SUPREME COURT OF QUEENSLAND

CITATION:	*Cootes v Concrete Panels & Ors* [2019] QSC 146
PARTIES:	**DARREN COOTES** (plaintiff) **v** **CONCRETE PANELS (QLD) PTY LTD (ACN 152 691 720)** (first defendant) AND **SMJ PROJECTS PTY LTD (ACN 119 460 418)** (second defendant) AND **CAPABLE CONSTRUCTION (QLD) PTY LTD (ACN 159 427 004)** (third defendant)
FILE NO/S:	BS No 897 of 2017
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 June 2019
DELIVERED AT:	Rockhampton
HEARING DATE:	27, 28, 29 and 30 May 2019
JUDGE:	Crow J
ORDER:	**1. Judgment for the plaintiff against the first defendant in the sum of $548,612.95; and** **2. Judgment for the plaintiff against the second and third defendants in the sum of $909,504.00.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where plaintiff suffered personal injury when an excavation collapsed upon him at a work site while he was retrieving a drill – where plaintiff brings proceedings against his former employer – where risk of injury resulting from the collapse of the excavation was foreseeable – where risk of injury was not insignificant – where a reasonable person

would have taken precautions against the risk of injury – whether the employer has breached the duty of care owed to the plaintiff

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY - where plaintiff suffered personal injury when an excavation collapsed upon him at a work site while he was retrieving a drill – whether the plaintiff failed to take precautions against the risk of the excavation face collapse – whether there ought to be a finding of contributory negligence

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – OTHER CASES - where plaintiff suffered personal injury when an excavation collapsed upon him at a work site while he was retrieving a drill - where plaintiff brings proceedings against the principal contractor, and the project manager – where risk of injury was foreseeable – where content of duty of care required the use of reasonable care to avoid the unnecessary risk of injury caused by a collapse – where reasonable care required compliance with site safety plan – whether the principal contractor and project manager breached a duty owed to the plaintiff

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff suffered personal injury when an excavation collapsed upon him at a work site while retrieving a drill – where plaintiff suffered a spinal injury and psychiatric harm as a result of the collapse – where defendant also suffers from an unrelated hip injury and cardiac condition - whether damages ought to be reduced as a result of unrelated conditions

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 305B, s S305D, S 305F, s S305H
Workers' Compensation and Rehabilitation Regulation 2003 (Qld)
Civil Proceedings Act 2011 (Qld) s 58

Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254
Vella's Plant Hire Pty Ltd v Mistranch Pty Ltd [2012] QSC 77
Hopkins v WorkCover [2004] QCA 155
Watts v Rake (1960) 108 CLR 158
Tame v New South Wales (2002) 211 CLR 317
McLean v Tedman (1984) 155 CLR 306

Wyong Shire Council v Shirt (1980) 146 CLR 40
Osborne v Downer EDI Mining Pty Ltd & Anor [2010] QSC 470
Wylie v The ANI Corporation Limited [2002] 1 Qd R 320
Kennedy v Queensland Alumina Limited [2015] QSC 317
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492

COUNSEL: J J Wiltshire for the plaintiff
R C Morton for the first defendant
R J Lynch for the second and third defendants

SOLICITORS: Smith's Lawyers for the plaintiff
Hall & Wilcox for the first defendant
Mills Oakley for the second and third defendants

Introduction

[1] In May 2013, the second defendant (SMJ Projects) entered into a commercial building agreement for the construction of a motor vehicle showroom at 246 Brisbane Road, Booval. Mr Scott Jennison is a director of the principal contractor SMJ Projects. SMJ Projects entered into a subcontract with the third defendant Capable Construction for the provision of a site supervisor. Lance Judd, a director of Capable Constructions was the site supervisor, he "managed everything on site".[1] Additionally in or about May 2013 SMJ Projects entered into a subcontract with the first defendant, Concrete Panels, for the supply and installation of all concrete and associated works forming part of the construction works. The plaintiff, Mr Cootes, was employed by Concrete Panels as a foreman. Mr Love, a director of Concrete Panels deployed Mr Cootes to act as foreman for the subcontract works being carried out by Concrete Panels at the works site.

[2] Mr Cootes is currently 57 years of age having been born on 10 June 1962. Mr Cootes ceased his school education at about age 16. Mr Cootes cannot recall if he completed Form 3 or 4 of secondary school in Victoria in or about the mid-1970s. Mr Cootes commenced work as a labourer in the construction industry when aged 16. Mr Cootes acquired skills in welding, roofing, steel fixing and form working. Mr Cootes has no formal qualifications, has never turned a computer on and is able to use a mobile phone only to make and receive telephone calls.

[3] Mr Cootes' construction skills were learned on the job, Mr Cootes said had "just been taught from this old fellow".[2] Mr Cootes did not say who the "old fellow" was. Mr Cootes then said he formed a company with the "old fellow" then at some later undefined point split company with the "old fellow" and took up a job as a storeman for a firm that manufactured horse shoes. Mr Cootes continued to work as a storeman for one year before he returned to the construction industry. Mr Cootes then went into the construction industry with a "mate" in or about 1997.[3] During that period Mr Cootes moved in the construction industry from Victoria to the Gold Coast. Mr Cootes recalled

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1 T2-21/14.
2 T1-9/44.
3 T1-11/11.

that he was 21 when he moved to the Gold Coast. Accordingly Mr Cootes moved to the Gold Coast in or about 1983. It would seem that Mr Cootes thereafter continued to work with his "mate" for a further 14 years until 1997.

[4] In 1997 Mr Cootes ceased working with his "mate" and then obtained work steel fixing for approximately six years. Mr Cootes then worked for a business called Coastcrete which was a concrete tilt panel contractor business in which he was allocated to perform the ground work such as form work, building of footings and associated excavation work.

[5] After ceasing with Coastcrete in late 2011 Mr Cootes returned to Victoria for approximately 14 months. In Victoria Mr Cootes says he went back to work there with "my same mate".[4] It was not explained what occurred between Mr Cootes and his "same mate" however in April 2013 Mr Cootes moved back to Queensland. Mr Cootes' brother resided in Queensland and worked as head of a section for the construction of concrete panels in the business of the first defendant Concrete Panels. Mr Cootes' brother knew the owner and director of Concrete Panels, Mr David Love and through this association Mr Cootes obtained work with Concrete Panels firstly in the panel shop. It appears that within two weeks Mr Love recognised Mr Cootes' practical skills and appointed Mr Cootes as an on-site foreman.

