expected of an operator of the excavator.

[28] The issue then is whether these errors constitute a breach of duty owed to the plaintiff by either defendant.

Was Hail Creek in breach of duty?

[29] I do not think there can be any criticism of Hail Creeks' system of work. The plaintiff urges that the system of work should not have involved an operator slewing his bucket into position as the truck approached. While that may have lessened the risk that the operator might misjudge the respective positions of the truck and the bucket it would not have removed the risk entirely. Against that, as is conceded, such a change would have an impact on production, and I would think a very significant impact. More importantly there was no evidence that despite this operation having been carried out in this way on probably many thousands of occasions a similar event had ever occurred.

[30] What went wrong was an operator error, that operator not being Hail Creek's employee, at least directly. Is Hail Creek responsible? I cannot see why not. It has long been the law that the duty owed by an employer is a non-delegable one: *Kondis v State Transport Authority*;[28] *Czatyrko v Edith Cowan University.*[29] It is immaterial that the

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[21] T2-66/10-11.
[22] T2-80/44.
[23] T2-79/10-13.
[24] T2-70/21-28; T2-78/6-9.
[25] T2-78/11-15.
[26] T1- 46/45.
[27] T1-12/38-39.
[28] (1984) 154 CLR 672 at 687-688 per Mason J

employer is not personally at fault. As Gummow J said in *Scott v Davis* "... the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty".[30]

[31] I do not see that the position is in any way altered by sections 305B and 305C of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) which are relevant to the duty owed by an employer of a worker. There is nothing in those sections to suggest that the non-delegable nature of the employer's duty has been affected. The common law still informs the application of the principles there set out.[31]

[32] Those provisions are as follows:

> **305B General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury.
>
> **305C Other principles**
>
> In a proceeding relating to liability for a breach of duty—
>
> (a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and
>
> (b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give

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[29] (2005) 214 ALR 349 at 353 paragraph [12].
[30] (2000) 204 CLR 333 at 417 paragraph [248].
[31] Cf. but in respect of different legislation see *State of New South Wales v Mikhael* [2012] NSWCA 338 at paragraph [82] per Beazley JA.

rise to or affect liability for the way in which the thing was done; and

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

[33] I am satisfied that the three pre-conditions set out in section 305B(1) are met. The risk of injury was plainly foreseeable and it would appear from the safe operating procedure, in fact foreseen. The risk was far from insignificant. As senior counsel for Mr Paskins submitted: "The system was one which encouraged 'efficiency' and a procedure which had two large pieces of mining equipment coming together simultaneously. The margin for error was small and had significant consequences given the size of the machinery and weights and forces involved."

[34] The weight of a laden bucket was estimated by Mr Phillips as being at least in the order of 55 tonnes and may have been much higher.[32] It is obvious that a collision between a bucket so laden and the truck could result in significant forces coming on to the operator of the truck. Mr Phillips readily accepted that possibility.[33] Mr Paskins' description of the effect on him on this occasion was not disputed. No reason was advanced as to why a reasonable person in the position of Hail Creek would not have taken precautions to avoid the injury. In fact they did – they employed experienced operators and instructed them to keep their buckets clear of the tray. Mr Phillips simply failed to follow the instruction on this occasion.

[35] As to the factors in section 305B(2): the probability of injury should there be a collision was high; the prospect of injury potentially serious; and the burden of avoiding the risk was relatively small – adequate training and instruction.

[36] The matters mentioned in section 305C do not impact on the assessment here. I did not receive any submissions to the contrary.

[37] Nor do the duties imposed on Hail Creek as the "coal mine operator" under the *Coal Mining Safety and Health Act 1999* (Qld) alter this conclusion. If anything the duty is reinforced by the obligations there imposed.[34] I do not see the need to consider the issue further.

Is Workpac liable to the plaintiff?

[38] Workpac was Mr Phillips' employer. An employer is vicariously liable for an employee's negligence. Latham CJ set out the relevant principle in *Deatons Pty Ltd v Flew*:

> "An employer is liable for the act of his servant only if the act is shown to come within the scope of the servant's authority either as being an act which he was employed actually to perform or as being an act which was incidental to his employment. The law is clearly

[32] T2-76/20.
[33] T2-76/44-45 – "quite an impact".
[34] See sections 37, 38 and 41.

> stated to this effect in *Canadian Pacific Railway Co v Lockhart* (1942) AC 591."[35]

[39] Mr Phillips was plainly acting within the scope of his employment at the relevant time.

[40] Workpac seeks to avoid the imposition of liability on it by invoking the concept of a temporary abrogation of the relation of master and servant between itself and Mr Phillips (the *pro hac vice* concept) citing *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd* [1947] AC 1; *McDonald v Commonwealth* (1945) 46 SR (NSW) 129; *Deutz Australia Pty Ltd v Skilled Engineering and Anor* [2001] VSC 194; *Barrett v Drake Personnel Limited* (Unreported, District Court of Queensland, McLauchlan DCJ, 20 April 1998); and *Kelly v Bluestone Global Ltd (in liq)* [2016] WASCA 90. Given the ubiquity of labour hire arrangements, particularly in the mining industry, the point raised here is of some importance. I note that the position is complicated by the fact that Hail Creek had imposed on it statutory obligations under the *Coal Mining Safety and Health Act 1999* (Qld). The contractual provisions that provided for Hail Creek to exercise what control it did over Workpac's operatives (to which I will come) also ensured that it could discharge its statutory obligations.

[41] Workpac submits that Mr Phillips was "effectively subsumed into the system of work of the mine operator, because the mine operator:

(a) trained all workers who came into the mine;
(b) carried out all induction and training;
(c) had superintendents and mine supervisors to control the systems and methods of communication between workers when carrying out their duties;
(d) did not engage labour hire employees in any supervisory role;
(e) coordinated all workers on site;
(f) conducted all safety investigations on site;
(g) determined the site rules;
(h) did not differentiate in any practical sense between labour hire workers and its own employees;
(i) had clear and defined systems for induction training and operation on the mine site and the second respondent had no role or control over those matters;
(j) was entitled to direct labour hire employees not only in what they were required to do but, importantly, how to do it;
(k) had in place a written procedure for loading dump trucks on the site in which procedure the appellant had been trained."

[42] That summary is, subject to the points that immediately follow, accurate. Hail Creek denies that the conclusion should follow pointing out:

(a) Workpac kept an office on site;
(b) Workpac had supervisors on site who dealt with human resources issues – such as disciplinary matters, performance reviews, recruitment, [36] pay issues, or uniforms;[37]

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[35] (1949) 79 CLR 370 at 378; and see *State of New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511 at paragraphs [40], [202], [223], [225]–[232].
[36] T2-84/37 – 85/12.
[37] T2-61/8.

(c) Mr Phillips was an experienced operator and claimed the right to carry out his work as he saw fit.[38]

(d) The contract between the parties preserved Workpac's entitlement to control its workforce. I detail the terms below.

Discussion

[43] In *McDonald*, Sir Frederick Jordan (Halse Rogers & Roper JJ agreeing) said:

> "The more authoritative modern decisions emphasize the point that, unless of course the act of the employee was outside the scope of the employment of both general and particular employer, the liability of the former or the latter depends upon the nature and the extent of the control transferred to the latter or retained by the former … *Prima facie*, it is the general employer who is liable; … and **liability is not shifted to the particular employer by the fact that even a considerable degree of control is exercisable by him; but the greater his right to control, the greater the likelihood that it is open to a tribunal of fact to find that his has become the relevant control, and that a shift of liability has occurred** …I think that the principles established by the authorities are as follow. **If by the agreement the employer vests in the third party complete, or substantially complete, control of the employee, so that he is entitled not only to direct the employee what he is to do but how he is to do it, and the employee was performing services stipulated for, or authorised by, the third party at the time, the third party is liable … If the control vested in the third party is only partial, so that, although the third party is entitled to give directions to the employee as to what he is to do, he is not entitled to direct him how he is to do it, the employer remains liable.** If, however, the third party, though not entitled to do so as between himself and the employer, assumes to give a special direction to the employee as to how he is to do a particular act, or if he directs him to do an act outside the scope of the stipulated services, and the employee, in complying with the direction, negligently causes the injury, it is the third party who is liable … If the act of the employee which causes the injury was done outside the scope of any employment either by the employer or by the third party, and not as the result of any express or implied direction of either, the employee alone is liable."[39]

[44] As the above passage makes clear it is the right to control that is crucial. The contract between Workpac and Rio Tinto (under which Mr Phillips' labour was hired to Hail Creek)[40] expressly preserves Workpac's ability to exercise control over its employees. There are several relevant clauses.