[6] Mr Cootes explained that his position was "like a foreman"[5] and that Mr Love said he was to "run the jobs, go and do them".[6] Mr Cootes explained that although he would be in charge of the jobs, he would work hands on. Although Mr Cootes had a limited school education and no formal qualifications it would appear that he had through approximately 33 years of construction experience acquired skills in the construction of concrete works. Mr Cootes has an impressive work history despite his lack of school and formal qualification.

[7] Mr Cootes said, and I accept, that he enjoyed work[7] and prior to being injured his life revolved around working and sport pursuits, in particular AFL.

[8] It is not in dispute that Mr Cootes' life dramatically altered on 26 August 2013 when he suffered serious personal injury when an excavation collapsed upon him at a work site. It is admitted that collapsing of the excavation caused Mr Cootes to suffer from a commuted fracture of the body of his L3 vertebrae, fractures of his right L1 and L2 transverse process and symptoms of post-traumatic stress disorder.

[9] In respect of his injuries Mr Cootes has brought proceedings against his employer the first defendant, the principal contractor, the second defendant, and the project manager and site supervisor, the third defendant in respect of his injuries. Liability and quantum remain in issue.

Liability

[10] It is not in dispute that after the collapse of the trench Mr Cootes was found by an unidentified rescuer buried to the top of his chest. It is also not in dispute that the trench

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4 T1-11/20.
5 T1-11/46.
6 T1-11/46.
7 T1-51/31.

was about 700mm deep and it was a trench dug by an excavator to allow for the pouring of concrete footings. The difficulty was not so much the 700mm or knee depth trench but the 2.6 metre high excavation "face" which sat on one side of the trench and above the 700mm trench. The 2.6 metre high earth embankment was in fact a compacted area which ran the entirety of the 6 to 7 metres of "face" area with the exception of a small portion of about 300mm of drainage aggregate which had been placed adjacent to a pre-existing concrete retaining wall. The net affect was that a person standing in the trench working was working up against a face of up to 3.3 metres in height.

[11] One of the unusual features of the case is that there is no photograph taken of the accident scene prior to or immediately after the accident nor was there any contemporaneous incident report in respect of the accident. Document 1 of exhibit 1 contains a series of 11 photographs extracted from the Workplace Health and Safety file which shows the accident site. However, all the photographs were taken after the accident and after remedial works had been conducted at the accident site to remove the sheer face by means of benching, that is, creating a step approximately half way up the height of the cliff face. The benching to make the accident site safe occurred soon after the accident to make the area safe.

[12] There are no independent eye witnesses to what occurred immediately prior to and at the time that Mr Cootes was injured. So what actually occurred, and importantly what Mr Cootes was doing in the trench, is something that depends entirely upon Mr Cootes' evidence. Prior to Friday 23 August 2013, Mr Cootes performed work as a foreman at the site. In particular, he had assisted in the digging of pier holes in an area of "pretty hard rock" in respect of which he said "we had a fair bit of drama with them".[8] After placing steel in the pier holes Mr Cootes said that "once that was done, we went away for a while, till all the block work was up". After the block work was up Mr Cootes said that he returned to the site with his crew and performed "all the formwork for the slab" then the slab was ready to be poured.[9] Mr Cootes explained that after pouring the slab "I went away again".[10]

[13] On one occasion prior to Friday 23 August 2013, Mr Cootes said he would "have a look and have a look with Lance – what we had to do".[11] Mr Cootes explained that at the area where the footings needed to be dug, there had been "a lot of fill in there, compacted fill, which was overdone. We had to cut that back vertically on both sides".[12] Mr Cootes then explained that on Friday 23 August 2013 he worked at site directing an excavator digging the trenches in the area of the compacted fill. Mr Cootes then explained that the excavator dug a vertical cut back along the area where the footings need to be constructed which joined up to the rock block wall shown in exhibit 1. Mr Cootes added that when excavating close to the existing rock block wall, the drainage aggregate was collapsing in to the excavation and creating what he described as "an undermine on that corner".[13] Mr Cootes described the undermine as like a cave and a similar type of undermine may be observed in exhibit 1 photograph 9. Mr Cootes further explained that as the excavator continued digging out "all this exposed ag just

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8 T1-15/13-18.
9 T1-15/43-48.
10 T1-15/49.
11 T1-16/8-10.
12 T1-16/23-25.
13 T1-19/23.

kept falling down, falling down."[14] The net affect was that the excavator had created an unintended large excavation, described by Mr Cootes as a hole, at the corner of the existing concrete retaining wall. Mr Cootes explained that after observing the "ag was still falling down" he "stopped work and went and [saw] Lance".[15]

[14] Mr Cootes said that his concern about the undermine, was that it was going to cave in and expressed that concern to Lance Judd. Mr Cootes' evidence is that Lance Judd informed him that after he had finished excavating the footings he would "send Barry down to shore it up".[16] Mr Cootes telephoned his boss[17] Mr Love telling him of his concerns, that is, that the earth would cave in and was informed by Mr Love that Mr Love would raise the issue with the principal contractor SMJ, and also the site foreman Lance Judd. Mr Cootes made it plain to Mr Love that he was "concerned" that there could be a "cave in" causing injury to any worker in the trench.[18]

[15] Mr Cootes who had over 33 years' experience in construction, said of the way in which the work was being conducted

> "MR COOTES: I've never done one this way. I've done quite a few. I've done a big one at Browns Plains, the home centre there, which was five times bigger than this, and it was all battered back on a 45. It was the same sort of procedure.
>
> MR WILTSHIRE: All right. So what was it, that was unusual about this job from your point of view?
>
> MR COOTES: Well, vertical fill."[19]

[16] Mr Cootes said that he raised his concerns with the site supervisor Lance Judd asking Mr Judd why "it was done like this. 'Shouldn't it be battered back or benched back?' And Lance said 'It's the only way it can be done. The engineer's not going to pass it'."[20] Mr Cootes says that he had this conversation with Lance Judd once or twice on Friday 23 August 2013.

[17] It is common ground that Mr Cootes and his work crew from Concrete Panels were directed to stop work at approximately 2.00pm on Friday 23 August 2013 because of the need for the area to be shored up. Mr Cootes then returned to the work site on Monday 26 August 2013 and observed "[t]here was more of a cave-in down there. More ag had fallen down over the weekend".[21] Mr Cootes raised the issue again with Lance Judd who instructed him to continue to perform the digging out of the footings and that he was sending a labourer Barry Judd down to construct the shoring up. The footings that were to be dug that morning involved the digging of two trenches for the footings for the side of the stairs. The two smaller trenches were at 90 degrees to the existing longer trench and can be observed in photos 6 and 8 of exhibit 1. Mr Cootes

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14 T1-19/45-46.
15 T1-20/18.
16 T1-21/18.
17 T1-12/1.
18 T1-21/5.
19 T1-22/25-34.
20 T1-22 l 43-45.
21 T1-24/5-8.

then arranged for the excavator to dig the stairwell trenches at 90 degrees or right angles to the main trench. The digging of those trenches resulted in a larger hole forming adjacent to the apex of the existing block wall. It was described by Mr Cootes as "much over-excavated".

[18] Whilst Mr Cootes was supervising the excavator driver in performing the digging out of the stairwell trenches a concreter was performing "tying steel" and laying the steel in the far end of the trench. Mr Cootes was able to observe that worker. Mr Cootes stopped the concreter performing that task because the concreter "was complaining that stuff's falling on his head".[22] After the stairwell footings had been dug out Mr Cootes "went up and grabbed Lance, because Lance wanted to come down and have a look to instruct Barry what to do. Lance and Barry then [came] down were standing in the trench there … conferring – what they were going to do".[23] Mr Cootes then explained that he had stopped his concreter from tying steel, stopped his excavator driver from working and acted as a spotter. Mr Cootes explained that after the discussion "Lance went back up. Barry trod off and – to get some ply and timber …". Mr Cootes explained that Barry Judd returned the ply and timber and was working in the trench. Mr Cootes observed Barry Judd hold up a bit of timber on the block wall and mark drill holes and then use a cordless hammer drill to drill holes into the mortar between the bricks. Mr Cootes explained that whilst Barry was both standing and kneeling in the trench exposed ag was falling down. Mr Cootes said that:

> "Barry was kneeling in this trench, and this exposed ag was still falling down around Barry's bloody feet. I kept going up to try to get Lance to come down and have a look, because I was getting a bit concerned at this time. But Lance was at the meeting; so I just kept coming back and standing [there], watching Barry, [until] I could try and get Lance."[24]

[19] Mr Cootes was not in charge of Barry Judd nor in charge of the work that was being performed but he was asked by Lance Judd to be the 'spotter' and he was concerned that it was unsafe. Mr Cootes wanted Barry Judd out of the trench. Mr Cootes explained that Barry Judd was in the trench between five and ten minutes performing the work, and during that period he walked up twice to attempt to get Lance Judd's attention but was unable to do so. After returning back to observe Barry continue to work in the trench Mr Cootes said to Barry Judd "I'm just not liking this. Get out of the trench".[25] Mr Cootes said that Barry Judd then "had a bit of a go at me".[26] Mr Cootes explained that Barry said "you concreters think you can effing do this, effing do that". Mr Cootes persisted and said to Barry Judd "Get out, Barry. Jump on your excavator and go get – yeah, go get the auger for the excavator driver, because he's packing up." Barry Judd then left to obtain the auger.

[20] Mr Cootes then explained he went up to see Lance Judd again because "there [were] three blokes doing nothing there now, plus me".[27] However Mr Judd was still involved in the meeting and Mr Cootes returned to the area of the trench.

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[22] T1-25/44.
[23] T1-26/1-4.
[24] T 1-27/32-36
[25] T1-29/8.
[26] T1-29/7-10.
[27] T1-29/36.

[21] The significant factual dispute with respect to the issue of liability concerns what occurred when Mr Cootes returned to the area of the trench. As Barry Judd had left to obtain the auger for the excavator there were no eyewitnesses. What is common ground between the parties is that Mr Cootes was in fact in the trench and as a result of the collapse of the trench he was buried up to the top of his chest. What is in dispute is what Mr Cootes was doing in the trench and where Mr Cootes was in the trench. The alternatives are Mr Cootes' evidence that he entered into the trench to retrieve the drill left by Barry Judd or the factual scenario urged by the second and third defendants as set out in paragraph 9(aa) of the second and third defendants' amended defences namely:

> "In the absence of both Lance and Barry the plaintiff picked up the drill, entered the trench, and continued the process of shoring up, putting bolts into the block wall and then screwing ply to the front of that".

[22] It is important to appreciate that the second and third defendants run a positive case in the sense of disputing Mr Cootes' version that he and entered the trench simply to retrieve the drill. The second and third defendant's version of the facts, is based on admissions in the Workplace Health and Safety investigation and is a case which is not put by the first defendant. In its rejoinder, paragraphs 2, 3 and 7, the first defendant admits paragraph 3(vi) of the first defendant's reply to the amended defence which reads:

> "[T]he plaintiff was not intending to, not attempting to, perform any further work in the area, consistent with Lance Judd's directions and the plaintiff's concerns".

[23] The litigation has been conducted on the basis of numerous admissions made between the parties. On the pleadings alone there are 42 matters admitted between the plaintiff and first defendant. It is not important to record all of them but they are enumerated in the 22 listed facts in the first defendant's submissions.[28] The admitted facts 25 to 30 are that between 8.00am and 9.00am on 26 August 2013 Mr Cootes advised Lance Judd that loose gravel was still falling into the trench as they were trying to dig and "both loose gravel and compacted fill was falling into the trench". As a result of this Mr Cootes told Lance Judd that it was too dangerous for him, the excavator driver and the concreter to keep working in the vicinity of the trench. This resulted in an inspection by Lance Judd which concluded that the area needed to be shored up with Lance Judd instructing Mr Cootes and the excavator driver, Mr McQueen, that no further work was to be done in the area until the area had been shored up. Mr Cootes had made his position plain to Mr Judd that it was too dangerous for him or his fellow workers to keep working in the vicinity of the trench and Mr Cootes said he was not prepared to keep working in the vicinity of the trench.

[24] As a result of this, in order for the shoring up work to be undertaken by Lance Judd and Barry Judd, Mr Cootes acted as a spotter. Lance and Barry Judd commenced the works before Lance Judd attended the site meeting, Barry Judd then remained in the trench performing the shoring work. As between the plaintiff and first defendant, admitted fact 52 is that Mr Cootes asked Barry Judd to fetch an auger as Mr Cootes wanted Barry Judd to get out of the trench because he was concerned about the risk to Barry Judd of the face collapsing. Admitted fact 56 is that Mr Cootes apprehended there was a serious

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[28] Exhibit 8, pp 50-59.

risk of the trench or material above the trench collapsing into the trench. Admitted facts 61 and 69 admit that in any event "the plaintiff was not intending to perform any work in the area of the trench and excavation face" and "[t]he plaintiff was not intending to, not attempting to, perform any further work in the area, consistent with Lance Judd's directions and the plaintiff's concerns."