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[38] T2-60/32-33.

[39] *McDonald v Commonwealth* (1945) 46 SR (NSW) 129 at 132 – my emphasis.

[40] I refer to the contract described as "Rio Tinto – Variation Agreement (No 5) Umbrella Supply Contract Services (and Associated Goods) Contract No 5600019265 – Supply of Supplementary Labour.

[45] Clause 59 of the General Conditions[41] imposes on Workpac an obligation to manage industrial relations with its employees, provides that Hail Creek can exclude Workpac's employees from site, and provides inter alia:

> (o) For the avoidance of doubt, there will be no relationship of employer and employee, nor principal and agent nor contractor and independent contractor between the company and the Temporary Personnel. Specifically:
>
> (i) the Service Provider has no authority to make any offer, whether to Temporary Personnel or any other person, of employment with the Company or any other member of the Rio Tinto Group; and
>
> ii) the attendance of Temporary Personnel at the Site and the performance of work by them does not create any legal relationship (including that of employer and employee) between the Temporary Personnel and the Company or any other member of the Rio Tinto Group.
>
> (p) The parties acknowledge and agree that one of the Service Provider's fundamental obligations is to direct the Temporary Personnel to comply with the day-to-day guidance and instruction of the Relevant Company. **This does not remove the obligation of the Service Provider to exercise overall direction and control in relation to the Temporary Personnel.**[42]

[46] Thus the agreement between the parties contemplated continuing control being exercised by Workpac. Other terms and conditions similarly evidenced that continuing control. The variation to the contract that applied at the material time provides, so far as relevant is to similar effect (with my emphasis):

> **1. General**
>
> (d) The objective of this Contract is to address the Relevant Companies' need for Temporary Personnel to supplement the Permanent Workforce on account of variations in market conditions confronted by the Relevant Company and their need to respond to such variations.
>
> (g) **Temporary Personnel shall be and will remain at all material times Service Provider Personnel and may include a range of disciplines and trade categories**.
>
> **11.2 Inductions**
>
> (a) **The Service Provider must ensure that Temporary Personnel entering upon the Sites undergo Relevant Company Inductions, including required area familiarisations, prior to entering the Site**.
>
> (b) The Service Provider must provide the Relevant Company with as much notice of the Temporary Personnel requiring Relevant Company Inductions as per Paragraph 11.2(a) of Schedule A2 as is possible and reasonable and

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[41] Inserted by Schedule F2 to the contracts and to be found at Ex 1 Vol 2 pp 479 – 481.
[42] My emphasis.

follow the Relevant Company's procedures with respect to the conduct of the Relevant Company Inductions.

11.3 Temporary Personnel Management

(a) **Temporary Personnel are to remain at all times employees of the Service Provider**. The Service Provider must provide an account manager who will be a single point of contact **and a day to day presence at the Relevant Company Site for Personnel and Contract management issues**.

16.5 Legal Relationship

(a) For the avoidance of doubt, **there will be no relationship of employer and employee** nor principal and agent or contractor and independent contractor between each Relevant Company and the Temporary Personnel. Specifically:

(i) the Service Provider has no authority to make any offer of employment, whether to Temporary Personnel or any other person, of employment with Rio Tinto or a Relevant Company; and

(ii) **the attendance of Temporary Personnel at the Sites and the performance of work by them will not create any legal relationship (including that of employer and employee) between the Temporary Personnel and any member of the Rio Tinto Group and/or a Relevant Company.**

(b) The Parties acknowledge and agree that one of the Service Provider's fundamental obligations is to direct the Temporary Personnel to comply with the day-to-day guidance and instruction of the Relevant Company. **This does not remove the right of the Service Provider to exercise overall direction and control in relation to Temporary Personnel**.

[47] Schedule E2 to the contracts provides for terms specific to the Hail Creek site. Clauses 3.6, 6, 7 and 10, particularly 10.1, 10.6 and 10.10, are said to be relevant to the issue. Those clauses place continuing obligations on Workpac inconsistent with an abrogation of complete control. Those clauses provide (the "Contractor" being Workpac for present purposes):

3.6 Inductions and Training

(a) Arranging inductions:

(i) Company Site Inductions are regularly booked out;

(ii) the Company requires a minimum of one week's notice from the Contractor of the number of its intended nominees for Site Inductions;

(iii) to ensure a place for the Contractor's Personnel at Site Inductions on Contractor preferred dates, the Contractor must give as much advance notice to the Company as possible;

(iv) irrespective of notice given by the Contractor to the Company, in relation to any particular Site Induction, the:

(A) number of Contractor Personnel that can attend; and

(B) date of Site Inductions that Contractor's Personnel can attend;

is at the sole discretion of the Company Representative.

(v) all necessary paperwork must be provided at least three working days prior to the induction date.

(b) Training, skills and competencies:

(i) To ensure safe and effective performance of its obligations under the Contract, the Contractor must ensure that:

(A) required experience and skill levels of its Personnel are maintained;

(B) its Personnel have skills and competencies to a level that allow them to carry out tasks competently, safely, efficiently, effectively and professionally;

(C) None of its Personnel operate vehicles, plant or equipment without training considered appropriate under, but not limited to, the requirements of the:

(1) Queensland Coal Mining Safety and Health Act and associated Regulations;

(2) Contractor's safety and training systems;

(3) Company's HSEQ MS;

(4) Company's HSEQ MS procedure: '…Learning and Development Scheme';

(5) training competencies nominated by the Queensland Coal Mining Safety and Health Advisory Committee; and

(6) Standard 11;

(D) an assessor registered and approved by the Company conducts any competency assessments; and

(E) each of the Contractor's Personnel are familiarised, trained, tested and assessed by the Company approved Contractor's authorised trainers and assessors before being authorised to operate any vehicles, plant or equipment.

(ii) The Company reserves the right to assess any of the Contractor's Personnel to ensure they are competent to operate the equipment.

(iii) The Company may, at any time, and at its sole discretion, prescribe additional Training, skill and competency requirements for the Contractor's Personnel, if it is advised as being required by the appropriate authorities, such as the Department of Environment and Resource Management (DERM).

(iv) In addition to and in support of the requirements of this Paragraph 3.6, the requirements for induction and training covering those Personnel working at the Company's Site are detailed in the HSEQ MS, specifically procedure: '…Learning and Development Scheme'.

6. Monitoring of services and work

The Company's Representative will monitor the quality of the work and Services carried out by the Contractor's Personnel. The Company Representative may direct the Contractor to improve the quality of any workmanship that the Company Representative deems unsatisfactory.

7. Right to direct the removal contractor's personnel from site

The Contractor warrants its understanding that:

(a) if the Contractor causes, or allows any person to work on Site including, without limitation:

(i) in the provision of Services;

(ii) work on, or with any:

(A) tools;

(B) vehicles;

(C) plant;

(D) machinery; or

(E) mobile equipment;

who has not been suitably inducted and appointed for the type of work or Service that person is performing, the Contractor may be in breach of the Queensland Coal Mines Safety and Health Act1999 and associated Regulations.