[25] Mr Cootes' version was: "[s]o I've come back down and noticed there was a drill in the bottom of the trench …. the one Barry was using in the trench".[29] Mr Cootes explained as the drill was lying on the bottom of the trench he could observe that dirt was falling on to the drill burying it. Mr Cootes then attempted to retrieve the drill. Mr Cootes described what occurred as follows:

> "Well, it was – dirt was falling on top of the drill; so I walked across these two strip footings here and you could get down here. It was like a step because it was all over [indistinct] and this is where I tried to kick – drag that drill back with my foot."[30]

[26] Mr Cootes explained how he attempted to retrieve the drill back with his foot. Mr Cootes said he was leaning up against the block wall with his right hand, he was facing down the trench and that he used his right leg in attempting to drag the drill back with his foot. Mr Cootes described how the drill was on the bottom of the trench and situated 400mm to 500mm from the edge of the block wall which required him to step out beyond the block wall to perform the task of kicking or dragging the drill back with his right foot. Mr Cootes explained that whilst he was kicking or dragging the drill back with his right foot a "[t]hat's when the first lot of dirt got me on the back of the calf and sent me right into this hole here".[31] Mr Cootes then described that the area in which he was buried up to the top of his chest was the large over excavated or big hole area adjacent to the corner of the rock block wall. Mr Cootes explained how the collapse occurred very quickly so he did not have time to escape.

[27] The second and third defendants allege that the accident occurred in different circumstances as set out in paragraph 9 of the amended defences of the second and third defendants. The essential difference in versions of fact is set out in paragraph 9(y) to (ee)) alleging that the drill was not left on the bottom of the trench but rather the drill was left by Barry Judd on the side of the trench such that Mr Cootes had no reason at all to enter the trench. The first defendants originally joined in on this alternative version of fact (in paragraph 7(i)(xxvii) to xxxii) of the amended defence) but in submissions and in its rejoinder the first defendant abandoned that position.

[28] In its rejoinder filed 5 April 2019 the first defendant expressly admits paragraphs 3(p)(vii) of the plaintiff's reply. Paragraph 3(p)(vii) of the plaintiff's reply alleges that it is the plaintiff's case that "when the incident occurred, the plaintiff was in the trench standing behind the block wall attempting to use his leg to retrieve a drill which had been left in the trench by Barry Judd, or allowed to fall into the trench by Barry Judd." On the basis of this admission by the first defendant there is admission or acceptance of Mr Cootes' version as to why he entered the trench.

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[29] T1-24/38-41.
[30] T1-30.
[31] T1-30 l 40-45.

[29] The second and third defendants make no such concession but positively assert that when Barry Judd exited the trench he left the drill (on the side of the trench) with the bolts and ply wood, and that Mr Cootes picked up the drill (from the side of the trench) then entered into the trench and "continued the process of shoring up, putting bolts into the block wall and then screwing ply into the front of that."[32] The genesis of the factual dispute is Barry Judd's evidence that he did not leave the drill at the bottom of the trench but rather left it on the side of the trench. Barry Judd's evidence on this issue is that he left the drill close to the edge of the trench.[33] The second and third defendant also rely on a prior inconsistent statement provided by Mr Cootes to investigators from the division of Workplace Health and Safety.

[30] Mr Cootes accepted that on 14 September 2013 he was interviewed by officers of the Division of Workplace Health and Safety.[34] However Mr Cootes conceded he did not remember too much of the interview. Mr Cootes said he could recall the interview occurred at his place but was unable to recall what was said. It was put to Mr Cootes:

> "MR LYNCH: You told the investigators from Workplace Health and Safety, I suggest, that you were in the trench at the time it collapsed.
>
> ANSWER: Definitely wrong."

[31] That is an unusual answer because it is plain Mr Cootes was in the trench as he described for the purposes of retrieving the drill at the time the trench collapsed, and had a short time prior to this denial admitted to being in the trench. After asserting that was definitely wrong Mr Cootes said he did not recall what he said, which given the interview occurred almost six years ago is unsurprising. Mr Cootes accepted that he had read a number of matters from the Workplace Health and Safety investigation but "it's just not how it happened".

[32] It was put to Mr Cootes that he told investigators from Workplace Health and Safety that he had replaced Barry Judd in the trench. Mr Cootes said he did not say that, yet he recalled that he had read that but just could not remember saying it, Mr Cootes adding "that's not how it happened". It was put to Mr Cootes "[y]ou told the investigators at Workplace Health and Safety that you were in the trench to finish the shoring-up work" to which Mr Cootes answered "same again, sir" which I interpret as meaning he has read it, he did not remember saying it and "it's just not how it happened". Importantly, in the cross examination of Mr Cootes, Mr Cootes said:

> "MR LYNCH: You didn't tell them anything about trying to retrieve a drill. Did you?
>
> MR COOTES: I don't think I read anything, no.
>
> MR LYNCH: You agree that you didn't tell the Workplace Health and Safety investigators that you [were] attempting to retrieve a drill and that's how the accident happened. You agree with that?

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[32] Paragraph 9(aa) of the second and third defendants' further amended defences.
[33] T2-79
[34] T1-80 - T1-81

MR COOTES: Yes"[35]

[33] The admissions were made at a time proximate to the time of the accident, being within three weeks, when Mr Cootes was on Endone for his pain.[36] One thing that was apparent from the outset of Mr Cootes' evidence is that he is most imprecise in the use of the English language in a formal sense. For example Mr Cootes considers kicking a drill away the same as dragging a drill towards him. Literally, the two are completely different actions. Another example is that it is true to say that Mr Cootes did replace Barry Judd in the trench however if that phrase is meant to infer that Mr Cootes was attempting to continue with the shoring up work, that infers a completely different meaning to the reason for Mr Cootes' presence in the trench. With respect to the presence of the drill there is nothing to suggest that the investigators from the Workplace Health and Safety Department would have been aware of the existence of the drill, nor its part, on Mr Cootes' version, that it had to play in the accident. It would be fair to expect the average educated person to have volunteered the positioning of the drill and its role in the cause of the action in any investigation. However, Mr Cootes did not do so. It is plain that Mr Cootes is extremely knowledgeable in matters of construction but it would also appear plain that he has limited skills in expression or the use of accurate language, in that Mr Cootes speaks using general (and vague) words. Notwithstanding this, I do not doubt Mr Cootes' honesty.

[34] Another important matter in this regard is Mr Cootes' uncontradicted evidence that he made multiple complaints about the danger of the face to Mr Love and to both Lance and Barry Judd. I accept his evidence in this regard. Having made those complaints it would seem incongruous that Mr Cootes would voluntarily enter the trench and place himself in danger. It would, on Mr Cootes' own analysis be a highly dangerous act and one unlikely that Mr Cootes would perform.

[35] Lance Judd and Barry Judd gave evidence that they considered that working beside the exposed cliff face did not pose any risk of danger. They themselves worked in the trench in the very area where the incident occurred. It seems prior to the accident that Mr Cootes was the only person, apart from the concreter who was being struck by falling materials who perceived the danger. As set out above it is an admitted fact by the first defendant that not only the gravel but also fill was falling into the trench prior to the incident.

[36] In resolving this important issue of fact, the evidence of Mr Cootes needs to be assessed against evidence of the admissions made in and omissions from the Workplace Health and Safety investigation. Additionally Barry Judd needs to be assessed as a witness in so far as it is clear evidence that he left the drill on the side of the hard stand or trench. I did not find Barry Judd to be an impressive witness. Barry Judd could remember with precision that he left the drill on the side of the hard stand or trench and was able to indicate the area where he left the drill, however he could remember any detail of what had occurred the previous Friday afternoon regarding the shovelling of the gravel out of the trench which was recalled by his brother Lance Judd. Barry Judd said that his first involvement with the trench was on the Monday morning of 26 August 2013.[37] Barry

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35 T1-91/14-19.
36 T1-32/20-30.
37 T2-82/31.

Judd did not recall some of the important conversations which occurred that morning.[38] Barry Judd explained that he recalled leaving the drill on the edge of the hard stand as follows:

> "MR LYNCH: All right. And can I ask you why you would put your drill and other bits and pieces there while you were working?
>
> BARRY JUDD: Well, for a start, bending down there to pick up the drill and – it's easier to put it up high than put it down low in – in the trench. …
>
> MR LYNCH: All right. So it – was it more convenient?
>
> BARRY JUDD: Yeah, it's more convenient, yes."[39]

[37] Barry Judd's answer that the reason he left the drill on the hard stand as it was more convenient because it avoided the need to bend down to pick up the drill, in the abstract, is objectively reasonable. However when reference is had to photographs 5, 6 and 8 in exhibit 1 it can be observed that there are two lengthy steel reinforcement bars inserted into the retaining wall which impede the ability of a person working on the timber to conveniently access the hard stand. Barry Judd confirmed these pieces of steel were "put in before we put the timber up".[40] It would thus be necessary on Barry Judd's version for Barry Judd to bend down and go under the steel reinforcing bars or walk backwards and around them. There is a paucity of evidence upon the steel reinforcing bars.

[38] Mr Cootes thought the "starter bars" were put in after the accident.[41] It is known that the trench is approximately 700mm deep and yet the photographs 6 and 8 in exhibit 1 suggest the reinforcing bars are a little higher than the 700mm trench. More importantly, the place where Mr Judd left the drill is the subject of evidence at T2-79, and Barry Judd indicated the position of the drill with reference to photograph 6 as being placed between the excavations made for the stairwell footings. Barry Judd's evidence, it would seem is that it was more convenient to either bend underneath the bar or walk backwards a distance around the reinforcing bars to place the drill in the middle of the stairwell footing excavation rather than simply lower it to his feet and then pick it up. As Barry Judd said in evidence he is not a tall man and I have difficulty accepting it was more convenient to bend underneath the bars or to walk backwards and around the starter bars to rest the drill rather than simply putting it on the ground. As Barry Judd had constructed the hard compacted area, claimed it was as hard as cement and had been tested by geotechnical engineers, he was strongly of the belief that the hard stand would not collapse. Barry Judd would not accept that gravel was falling to his feet. Viewed objectively and in particular in light of the catastrophic failure of the bank which occurred shortly after Barry Judd left the area I do not accept Barry Judd's evidence that no gravel nor fill was falling at his feet at the time he was performing the work. I accept Mr Cootes' evidence that, gravel and "stuff's still falling down round

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38 T2-82/33.
39 T2-80/1-5.
40 T2-88/9-10.
41 T1-26/28.

Barry's ankles".[42] Exhibit 1, photograph 9 shows that the gravel was not vertically uniform which "reduced the side support to the excavated road base face, reducing its stability".[43] I accept Mr Dargush's risk analysis in this regard and as set out on page 60, of exhibit 1. Mr Dargush's opinions are not challenged and I accept them.

[39] It is to be recalled that Barry Judd was operating a hammer drill drilling into a concrete retaining wall. In this respect I accept the evidence of Mr Cootes and reject the evidence of Barry Judd and find that while Barry Judd was performing the work, gravel and other "stuff" was falling from the face where Barry Judd was performing his work.

[40] I consider that Mr Cootes gave his evidence in a direct manner and in a convincing manner. Whilst Mr Cootes was most imprecise in his language at times, it seems to me that this is part of Mr Cootes' personality. In particular I accept Mr Cootes' evidence that he observed Barry Judd's drill at the bottom of the trench after Barry Judd left to obtain the auger. Either Barry Judd left the drill on the bottom of the trench or he left the drill on the edge of the trench and it fell into the trench. Although Barry Judd's evidence supports the latter version I do not consider his evidence to be reliable. Barry Judd was angry[44], had a go at Mr Cootes and was swearing at Mr Cootes. Mr Cootes was directing Barry Judd to "get out".[45]

[41] I accept Mr Cootes' evidence that the starter bars were not present at the time of the accident. I accept Mr Cootes' evidence that material was falling around Barry Judd when he was in the trench. I reject Barry Judd's evidence of the convenience of leaving the drill on the side of the trench as it was not a convenient measure at all. However, I accept that Barry Judd left the drill on the edge of the trench because if he left it on the bottom of the trench it would have become covered in dirt and debris falling from the excavation face. As I accept that Mr Cootes saw the drill on the bottom of the trench, I infer that the drill fell into the trench as a result of Barry Judd leaving the drill on the edge of the trench.

[42] I further find that after Barry Judd left the trench, dirt continued to fall to the bottom of the trench in the same manner as it had whilst Barry Judd was working in the trench. I accept Mr Cootes' evidence that the dirt was falling on Barry Judd's drill and that Mr Cootes entered into the trench in order to perform a "rescue" of the drill. I accept Mr Cootes' evidence of how the accident occurred namely that he entered the trench from the step down adjacent to the existing retaining wall, he placed his right hand upon the retaining wall, that he stepped out a distance and attempted to drag the drill back to a position behind the retaining wall. Mr Cootes demonstrated this position in the photo on page 51 of exhibit 1. I further find that Mr Cootes, whilst holding onto the wall with his right hand and stepping out into the trench exposed himself to the risk that he feared, namely, the collapse of the face, and whilst attempting to retrieve the drill the face collapsed on him.