(b) if such a circumstance contemplated in (a) above should arise, the Company's Representative may direct the Contractor to reassign or remove from Site:

(i) the person concerned; and/or

(ii) the Contractor's Site representative.

(c) if the Company Representative considers that the work or Service performance of any of the Contractor's Personnel including but not limited to:

(i) attitude to safety;

(ii) conduct of any of the Contractor's Personnel;

warrants the removal of that Personnel from the Services and/or the Site, then the Company's representative may direct the Contractor to remove that Personnel.

(d) the Contractor must, at no cost to the Company, comply with any direction given by the Company under this Paragraph 7.

10.1 General

(a) The Contractor is accountable, and responsible for, and must ensure that all its Personnel and invitees work in a safe manner on site at all times.

(b) The Contractor warrants that it understands that all matters and conditions that concern the:

(i) safety;

(ii) health; and

(iii) welfare

of Personnel employed or provided by it to:

(i) work at; or

(ii) to provide Services to;

the Company at its Site will be:

(i) the Contractor's sole responsibility;

(ii) at the Contractor's expense; and

(iii) to the satisfaction of the Company's Representative.

10.6 Safety health management system

The Contractor warrants that it understands that at a coal mine it has an obligation to ensure, to the extent that they relate to the work undertaken by the Contractor, that provisions of the Qld Coal Mining Safety and Health Act and the Hail Creek Mine HSEQ MS are complied with.

10.10 Safety huddles

The Contractor must:

(a) hold a Safety Huddle with the crew at the start of each shift; and

(b) ensure the crew:

(i) reviews the previous day's events;

(ii) any tasks and hazards for the coming shift; and

(iii) identifies how the hazards are going to be controlled.

[48] Thus under the terms of the contract between the parties Workpac is obliged to have a continuing presence on site and to exercise significant controls over its employees. Nonetheless, while relevant, the terms of the contract are not determinative. It is the totality of the relationship that must be considered, the right to exercise relevant control being the important factor.

[49] In *Deutz Australia Pty Ltd v Skilled Engineering*[43] Ashley J, after an extensive review of the authorities summarised the principles that apply as follows (footnotes omitted):

> "[109] What has been decided, I think, is this: first, a general employer which seeks to shift vicarious responsibility for the negligence of its servant onto another bears a heavy onus, which can only be discharged in quite exceptional circumstances.
>
> [110] Second, transfer will less readily be inferred where the general employer provides man and machine; and probably also where the general employer provides a skilled worker.
>
> [111] Third, transfer may be discerned where the hired worker, despite a machine being also hired out, is bound to work the machine "according to the orders and under the entire and absolute control" of the hirer.
>
> [112] Fourth, the contract made between general and temporary employers, so-called, cannot determine whether there has been change of masters for purposes now under discussion.
>
> [113] Fifth, circumstances in which transfer may be discerned are the following:
>
> (i) Where the hirer can direct not only what the workman is to do, but how he is to do it.
>
> (ii) Where the hirer "is entitled to tell the employee the way in which he is to do the work".
>
> (iii) Where the complete dominion and custody over the servant has passed from one to the other.

[43] [2001] VSC 194 – citations omitted.

(iv) Where, by an agreement "the employer vests in the third party complete, or substantially complete, control of the employee, so that he is not only entitled to direct the employee what he is to do, but how he is to do it".

(v) Where it can be said that the hirer has such authority to control the manner in which the worker does his work that it can be said that the worker is serving the hirer, not merely serving the interests of the hirer.

(vi) Where it cannot be said that the reason that the worker subjected himself to control of the so-called temporary employer as to what he did and how he did it was that his general employer told him to do so.

(vii) Where it can be said that the servant was transferred, not merely the use and benefit of his work."

[50] Accepting the accuracy of that analysis I observe that of the seven circumstances identified by Ashley J in paragraph [113] those I have numbered (i), (ii), (iv) and (v) are all reflecting much the same concept. Of those Mr Phillips denied (i) and (ii), and I do not accept that the contract was of the type mentioned in (iv). In those circumstances the inference in (v) does not follow.

[51] Quite apart from the contract several features of the arrangements seemed to me to be against the transfer of employment:

(a) Mr Phillips was highly skilled.
(b) Workpac retained administrative controls, and in a day to day sense with an on-site office.
(c) The circumstances are entirely consistent with a transfer merely of the "use and benefit" of Mr Phillips' work.
(d) Mr Phillips subjected himself to the control of Hail Creek to the extent that he did because that is what his employment with Workpac obliged him to do.

[52] While this is a factual decision counsel argued that two cases in particular were instructive.

[53] Senior Counsel for the plaintiff submitted that the leading decision on the point was Mason P's judgment in *TNT Australia Pty Ltd v Christie.*[44] There Mason P rejected the argument that a labour hire company (there Manpower) did not have imposed on it the employer's non-delegable duty because it was no more than an employment agency/bureau or "body hire company" and because it had handed over its employee into the control of the hirer (Hail Creek's equivalent). His Honour pointed out:

> "[66] Manpower's concession (properly made) that it was and remained the plaintiff's employer and the facts showing a continuing

[44] [2003] 65 NSWLR 1 at 15 paragraphs [64]-[67] – Foster AJA agreeing.

> relationship of that nature negated the possible application of the qualification described by Gibbs CJ in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 641:
>
> > Where the services of the servant of one employer are temporarily used by another, both employers will not be liable; prima facie the liability will usually remain with the general employer who may, however, `show, if he can that he has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts': *Mersey Docks and Harbourboard v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 at 13.
>
> [67] In my view, it would be contrary to principle to enable or even to encourage an employer that operates a labour hire business to treat the normal incidents of the employment relationship as modified simply because its employees are sent off to work for a client. Indeed, the very fact that employees are dispatched to external venues and placed under the de facto management of outsiders will, in some cases, have the practical effect of requiring the employer to adopt additional measures by way of warning or training in order to discharge its continuing common law duty of care to its employees. (Footnotes omitted)"

[54] I do not accept that Mason P's decision does decide the point. Mason P's analysis is not completely apposite. The issue in *TNT Australia* concerned the "continuing common law duty of care to its employees." That is not the issue here. In *TNT Australia,* Manpower was endeavouring to avoid its obligations to its own injured employee. Here Workpac seeks to avoid an imposition on it of liability to another for its employee's negligence. The considerations mentioned by Mason P in the last sentence of paragraph [67] above are not directly relevant to that issue.

[55] There is some authority for the proposition that it is possible for a person in employment to have 'different employers' for different purposes: *Kelly v Bluestone Global Ltd (in liq)* [2016] WASCA 90 per Murphy JA at [71] citing *De Domenico v Marshall* (1997) 75 IR 182 at 191. As well, the proposition is implicit in Brennan J's observation on the effect of *McDonald* in *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 668:

> "The rule to be derived from *Mersey Docks* and *McDonald* is not that two persons cannot be vicariously liable for the same damage or that an employee cannot be the servant of two masters, but that two employers of the same servant who negligently causes damage will not both be liable for the damage if one rather than the other has what Jordan CJ called 'the relevant control': *McDonald* at 132."

[56] So, consistent with the continuing authority of the decision in *TNT v Christie* (which has been widely followed since 2003), it may be right to say that for the different purpose of determining the extent of an employer's vicarious liability there is a

different answer to the question of whether the employment has been transferred to a third party.

[57] Senior counsel for the plaintiff has drawn my attention to the decision of Conti J in *Wilton and Cumberland v Coal and Allied Operations Pty Ltd* [2007] FCA 725 where his Honour examined closely whether employment had been transferred in the context of a labour hire arrangement in a mining setting. The decision concerns quite a different issue – the rights of employees under the *Workplace Relations Act 1996* and to payment under a certified agreement. I could not draw much guidance from the analysis and conclusion reached there.