Liability – First Defendant

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42 T1-29/21.
43 Exhibit 1, page 60.
44 T1-29/34.
45 T1-29/15.

[43] Section 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ('WCRA') provides:

> **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.

[44] In order to apply s 305B it is necessary to identify the duty referred to in s 305B(1).

[45] In respect of an employer's duty of care Dixon CJ and Kitto J in *Hamilton v Nuroof (WA) Pty Ltd*[46] said:

> "The duty, to whomever it falls to discharge it, is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury. The degree of care and the foresight required from an employer must naturally vary with the circumstances of each case."

[46] *Hamilton v Nuroof* sets out a long accepted general principal, however the High Court has emphasised the importance of defining the content (sometimes expressed as the extent or scope) of the duty of care.

[47] Although said with respect to the content of duty of care owed by an occupier, Hayne J said in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*:[47]

> "103 Because the extent of a duty falls for decision in relation to "concrete facts arising from real life activities" it will not always be useful to

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[46] (1956) 96 CLR 18, 25.

[47] (2000) 205 CLR 254, 289-290 para 103.

> begin by examining the extent of a defendant's duty of care separately from the facts which give rise to a claim. That may be possible, and useful, in a simple case (like motorist and injured road user) where the duty of care and its content are well established. In other cases, however, it may lead to an insufficiently precise formulation of the duty which obscures the issues that require consideration. That lack of precision may lie in formulating the duty too narrowly: for example, by asking did the defendant owe a duty of care to fence the *part* of the cliffs in its reserve from which the plaintiff fell? It may also, as in this case, lie in formulating the duty too broadly: for example, by asking did the defendant owe *any* duty of care to the plaintiff?
>
> 105 In cases such as the present, where the extent of the relevant duty is not clear, it is useful to begin by considering the damage which the plaintiff suffered, and the particular want of care which is alleged against the defendant. Asking then whether that damage, caused by that want of care, resulted from the breach of a duty which the defendant owed the plaintiff, may reveal more readily the scope of the duty upon which the plaintiff's allegations of breach and damage must depend."

[48] Hayne J further referred to the above paragraphs in *Tame v New South Wales*[48] before stating at paragraph 281:

> "281 Where there is a relationship between plaintiff and defendant, such as that of employee and employer, and psychiatric injury is suffered in consequence of that relationship, it may readily be concluded that the relationship is such that the duties of care owed one to the other include a duty to take reasonable care to avoid inflicting psychiatric injury. Exactly the same considerations of the control that an employer has over the place and system of work which require finding that an employer owes a duty of care with respect to physical injury support a conclusion that a duty is owed to take reasonable care about the place and system of work so as to avoid psychiatric injury."

[49] Paraphrasing Hayne J at paragraph 281, the general conclusion that the duty owed by the first defendant as employer, to the plaintiff as an employee, is a duty to take reasonable care about the place and system of work so as to avoid inflicting injury.

[50] In order to specify the content (for scope or extent) of the duty of care it is necessary to identify the relevant risk. In the present case the relevant risk is the risk of injury resulting from a collapse of the face of the excavation upon a worker working in the vicinity of the face of the excavation. The damage suffered was the personal injuries sustained by the plaintiff as a result of collapse of the excavation face upon the plaintiff. The want of care alleged against the first defendant as employer as set out in paragraph 11 of the statement of claim, is framed generally as a failure to provide a safe and proper system of work and as a failure to provide a safe and proper place of work. More specifically in paragraph 11(vi) the duty that is alleged is a failure to "ensure that reasonable care was taken for the plaintiff's safety by persons responsible for site safety

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[48] (2002) 211 CLR 317 at para 276.

and for systems of work at the places where the plaintiff was required to perform his duties." By paragraph 11(vii), the breach that is alleged is "by causing, permitting or allowing the plaintiff to perform work in the immediate vicinity of an exposed excavation face, in circumstances where it was unsafe to do so".

[51] Counsel for the first defendant submits that Mr Cootes was not performing work when he got into the trench as "[i]t was no part of the Plaintiff's employment duties for him to be rescuing Barry Judd's drill from under the exposed, and falling face. What if the Plaintiff had gone out onto Ipswich Road to retrieve Barry Judd's drill and been hit by a vehicle [?] No one could sensibly suggest that would involve the employer in liability … The plaintiff's case accordingly fails at that point".[49]

[52] The submission is brought upon facts as alleged by the plaintiff in his own case. In particular:

(a) that Mr Cootes told Mr Love that he would not be doing further work until the trench was safe;[50]

(b) Lance Judd had forbidden Mr Cootes to do work in the area until the shoring up had been completed;[51]

(c) that Mr Cootes had told Lance Judd that he was not prepared to get into the trench and that it was too dangerous to do any work in the vicinity of the trench;[52] and

(d) at the relevant time consistent with Lance Judd's instructions Mr Cootes was not intending to do any work in the trench.[53]

[53] Although an employee may successfully sue his employer for injuries suffered on a road caused by a motor vehicle,[54] an employee is unlikely to succeed unless the employer's system of work required the employee to regularly cross the road. In the present case no one suggested that if Barry Judd had in fact left his drill on Ipswich Road and was struck by a car rescuing the drill, that the first defendant employer would be responsible for damages to Mr Cootes. The first defendant's system of work or business had nothing to do with Ipswich Road, however it had everything to do with the construction site at 246 Brisbane Road, Booval. In the present case there is certainly no evidence that it was a specific part of Mr Cootes' duty to rescue Barry Judd's drill or anyone else's tools from being damaged in the construction process. The only evidence concerning Mr Cootes of the tasks required by his employer, the first defendant, is that he was told by Mr Love "[y]ou can run the jobs. Go and do them".[55]

[54] Practically, what occurred is set out at T1-12 to T1-13, namely, Mr Love or the site foreman would give Mr Cootes a copy of the plan. He would attend upon the site in order to "have a look"[56]. Mr Cootes explained: [57]

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49 Paragraphs 39 and 40 First Defendant's Submissions
50 T1-57/4-9.
51 Admitted Facts 29, 41 and 69.
52 Admitted Facts 27, 30, 33, 43 and T1-28/18.
53 Admitted Facts 69.
54 See *McLean v Tedman* (1984) 155 CLR 306, 315.
55 T1-11/46.
56 T1-12/44.

"MR COOTES: I'd go to the job site first and have a look and told Dave Love what was involved, and … if we needed steel tied to go in the footings, he'd send me two or three steel fixers or one concreter or a steel fixer, and we'd do that job. I'd do all the mark-out and set-outs …. "

MR WILTSHIRE: Okay. And if you needed any plant or equipment, how was that arranged?

MR COOTES: Yes. I'd Ring up --- Dave Love had a foreman. I'd ring up Mick, and he'd organised – if I needed concrete-cutters or drills, he'd have them on site, or I'd have to pick them up."

[55] On 26 August 2013, Mr Cootes was the foreman in charge of two or three other workers including the excavator driver and a steel fixer. Prior to his injury, and because of Mr Cootes' insistence that no work be carried out until the area was made safe, Mr Cootes said that "there [were] three blokes doing nothing there now, plus me". Mr Cootes certainly was not running the job as he had been instructed. Mr Cootes could not run the job because of the collapsing of the face which was occurring. Importantly, Mr Cootes raised this problem with Mr Love on Friday, 23 August 2016 and was told by Mr Love that Mr Love would speak to "SMJ" and "Lance".[58] It is important also to reflect that the law places a duty on the employer to ensure there is both a safe place of work and a safe system of work. Admitted fact 28 (and in Mr Cootes' and Lance Judd's evidence[59]) is that there was a conference on the morning of 26 August 2013 between Lance Judd, Barry Judd and Mr Cootes about the shoring up work that could be done in an attempt to make the area safe. It is also important to record that that is not the first time that Mr Cootes had raised the issue with the site supervisor Lance Judd. Mr Cootes had raised the same issue with Barry Judd on Friday 23 August 2013.[60] In raising his concern on Friday, 23 August 2013, Mr Cootes evidence on this issue is set out below:[61]

"MR WILTSHIRE: And what was the context of him telling you that?

MR COOTES: Because I asked why it was done like this. "Shouldn't it be battered back or benched back?" And Lance said "it's the only way it can be done. The engineer's not going to pass it."

[56] Therefore, in summary, Mr Cootes had raised with site supervisor Lance Judd the danger of the excavation face on Friday 23 August 2013, suggesting a solution (which subsequently was implemented post-accident) of battering back or benching back which was rejected by Mr Judd. Mr Cootes had raised his concerns with Mr Love. Mr Cootes

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57 T1-12 l 45 – T1-13 l 4.
58 T1-22/19.
59 T1-26; T2-29.
60 T1-22 - T1-23.
61 T1-22/43 – T1-22/45.

had returned to work on the Monday 26 August 2013 and again raised his concerns and discussed the matter with Lance Judd and Barry Judd who proposed a solution of shoring up the excavation area in respect of which Mr Cootes was requested to act as a spotter.

[57] In accordance with his general direction from his employer to "run the jobs [and] do them". Mr Cootes was assisting as spotter. He and the other 2 or 3 employees of the first defendant could not perform any meaningful work until the solution was implemented. During the implementation of the solution Barry Judd's drill, which was a necessary part of the proposed solution was being covered by dirt or debris falling upon it. Had the drill been left to be covered in debris or dirt and/or damaged, then it may have taken some considerable additional time to complete the shoring up process which would not have allowed Mr Cootes to fulfil his role as foreman in running and doing the job as he and his workers would have been idle for a longer period of time.

[58] Therefore I consider it was within Mr Cootes' scope of duty to act as a "spotter" and having spotted the drill potentially being damaged, it was within Mr Cootes' scope of duty to rescue the drill, to ensure that it continued to be operable, so as to allow the shoring up process to be completed and in turn allow he and his men to complete their work. In my view the rescue of the drill is a task closely aligned with the duties allocated to Mr Cootes as a spotter so as to come within his scope of duties as an employee of the first defendant to "run the jobs [and] do them".

[59] In terms of s 305B(1)(a) I find that the risk of injury from collapse of the excavation face was foreseeable as it was a risk which the first defendant knew of as that risk had been communicated by Mr Cootes to Mr Love on 23 August 2013. Mr Love was not called as a witness and accordingly there is no evidence to contradict Mr Cootes' evidence that he told Mr Love of the danger of the excavation face collapsing. Further, I find in terms of s 305B(1)(b) and (c) that the risk was not insignificant as I accept the evidence of Mr Cootes that he had in fact observed the debris falling not only in the vicinity of the accident area but also further along the excavation face when material was falling striking the steel fixer who was making complaints.

[60] Furthermore, the 'Health Safety & Environmental Management System & Plan' ('site safety plan') of the second defendant at page 10, ('Excavation and trenches' and 'Trenches') identifies both the risk and the solution, namely, benching or battering.[62] In respect of trenches, the plan requires that when any person is entering a trench more than 1.5 metres deep, the trench "must be shored or shielded, benched (…), battered (…), and approved in writing by an engineer as safe to work in". The plan also provides that "[w]ritten approval to vary the benching and battering requirements may be obtained from an engineer [and] the approval is to be kept on site at all times". The risk exposed by excavations and trenches is obvious and not insignificant. The site safety plan of the second defendants sets out precisely what a reasonable person would have done and that is to ensure there was benching or battering in the form that occurred immediately after Mr Cootes was injured.

[61] Document 4 of exhibit 1 is the report of Mr Dargusch, engineer. It is not necessary to refer to the unchallenged expert report in detail. On page 24 of the report, Mr Dargusch lists seven Australian codes of practice and advisory standards dating back to 1982

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[62] Exhibit 1, document 3.

which suggest that the proper way to manage the risk of excavation collapse is to engage in benching or battering of excavations or trenches. Mr Dargusch then refers to seven international studies dating back to 1995 which reach the same conclusion in addition to Mr Cootes not having observed excavation done in that way in his 33 years of construction experience.[63] Lance Judd also with 54 years of experience in the construction industry had not previously observed an excavation face being managed in the way it was in the present case.[64]

[62] In terms of s 305B(2) (an analogue of the *Wyong v Shirt*[65] factors) I conclude that there was a low probability of the injury occurring if care were not taken. I consider the probability low because the area above the excavation had in fact been compacted to a high degree by Barry Judd. The photographs in exhibit 1 appear to show that the compacted area of the excavation trench was stable. It would appear that both Lance Judd and Barry Judd were prepared to effectively bet their life on the stability of the excavation with both men working under the face attempting to shore up the area for a period exceeding 10 minutes.

[63] I consider that the likely seriousness of injury was very high. That is, if there were a collapse of the face it was quite plain that a person working under the face may be killed or if not severely maimed. As Mr Dargusch points out in his report, there is considerable research verifying that which appears to be a matter of common sense, namely, many deaths and serious injuries have occurred as a result of persons working below an excavation face.