[58] Counsel for Workpac relied on the decision of the Court of Appeal in Western Australia in *Kelly v Bluestone Global Ltd (in liq)* [2016] WASCA 90. While the circumstances of the incident in which the plaintiff there was injured are markedly similar to those that pertain here, the relationship between the mining company (ie the Hail Creek equivalent) and the employer of the excavator operator (ie Workpac here) is crucially different. As McClure P explained:

> **"[59]** The facts of this case are unusual. It is misleading to characterise the second respondent's business as that of labour hire. It is more akin to the provision of a HR function in which the second respondent presents to its client, for the client's consideration and selection, potential future employees of the client following an initial trial period working for the client, during which the second respondent nominally remains the employer of the worker."

[59] It would not be accurate to say of the facts here that Workpac was the "nominal" employer of Mr Phillips. Nor is there any evidence that the arrangement was entered into for the purpose of vetting potential future employees. The arrangement here is a labour hire contract.

[60] Further it is worth observing that the decision in *Kelly* was by majority. The dissentient, Mitchell J, pointed out the scarcity of decisions over the last near 120 years and the mischief that would be caused if the argument that Workpac advances here were to be accepted:[45]

> "**[90]** The burden of proof on an employer, who seeks to avoid vicarious liability by alleging a transfer of the right to control how the relevant work is done, is a heavy one which can only be discharged in quite exceptional circumstances. This is illustrated by the rarity of modern cases in which the principle has been applied to excuse an employer from vicarious liability for the negligence of an employee acting in the course of his or her employment. Aside from *McDonald*, counsel were not able to refer the court to any 20th or 21st century case in which the principle had been applied to exclude an employer's vicarious liability.
>
> **[91]** There are sound policy reasons why the principle should only be applied in exceptionally clear cases. If it were otherwise, the uncertainty as to who might be vicariously liable for an employee's

[45] Authorities omitted.

> negligent acts would require a plaintiff to sue multiple parties, or risk having the case dismissed on the ground that the wrong defendant has been sued. If a plaintiff sues multiple parties, then the cost to the plaintiff will be increased, the increased complexity involved in introducing an additional party will tend to delay the resolution of the action and an additional party will be exposed to the burden of litigation. If a plaintiff does not sue multiple parties, he or she risks losing a valid claim through misjudgement as to the identity of the defendant. Neither of these outcomes advances the administration of justice. The rule that an employer is vicariously liable in all but quite exceptional cases where there has clearly been a transfer of control and responsibility has the advantage of certainty. Ordinarily (and recognising that there will be cases where the identity of the actual employer is in issue) a plaintiff can identify the proper defendant as the employer of the negligent employee. Employers, and third parties with whom they deal, can more certainly identify the liabilities against which they should insure."

[61] In my view these are cogent policy considerations against Workpac's arguments. And the question of an employer's vicarious liability was historically, in large degree, governed by policy not principle: *Hollis v Vabu Pty Ltd*.[46] Usually an injured person would have no knowledge of the arrangements between two possible "employers". Effectively the issue is which of two personally blameless defendants should bear the liability for Mr Phillip's negligence. Hail Creek was certainly in the better position to supervise and control the operators as they went about their work. But no amount of supervision or control can prevent casual acts of negligence.

[62] It is clear that the onus lies on the general employer (ie Workpac) to show the transfer of services and that the "burden is a heavy one and can only be discharged in quite exceptional circumstances": *Mersey Docks Harbour Board v Coggins & Griffiths (Liverpool) Ltd* per Viscount Simon.[47] Lord Simonds in that case cited Lord Esher in *Donovan v Laing, Wharton & Down Construction Syndicate* Ltd[48] finding that it could only be proved when the "'entire and absolute control' over the workman had passed".[49] That has not happened here.

[63] I have reached the view that Workpac should be held to the usual incidents of employment and that includes liability to injured third parties for the casual acts of negligence of its employees. In my view the heavy onus the authorities speak of has not been discharged.

Contributory Negligence

[64] Each of the defendants contends that Mr Paskins contributed to his injury by his own negligence. The submissions made differ between the parties. Collectively there are five submissions put:

(a) He failed to take action on the spillage, despite having identified it as a potential hazard;

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[46] (2001) 207 CLR 21 at 37 paragraph [34].
[47] [1947] AC 1 at 11.
[48] [1893] 1 QB 629 at 632.
[49] [1947] AC 1 at 19.

(b) He failed to keep a proper lookout for the wheels and rear of his tray which would have ensured he kept a safe distance from the bench;[50]
(c) he failed to ensure that he reversed at a speed slow enough to permit Mr Phillips to blast his horn in circumstances where he was likely to collide with the bucket of the excavator;
(d) He failed to take appropriate action in circumstances where he knew, or should have known, that the seatbelt in his truck was defective; or alternatively
(e) Had he been wearing the seatbelt properly it would not have been possible for him to have sustained the injuries he received.

[65] Hail Creek advances only the seatbelt issues in (d) and (e). Relevant to the employer's argument are sections 305F and 305H of the *Worker's Compensation and Rehabilitation Act 2003* (Qld) (WCRA). They relevantly provide:

305F Standard of care in relation to contributory negligence

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the worker who sustained an injury has been guilty of contributory negligence in failing to take precautions against the risk of that injury.

(2) For that purpose –

(a) the standard of care required of the person who sustained an injury is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

305H Contributory negligence

(1) A court may make a finding of contributory negligence if the worker relevantly—

(a) failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons; or

…

(d) inappropriately interfered with or misused something provided that was designed to reduce the worker's exposure to risk of injury; or .."

[66] The principles that apply to breach of duty mentioned in section 305F WCRA include those set out in section 305D WCRA which relevantly provides:

[50] The submission reads "and the tray" which is confusing. Perhaps the intention was to refer to the bucket of the excavator.

> "(1) A decision that a breach of duty caused particular injury comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***)…"

[67] At common law a plaintiff is guilty of contributory negligence when the plaintiff exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which he or she was exposed: *Joslyn v Berryman.*[51] The question is whether, in the circumstances and under the conditions in which the worker was engaged, the worker's conduct amounted to mere inadvertence, inattention or misjudgement or to negligence rendering him responsible in part for the damage: *Bankstown Foundry Pty Ltd v Braistina*.[52] The onus of proof lies on the defendant.

[68] In my view contributory negligence is not made out. My responses (using the same lettering as above) follow:

(a) It is quite wrong to assert that Mr Paskins took no action regarding the spillage. He identified it and attempted to avoid it. That he failed is not negligence but inadvertence. And he might well have misjudged its height but again he was operating in difficult conditions and such a misjudgement falls well short of negligence. As well he was quite entitled to rely on Mr Phillips to alert him to any potential risk. It is common ground that Mr Phillips was in the superior position.

(b) The issue was not the bench but the location of the bucket. The evidence was that truck drivers positioned their trucks with the wheels "just short" of the bench[53] or resting on it.[54] So far as the evidence shows this is what Mr Paskins did. If there was any impact with the bench it is not shown to be causally relevant.

(c) I have made findings on the speed issue above. Mr Phillips had sufficient time to use the horn of the excavator to alert Mr Paskins. The speed of the truck is not shown to be so far out of the usual to constitute negligence;

(d) It was not shown that Mr Paskins had any prior knowledge that the seatbelt had any defect;

(e) I do find that Mr Paskins was not wearing the seatbelt appropriately – see above.[55] I accept the submission that the failure to wear the seatbelt appropriately would be in breach of an employee's obligation to take care of their own safety. Section 305H(a) is engaged and perhaps (d). Typically a failure to wear a seat belt, with the result that injury suffered has been worsened, has resulted in a reduction in damages of between 15% and 25%: *Eagles v Orth* [1976] Qd R 313; *Froom v Butcher* [1976] Q.B. 286;

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[51] [2003] HCA 34; (2003) 214 CLR 552 per McHugh J at 558 paragraph [16].
[52] [1986] HCA 20; 160 CLR 301.
[53] T1-45/29-40.
[54] T2-70/47.
[55] Paragraphs [7]-[10].

Hallowell v Nominal Defendant (Qld) [1983] 2 Qd R 266. But what is not shown here is what difference it would have made to the injuries sustained if Mr Paskins had been wearing the belt appropriately. In my view, in order to make a finding of contributory negligence, I would need to be positively satisfied that the forces that came onto Mr Paskins' spine would have been materially lessened had he worn a seat belt. Using the terminology of the WCRA factual causation is not shown. Obviously it is probable that the facial injury which came about because of the contact with the steering wheel would have been avoided. But the injury to the face was a minor cut. There is no evidence that the significant injury to the back would have been different had the seatbelt been worn. I will ignore the facial injury in the assessment of damages.

THIRD PARTY CLAIM

[69] Hail Creek claims that Workpac is obliged under its contract with Rio Tinto to indemnify Hail Creek in respect of Mr Paskin's claim. Reliance is placed on clause 34.2 of the General Conditions of the contract whereby Workpac agreed:

> (a) Subject to Clause 34.3, [Workpac] will indemnify (and will keep indemnified) [Hail Creek]…from and against all Liabilities that any Indemnified Party suffers, sustains or incurs, arising from any one or more of the following:
>
> …
>
> (ii) any negligent act or omission or wilful misconduct by [Workpac] or its Personnel arising out of the performance of the Contract and/or any Purchase Order…[56]

[70] Under clause 34.3 it details the exclusions which are as follows:

> [Workpac] will not be liable under Clause 34.2 to the extent that the Liability was caused or contributed to, by the negligent acts or omissions or wilful misconduct (as the case requires) of [Hail Creek].[57]

[71] Workpac's arguments that the clause did not apply were predicated on a finding that Mr Phillips did not commit a negligent act or omission. I have found to the contrary. They were also predicated on the premise that cl 34.3 of the general conditions of the Contract applied. For that to be so it was necessary that there be a finding that Workpac's liability was of a kind "caused, or contributed to, by the negligent acts or omissions or wilful misconduct… of [Hail Creek]". Again my findings are to the contrary.

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[56] Ex 1 vol 2 p 326.
[57] Ex 1 vol 2 p 326.

[72] It follows that Workpac must indemnify Hail Creek for the liability incurred by Hail Creek in respect of the plaintiff's claim.

DAMAGES

[73] Mr Paskins was born on 10 July 1981. He was therefore 32 years of age at the date of the incident. He is presently aged 35.

[74] The Defendants admit that as a consequence of the incident Mr Paskins sustained a prolapse of the L4/5 disc, a laceration above his right eye, and a secondary psychological injury.[58] That psychological condition has been diagnosed as an adjustment disorder with anxiety and depression.

[75] I should say something of the unfortunate turn of events that followed treatment. Mr Paskins was advised to undertake surgery to correct the prolapsed disc and he did so. He had immediate relief, at least according to the treating surgeon. However, on the journey to the airport after surgery and to return home, the taxi he was in hit a bump in the road at speed. He felt an immediate onset of pain. The medical practitioners treating him subsequently determined that the disc prolapse had reoccurred. He required further surgical treatment. It is not in issue that the further surgery was unsuccessful in the sense that it did not relieve him of all of his symptoms. Pleaded arguments of a *novus actus interveniens* have not been pursued.

[76] The principal issue agitated by the defendants concerned the assessment of Mr Paskins reliability as a reporter of his symptoms and his level of disability. I have mentioned earlier my concerns with his reliability.

[77] His manner of giving evidence did not inspire me with confidence. He was argumentative at times. His behaviour was certainly well out of the ordinary. He sat rarely and at most for 20 minutes at one time. He stood for most of the day – when giving evidence and in the back of the courtroom. He gave no outward sign of being in pain when in the witness box, or standing next to it, and in fact appeared quite comfortable. Yet at periodic intervals when giving his evidence, and without any outward sign of increasing discomfort, he would perform squats. While protesting some difficulty with memory he appeared to cope well with cross examination generally and there was an air of convenience to the claims.

[78] As well there are question marks over the accuracy of the history that Mr Paskins has given. For example following the initial surgery Dr Tolleson has recorded:

> "Mr Clint Paskins did exceptionally well after surgery and was discharged two days after his operation in excellent condition. He had no sciatica and his back pain was under control."[59]

[79] When he saw a Dr Coyne a year later Mr Paskins is reported as saying of his condition after the first surgery:

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[58] Paragraph 13(a) First Defendant's Amended Defence and paragraph 10(a) of the Second Defendant's Amended Defence.

[59] Ex 1 vol 1 p 111.

"…immediately following surgery his pain was worse."[60]

[80] To a similar effect see the report of Associate Professor Williams.[61] His present evidence is to the same effect.

[81] I do not think that Mr Paskins was being actively dishonest. That an individual has difficulty recalling accurately the severity of symptoms long in the past and where some level of continuing symptoms are ever present is understandable. But his reliability remains in question.

[82] The medical practitioners who have examined Mr Paskins have expressed some concerns which I will detail. I accept those concerns. My assessment is that Mr Paskins has come to believe certain things which are not accurate. He is nowhere near as disabled as he thinks.

[83] There are references in the expert medical reports of non-organic pain behaviour.

[84] Dr Gert Tolleson was the treating surgeon. His reports were tendered with the consent of all parties. He saw Mr Paskins on 11 June 2014 and after the second surgery. After describing Mr Paskins' reports of pain he observed that they placed him in the category of "severely disabled". He went on:

> "[o]n clinical examination Mr Paskins walks without any difficulty. Toe and heel standing is normal. Trendelenburg test negative. Straight leg raise test difficult to assess. Normal extremity reflexes. Normal sensation in lower limbs. Normal mobility in lumbosacral spine after surgery.
>
> A follow-up MRI scan of total spine from the 10th of June 2014 shows in my opinion normal post-operative findings after an L4/L5 discectomy and no significant nerve compression. There is no other significant pathology in the cervical or thoracic spine. There is unfortunately no formal report with the MRI scan performed at Mackay Radiology.
>
> I do not believe I can help Mr Paskins further. I believe there is some degree of psychosocial barriers preventing Mr Paskins from improving. I believe it would be beneficial for Mr Paskins to see a Pain Specialist. I also recommend physiotherapy. I believe Mr Paskins could start to work in a gradual increased manner from now on."

[85] Dr Tolleson thought that Mr Paskins was capable of starting back at work on light office duties the following week (ie in June 2014) and "has a chance" to return to full duties in two months. He thought that Mr Paskins could return to coal mining but he would put his lumbosacral spine at risk and he should seek alternative employment.[62]

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[60] Ex 1 vol 1 p 135.
[61] Ex 1 vol 1 p 152.
[62] Ex 1 vol 1 pp 114-116.

[86] Dr Coyne, a neurosurgeon, saw Mr Paskins in July 2014. His opinion after a review was that "his persisting pain condition likely also has a significant component related to adverse psychosocial factors."[63]

[87] Associate Professor Richard Williams, an orthopaedic surgeon, examined Mr Paskins on 29 April 2015. He observed that there was some evidence of "inorganic influence on the perception of [Mr Paskins'] pain, which makes an accurate assessment of his incapacity in relation to employment somewhat more difficult to ascertain."[64] His evidence for this statement is this summary:

> "There was moderate evidence of inorganic influence on the perception of pain. There was a widespread distribution of pain, out of keeping with the radiologically demonstrated pathology. There was a 9 cm midline scar over the L4/5 segment. He was able to flex with fingers outstretched reaching the knee and had more discomfort on extension than flexion. He was able to heel and toe walk normally. He was able to straight leg raise bilaterally to 30 degrees with negative sciatic stretch testing. He had normal lower limb power and reflexes, with non-dermatomal and non-verifiable abnormality of sensation in the left lower limb."[65]

[88] Mr Paskins attended at the Wesley Pain Management Program in September/October 2014 to undertake a programme recommend by a neurosurgeon, Dr Atkinson. It was a three week inpatient programme. The exercise physiologist at the programme reported that while Mr Paskins performed an exercise program "at a high level" his "functional assessment scores did not reflect his capacity to exercise", noting that he was observed to walk up to 2 kilometres as opposed to the much more limited walking tolerance reported.[66] This inconsistency is in accord with the medical opinions I have mentioned.

[89] I had the same concern with Mr Paskins' reports of his activities at home, such as having no difficulty starting a whipper snipper yet being unable to push a lawn mower; or sitting apparently for significant parts of the day playing a computer game.

[90] In addition to the non-organic presentations there is a question mark over Mr Paskins' motivation, a subject to which I will return

General Damages

[91] Damages fall to be assessed both under common law principles (re Workpac) and pursuant to the *Workers' Compensation and Rehabilitation Act* (WCRA) (re Hail Creek).

[92] Senior counsel for Mr Paskins submits that the assessment should be $150,000 at common law and $102,950 under the WCRA. Counsel for Workpac submits that the common law assessment should be in the order of $55,000. Counsel for Hail Creek submits that the appropriate award pursuant to the legislative scheme is $35,100.

Assessment of Mr Paskins

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[63] Ex 1 vol 1 p 138.
[64] Ex 1 vol 1 p 156.
[65] Ex 1 vol 1 p 153.
[66] Ex 1 vol 1 pp 145-146.

[93] It is not easy to assess Mr Paskins. The psychosocial factors the experts have mentioned impact on his presentation. I accept that he has ongoing symptoms. I am confident that cessation of litigation will bring about a steady and marked improvement. He will be capable of getting back to employment and probably full employment. He has not been motivated to do so to date. There is consistent medical opinion that it would not be wise for Mr Paskins to seek employment in the coal mines. But there is a body of evidence that I accept that Mr Paskins is capable of commercial full time employment. I think Dr Coyne was right when he said that Mr Paskins should avoid heavy employment that places stress on the lumbar spine.[67]

[94] I am presented with a range of assessments. Associate Professor Williams, an orthopaedic surgeon, thought that there was an 11% whole person impairment. Because there was pre-existing degeneration with an episode of lumbar pain prior to the subject accident he apportioned 8% to the incident.

[95] Dr Atkinson, a neurosurgeon, assessed Mr Paskins in July 2014. He thought that in the longer term Mr Paskins was commercially employable but not in the coal mines. He recommended a two week multi-disciplinary pain management and rehabilitation programme. Dr Atkinson assessed a 17% whole person impairment under the AMA5 guides. This opinion was, of course, expressed before Mr Paskins had undergone the treatment suggested.

[96] Dr Cook, an orthopaedic surgeon who assessed Mr Paskins in September 2015, suggested a 15% whole person impairment related to the lumbar spine. It is evident that Dr Cook gave weight to "persisting pain levels and restriction in general mobility".[68] Dr Cook expressly avoided dealing with "all nervous, emotional, or psychological problems".[69] There is a technical difference between Dr Cook and Associate Professor Williams. The latter assesses Mr Paskins as falling in DRE Lumbar Category III and the former as falling between that category and Category IV.[70] As the Associate Professor points out the scheme is that one cannot fall between categories. More significantly I am sceptical of any genuine ongoing radicular pain the presence of which appears to have influenced Dr Cook. And Dr Cook appears to be a lone voice in his opinion that there is an injury to the sacroiliac joints.

[97] In my view Associate Professor Williams has assessed Mr Paskins accurately.

[98] In addition to the lumbar spine problems Mr Paskins has a psychological injury. Dr Chalk, a psychiatrist, diagnosed an "adjustment disorder with depressed and anxious mood in the setting of chronic pain". He performed a PIRS assessment and determined a 4% whole person impairment.

[99] The courts have always struggled to come to a fair assessment where there are physical complaints that are not in accord with objective evidence nor explicable anatomically. A unanimous Court of Appeal suggested that in such a case (the condition there being described as "functional overlay") the approach should not be generous one: *Queensland University of Technology v Davis*[71] where Pincus JA held:

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[67] Ex 1 vol 1 p 138.
[68] Ex 1 vol 1 p 196.
[69] Ibid p 192.
[70] See file note at Ex 1 vol 1 p 228.
[71] [1997] QCA 437.

> "Trial judges generally take a rather cautious approach to cases of this kind, one reason for that no doubt being that, if the community understands that very large sums are likely to be awarded in such circumstances, there is a possibility that the tendency to exhibit functional overlay may be enhanced, among people who are injured in circumstances which give them a prospect of recovering damages. It would be unfortunate if too generous an approach to cases of this sort were actually to promote the exaggeration of symptoms.
>
> Approaching that point from another angle, one would hope that injured plaintiffs who try their best to ignore minor disabilities rather than dwell on them should not be excessively disadvantaged in court proceedings, as compared with those who act otherwise."

[100] In *Davis* the initial injury was described as a minor one. The injury here was not minor. But the surgery undertaken on Mr Paskins, according to the evidence that I accept, was technically successful. It is not possible to distinguish between symptoms that are physically present and symptoms that are the result of brooding and introspection. But there seems to me to be good reason to be modest in the assessment.

The legislative scheme

[101] General damages for pain and suffering are to be assessed in accordance with section 306P of the WCRA and the general damages calculation provisions in section 130 of the *Workers' Compensation and Rehabilitation Regulation* ("the WCRR") and Schedules 8 and 9 of the WCRR.

[102] Senior counsel for Mr Paskins has summarised the relevant principles as follows. The summary is uncontroversial:

(a) the dominant injury is to be determined having regard to the range of ISV's applicable to the injury;
(b) determine ISV within the range of ISV's provided for the injury and determine whether the maximum ISV in the range adequately reflects the adverse impact of all the injuries ("the maximum dominant ISV");
(c) if the maximum dominant ISV is not sufficient, then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV;
(d) in arriving at the appropriate ISV, the court is to bear in mind that the effects of multiple injuries commonly overlap;
(e) in assessing an ISV for multiple injuries, the range for, and other provisions of Schedule 9 in relation to an injury other than the dominant injury of the multiple injuries can be considered;
(f) the overriding purpose of the ISV's prescribed – to reflect the level of adverse impact of the injury on the injured person;
(g) the court is guided by the provisions of Schedule 9 but is not necessarily limited to those factors and a court can have regard to other matters relevant to the particular case e.g., age, insight, life expectancy, pain, suffering and loss of amenity;
(h) an important consideration is the extent of the whole person impairment.

Assessment under the legislative scheme

[103] Counsel agree that the dominant injury is to the lumbar spine. They are agreed that Item 90 applies – serious lumbar spine injury. Counsel for Hail Creek argues for an Injury Scale Value (ISV) at the bottom of the range (16) and senior counsel for Mr Paskins at the top of the range (35).

[104] Associate Professor Williams view was that there was a pre-existing condition that had been symptomatic. So much is not in issue. Dr Cook thought that the condition was largely irrelevant to the assessment. As mentioned above, Associate Professor Williams attributed 3% of the whole person impairment assessment to that condition. Given that there had been symptoms and given that Mr Paskins had sought chiropractic treatment for them it seems probable that if he had attempted to pursue a life in the coal mining industry or in physical occupations that would place stresses on his back, he was likely to have problems from time to time. I think that Associate Professor Williams has appropriately brought that history into account. Nonetheless the incident has greatly worsened the condition. That worsening can properly be brought into account: see s 7 of Schedule 8 the WCRR.

[105] The comment about the appropriate level of ISV in Item 90 provides:

> An ISV at or near the bottom of the range will be appropriate if –
>
> (a) the injured worker has had surgery and symptoms persist; or
>
> (b) there is a fracture involving 25% compression of 1 vertebral body.
>
> An ISV in the middle of the range will be appropriate if there is a fracture involving 50% compression of a vertebral body, with ongoing pain.
>
> An ISV at or near the top of the range will be appropriate if the injured worker has had a fusion of vertebral bodies that has failed –
>
> (a) leaving objective signs of significant residual nerve root damage and ongoing pain, affecting 1 side of the body; and
>
> (b) causing a DPI of 24%

[106] There are no objective signs of significant residual nerve root damage and the impairment assessment is well below 24%. An ISV at the top of the range is not justified. An ISV near the bottom of the range is indicated. I acknowledge that countervailing factors must be brought into account. Mr Paskins is relatively young. His range of activities is reduced. Because of functional matters his perception of his difficulties is much worse than they would otherwise be to someone more stoical. I assess an ISV of 20.

[107] Counsel have treated the psychiatric injury as a separate injury (cf. s 5(2) of Schedule 8 WCRR). It falls in Item 12 (moderate mental disorder: ISV range 2 to 10). The PIRS assessment rating of 4% is at the bottom of the described range of 4-10%. I assess an ISV of 5.

[108] To allow for the effect of the two injuries I allow a modest uplift of the dominant ISV to 25. The damages are assessed at $45,950.[72]

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[72] See section 130 WCRR; Schedule 12 – Table 4: injury sustained post 1 July 2013.

Assessment under the general law

[109] I reject the submission that Mr Paskins has suffered, and faces a future, of crippling pain. It follows that the cases senior counsel referred to for comparative purposes are not of assistance.

[110] Counsel for Workpac submitted that *Hughes v Tucaby Engineering Pty Ltd*[73] and *Husband v Hikari (No 42) Pty Ltd*[74], where the impairment assessments were more in accord with Associate Professor Williams's assessment, provided a guide. In each case $55,000 was allowed.

[111] While helpful, those decisions are somewhat dated now and the value of money has inexorably fallen. I assess damages at common law at $60,000.

[112] Interest on general damages is recoverable against Workpac but not the employer (s 306N(1) WCRA). The claim at 2% on the past component is uncontroversial. I allow $2,400.[75]

Past Economic Loss

[113] Past economic loss has been agreed at $284,684.02.

[114] Interest is claimed at 1.34% against Hail Creek (see s 306N(3) WCRA) and 5% against Workpac and the amounts are agreed. I allow $587 as against Hail Creek and $2,193.11 against Workpac.

Future Economic Loss

[115] Sections 306J and 306L WCRA are relevant to the claim against Hail Creek but those provisions merely reflect the common law position and the principles relevant under the *Civil Proceedings Act 2011* (Qld) – see particularly s 61.

[116] Senior counsel for Mr Paskins submits that damages should be assessed at $1,223,037. This assumes an uninterrupted career to age 67 in the mining industry, two years of unemployment ahead while he retrains, and from then a very modest residual capacity of $250 net per week. The result is then discounted by 10% for contingencies. Counsel for Hail Creek submits that the award should be $566,023 adopting significant discounts to the life time mining model but assuming acceptance of Mr Hoey's opinions, which I do not. Counsel for Workpac simply urged, with detailed reasons which I largely accept, that Mr Paskins' claim not be taken at face value.

[117] There are two issues. The first is whether Mr Paskins would have maintained employment in the mining industry. The second issue concerns the assessment of Mr Paskins' residual earning capacity.

Continued Employment

[118] There are at least four reasons to be sceptical of the notion that Mr Paskins would have maintained a career at a high level of wages in the mining industry.

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[73] [2011] QSC 256.
[74] [2010] QSC 398.
[75] $30,000 x 2% x 4 years.

[119] The first is that his employment history in the industry had not been without problems. He had not demonstrated continuity of employment over his time in the industry – see below. He had been summarily dismissed from one employment for throwing a rock at a vehicle driven by another employee. He had given up another position after two days employment because he disliked the camp accommodation. At Hail Creek he had been disciplined on three occasions in a relatively short period of employment for various issues. The finding that I have made about the wearing of the seatbelt is pertinent here too.

[120] Secondly, even for exemplary employees it is evident that consistency of employment in that industry is by no means certain given the vagaries of the overseas markets. There have been numerous redundancies in more recent times. Mr Phillips with his great experience was employed on a labour hire contract which provided temporary work. I am aware that Mr Phillips gave up his permanent position and was not made redundant. But he represents the competition that Mr Paskins faces. The period in question here is employment for the next approximately 30 years.

[121] Thirdly, Mr Paskins has a degenerative condition in his spine. Before the age of 30 it had already caused him symptoms that required treatment. Mining work is hard and demanding. That is not to say that he was likely to end up in his present state. No one can predict the extent or timing of the onset of symptoms. But symptoms sufficient to make life as a miner/truck driver uncomfortable or worse are a distinct possibility.

[122] Fourthly, what appeals to a younger man does not necessarily appeal to someone more advanced in life. Mining work usually requires that the worker live far from home and sometimes for weeks at a time. Mr Paskins had been in the industry only a relatively short time. It cannot be known what his likely attitudes might be 10, 15 and 20 years hence. And families can make different demands at different times.

[123] I would rate Mr Paskins prospects of maintaining employment in the mining industry over the next 30 years at no better than 30% and even that is, I think, generous. The likelihood of him maintaining employment in such an industry into his sixties is virtually nil.

Residual capacity

[124] As to his past - Mr Paskins is a trained baker and pastry chef. He and his wife conducted their own bakery business for a short period. That was not successful. He eventually entered into mining work. He has had some eight positions with mining companies from about 2007 to the date of the incident. He obtained a number of qualifications in that time principally related to machinery operation. It is said that he lacks people skills and can be blunt. This was said to be demonstrated when he conducted the bakery business. While his wife supported that to a degree I do not accept that his skills are quite as poor as Mr Paskins painted them.[76] It is probable that his symptoms would preclude him carrying out the more demanding aspects of his trade.

[125] I have already mentioned some of the expert opinions relevant to this issue.

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[76] For a more optimistic view see T1-96-97.

[126] At the conclusion of the Wesley Pain Program that I have mentioned the occupational therapist reported that Mr Paskins had "demonstrated a capacity to return to work in duties of a *Medium* nature".[77] Under the heading "Motivation to return to work" she has recorded that Mr Paskins "main goal at this time is to stay home and care for his children, whilst also focusing and improving his health and wellbeing". She urged that Mr Paskins "take the necessary steps to engage back into the workforce as soon as possible".[78]

[127] Mr Paskins did not follow that advice. He did not act until he commenced a bridging course at university in 2016. He has taken no step to obtain employment to date and that despite making a number of concessions about his residual capacity.

[128] Dr John Chalk examined Mr Paskins on 8 May 2015. He observed that:

- Mr Paskins had "not undertaken any courses or study. He is however waiting for the litigation to be over, and wonders whether he could do rehabilitation work or run his own coffee shop;"[79] and
- resolution of Mr Paskins' claim will be the most therapeutic treatment and that he can and will return to gainful employment.[80]

[129] Mr Paskins claimed not to remember saying that he was waiting for the litigation to be over to the psychiatrist but nor did he deny that was his position. His inactivity was consistent with that being so.[81]

[130] I conclude that to date Mr Paskins has lacked motivation. In the circumstances there is no reliable way to assess his residual capacity as it remains untested. Of particular interest is the opinion expressed (and not tested by cross examination) of Dr David Johnson, a neurosurgeon. He was consulted by Mr Paskins on referral from his general practitioner. Dr Johnson conducts a "Functional Movement Training Centre NeuroHAB programme." His view was that the "imaging shows no reason for ongoing chronic back pain from a structural integrity point of view. His back pain is being maintained and wound up by persistent movement dysfunction."[82] He suggested a form of treatment that he thought would be efficacious in returning Mr Paskins to gainful employment.

[131] There are other opinions from medical practitioners and an occupational therapist that Mr Paskins advances but they depend on an uncritical acceptance of Mr Paskins' complaints. I disagree with the starting premise.

[132] I see no reason to discount the opinions of Dr Atkinson, Dr Coyne, Dr Johnson and Dr Chalk on this issue of commercial employability. Apart from anything else they were not challenged by cross examination. There is the practical difficulty that Mr Paskins will have to overcome the possible stigma of having had an extended period off work due to significant injury. Employers may well be wary of employing him. But many occupations are available that fall into the sedentary to medium category.

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[77] Ex 1 vol 1 p 148.
[78] Ex 1 vol 1 p 144.
[79] Ex 1 vol 1 p 170.
[80] Ex 1 voll p 176.
[81] T1-31/4-5; T1-35/42.
[82] Ex 1 vol 1 p 215.

[133] Senior counsel argues that the defendants have failed to discharge the evidential onus of showing the extent of the residual capacity citing *Thomas v O'Shea*[83] as qualified by *Bugge v REB Engineering Pty Ltd*[84] and *Coleman v Anodising and Aluminium Finishes of Queensland Pty Ltd*[85] A similar argument was rejected in *Adsett v Noosa Nursing Home Pty Ltd*[86] where Pincus JA held (McPherson JA and Shepherdson J agreeing):

> "But this argument fails, in my view, for a simpler reason; counsel for the appellant conceded that to throw any onus on the respondent the appellant had to prove that she had really tried to obtain employment."

[134] Mr Paskins has not yet tried to obtain employment.

Assessment

[135] I am required to make a judgement on hypothetical possibilities – what might have happened had the subject injury not occurred and what will happen in the injured state. The applicable principles were explained in *Malec v J C Hutton Pty Ltd*.[87]

[136] Had Mr Paskins no residual capacity and if it was assumed he would, if uninjured, have maintained employment in the mining industry to say age 60 then his loss would be in the order of $1,520,700 ($1850 x 822[88]). That must be discounted by the 30% chance of maintaining such employment regardless of injury – $456,210. To allow for his significant residual capacity I take 35% of that figure – $159,673. Something must be added for a period out of employment for re-training and seeking employment – perhaps a year's wages (say $95,000). As well Mr Paskins is at a disadvantage on the open labour market even on the assumption that he would not have continued in the mining industry.

[137] As is often the case these various calculations give an air of precision to the assessment. There obviously is no precision in any estimate of the likely future. I assess the loss of earning capacity at $350,000.

Loss of superannuation benefits

[138] It is agreed that the past loss should be assessed at $20,880.

[139] For the future the loss is claimed at 11.27% relying on the decision of the court of appeal in *Heywood v Commercial Electrical Pty Ltd.*[89] There is no dispute about the rate albeit that I note that the assumptions concerning the future statutory guarantee rate of superannuation underlying the decision in *Heywood* have been abandoned.[90] I allow future loss at $39,445.

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[83] (1989) Aust Torts Reports 80-251.
[84] [1999] 2 Qd R 227; [1998] QSC 185.
[85] [2002] 1 Qd R 141; [1999] QCA 467 at [16] per R.R. Douglas J.
[86] [1996] QCA 491.
[87] (1990) 169 CLR 638; [1990] HCA 20. See also *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [104] – [109] per Ipp JA; *Phillips v MCG Group Pty Ltd* [2013] QCA 83 at [57]
[88] The 5% discount multiplier for 30 years.
[89] [2013] QCA 270.
[90] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19.

Loss of employment benefits

[140] Mr Paskins would have received various benefits if he had maintained employment in the mining industry and if employment conditions had continued as with Hail Creek. The benefits included meal allowances and subsidised health care benefits.

[141] Past losses are agreed at $100 per week for meal allowances and $58 per week for health care benefits. I assess the loss of meal allowances at $18,600. I assess the loss of health care benefits at $6,280. No claim is made for interest.

[142] For the future I discount for the chance that Mr Paskins would not have maintained his employment in the mining industry. As well, counsel for Hail Creek, Mr Cullinane, points out that as the children age the benefit plan (and therefore cost and subsidy) would alter from a family plan to a partner plan. I allow $24,000 for meal allowances and $12,000 for the loss of subsidised health care benefits.

Gratuitous care and assistance

[143] An allowance under this head is effectively precluded as against the employer: see sections 306C – 306H WCRA.

[144] Very substantial claims are made. They assume the accuracy of Mr Hoey's opinions concerning Mr Paskins. Those opinions in turn depend for their acceptance on unqualified acceptance of Mr Paskins' view of his disabilities. I have a different starting premise. As well there is considerable force in the submission that Mr Paskins is quite active about the home in respect of indoor tasks, if anything more so than before sustaining his injuries. The evidence is far from clear and the plaintiff bears the consequences of any imprecision: *Shaw v Menzies* [2011] QCA 197 at [173].

[145] Mrs Paskins said that care was being provided to the extent of a few hours per week.

[146] While I can accept a difficulty in the future with heavier outdoor tasks that require sustained effort the justifiable claim is very modest.

[147] I do not think it is possible to make an arithmetical determination of a fair amount of compensation.

[148] Doing the best I can I allow about one-half of the past losses claimed and assess that amount at $20,000. As senior counsel for Mr Paskins submits the rate of $55 per hour advanced by Mr Hoey was not contested.

[149] For the future I allow $40,000 based roughly on a need for assistance for about one hour a week with a small discount.

Recurring medical and medication expenses

[150] The plaintiff claims $52,750 for the cost of medications and $15,000 for the cost of future attendances on medical practitioners. The claims are based on Mr Paskins' view that he has "relentless" back pain and that his present regime, costing $60.35 per week, should continue. I do not accept the premise. An ongoing need for substantial medication is not consistent with the views of the several experts that I have mentioned

that Mr Paskins is capable of commercial employment. Plainly enough it is not Dr Johnson's view.[91]

[151] It would be reasonable for Mr Paskins to undertake the course suggested by Dr Johnson. It is a 16 week course, with twice weekly sessions initially taking 30 minutes and increasing to an hour. I do not have evidence of the likely cost. There is authority for the view that in the absence of evidence of cost (at least in the context of home modifications) no amount should be allowed: *Munzer v Johnston and Anor* [2009] QCA 190 at [32] per McMurdo P.

[152] It is impossible to be precise. I will allow $15,000 as a global sum.

Special damages

[153] Special damages paid by the plaintiff is agreed at $71,508.45. No interest is claimed.

Summary

[154] In summary I assess the damages as follows:

Head of damage	Hail Creek	Workpac
General Damages	$45,950.00	$60,000.00
Interest on General Damages	$0.00	$2,400.00
Past Economic Loss	$284,684.82	$284,684.82
Past Loss of Employment Benefits	$24,880.00	$24,880.00
Interest on Past Economic Loss	$587.00	$2,193.11
Past Loss of Superannuation	$20,880.00	$20,880.00
Future Loss of Earning Capacity	$350,000.00	$350,000.00
Future Loss of Superannuation Benefits	$39,445.00	$39,445.00
Future Loss of Employment Benefits	$36,000.00	$36,000.00
Future Medical and Medication Expenses	$15,000.00	$15,000.00
Past Assistance	$0.00	$20,000.00
Future Assistance	$0.00	$40,000.00
Special Damages	$71,508.45	$71,508.45
Total	**$888,935.27**	**$966,991.38**
Less WorkCover refund	$180,527.01	$0.00
Net Total	**$709,408.26**	**$966,991.38**

Orders

[155] There will be judgment for the plaintiff against the first defendant in the sum of $709,408.26.

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[91] Ex 1 vol 1 p 215.

[156] There will be judgment for the plaintiff against the second defendant in the sum of $966,991.38.

[157] I will hear from counsel as to the appropriate orders in light of these reasons and as to costs.