[64] I consider the burden of taking precautions to avoid the risk of injury to be small. All that was required was to implement benching as occurred in the present case post-accident or alternatively battering. I observe that there was an excavator on site, and that before the officers of the Department of Workplace Health and Safety could attend the site to investigate the accident, the benching had been already been completed, as is evident from the photographs in exhibit 1. There was no impediment to the construction of the area being undertaken in the usual safe manner. I conclude that the first defendant is in breach of its duty of care to Mr Cootes to provide a safe place of work by failing to ensure that the excavation face had been benched or battered prior to allowing Mr Cootes to perform any work, including work as a spotter, in the area near the excavation trench. The first defendant was warned of the danger of the excavation face collapsing and is in breach of its duty to Mr Cootes to provide a safe place of work. By failing to ensure the face was benched or battered, the first defendant permitted and allowed Mr Cootes to perform work in the immediate vicinity of the exposed excavation face.

[65] I accept the first defendant's argument that a warning or instruction was not necessary. I also observe that by paragraph 11 of the amended statement of claim Mr Cootes does not allege a breach of duty or care caused by failing to warn or instruct him not to enter the trench.

[66] But for the failure to ensure a safe place of work, by benching or battering, the accident would not have occurred. I find that the breach of duty was a necessary condition of the

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63 T1-22/28-31.
64 T2-35/7.
65 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

occurrence of the injury, that is, factual causation within s 305D(1)(a) of the WCRA is established. In respect of scope of liability causation referred to in s 305D(1)(b). As Mr Cootes was an employee of the first defendant working within the scope of his employment, I find it is appropriate for the scope of liability of the first defendant to extend to the injuries so caused.

Contributory Negligence

[67] Sections 305F to 305H of the WCRA provides:

> **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.
>
> **305G Contributory negligence can defeat claim**
>
> In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.
>
> **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
>
> (b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them; or
>
> (c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury; or
>
> (d) inappropriately interfered with or misused something provided that was designed to reduce the worker's exposure to risk of injury; or
>
> (e) was adversely affected by the intentional consumption of a substance that induces impairment; or

> (f) undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account of obvious risk; or
>
> (g) failed, without reasonable excuse, to attend safety training organised by the worker's employer that was conducted during normal working hours at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event resulting in the worker's injury.
>
> (2) *Subsection (1)* does not limit the discretion of a court to make a finding of contributory negligence in any other circumstances.
>
> (3) Without limiting *subsection (2), subsection (1)(f)* does not limit the discretion of a court to make a finding of contributory negligence if the worker— (a) undertook an activity involving risk that was less than obvious; or (b) failed, at the material time, so far as was practicable, to take account of risk that was less than obvious.

[68] In *Osborne v Downer EDI Mining Pty Ltd & Anor* [2010] QSC 470 at 74, McMeekin J said of s 305H that it did very little to alter the common law position save to say that a court may make a finding of contributory negligence in those circumstances.

[69] Counsel for the first defendant urges that contributory negligence ought to be found at the level of 50% with reference to *Osborne*, *Wylie v The ANI Corporation Limited* [2002] 1 Qd R 320 and *Kennedy v Queensland Alumina Limited* [2015] QSC 317. Counsel for the first defendant submits that Mr Cootes' conduct on entering the trench was intentional and went well beyond inattention, misjudgement or inadvertence.[66]

[70] Findings of contributory negligence in those cases do not assist in the proper determination of contributory negligence in the present case. For example, *Kennedy* involved a skilled worker forgetting to operate an isolation valve which had been put in place by his employer specifically to "isolate" that is, to remove the risk of caustic liquid striking a worker performing the maintenance upon a lower valve. In *Wylie*, the trial judge reduced contributory negligence by 50% where a worker was operating an overhead crane and stood below the load of the overhead crane in circumstances where he need not. The trial judge (McGill DCJ) considered that the actions of the plaintiff "was an extremely foolish thing for the plaintiff to do, and an example of serious negligence on his part". The appeal did not involve the reconsideration of the issue of contributory negligence.

[71] *Osborne's* case concluded in a reduction of contributory negligence by 35% where the plaintiff fell down a hole which he had constructed and needed to walk past two barriers warning him of the hole. Mr Cootes' position is very different. Mr Cootes, it would seem was the only one pre-accident to actually acknowledge the risk. A finding of contributory negligence under s 305H(1)(f) of the Act is open as Mr Cootes considered the risk was obvious, however, Lance Judd thought the risk was non-existent. As stated in s 305F(1) the same principles that are applied in determining whether there is a breach of duty also applied to contributory negligence. I reach the same conclusions as recorded above, namely, the probability of the injury occurring was very low but the

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[66] First defendant's written submissions paragraphs 118 & 119.

likely seriousness of the injury was extremely high. There is however, two significant differences, and that is that Lance Judd and Barry Judd were happy to work fully exposed under him excavating for a long period of time because they considered that there no chance that the excavation would collapse. Mr Cootes, on the other hand, was prepared to partially expose himself to the risk by using the retaining wall to partially shield him, and then, to partially expose himself for the several seconds necessary to retrieve the drill.

[72] From Mr Cootes' perspective the burden of taking precautions to avoid the risk of injury i.e. by not retrieving the drill was not unduly large, however, it needed to be balanced with Mr Cootes' duty to his employer the first defendant to run the jobs and do them. It was plain on Mr Cootes' evidence that he knew that the trench was at risk of collapse and that he had expressed a clear desire not to enter into the trench area. Yet acting as a spotter he observed the drill on the bottom of the trench being covered by dirt and so it would seem Mr Cootes took a calculated risk. It is important that Mr Cootes entered into the trench in a safe area behind the concrete retaining wall. It is important that Mr Cootes had observed both Lance Judd and Barry Judd working in the area with no injury occurring to either man. The excavation face had been cut on the morning of Friday 23 August 2013, and had not suffered a major collapse for about 3 days prior to the accident. Lance Judd considered that there was no risk of collapse at all.[67] Lance Judd did not instruct Mr Cootes that he could not enter the trench.[68] Barry Judd said that he told Mr Cootes to "stay away from there and leave it until I come back".[69] Mr Cootes denies this and I accept his evidence. Barry Judd was angry, had "had a go" at Mr Cootes, and there is no reason on his evidence for Barry Judd to have warned Mr Cootes to stay out of the trench.

[73] Mr Cootes was then logically able to form the conclusion that there was an extremely little prospect of him being injured if he entered into the trench as he did because in order to retrieve the drill, he would need to expose himself to the danger for a very short period of time. The description given by Mr Cootes of his attempts to retrieve the drill at T1-30 to T1-31 and the photograph at page 51 of exhibit 1 shows that Mr Cootes had attempted to partially shield his body behind the concrete wall, and step out and expose a portion of his body for a period which may be measured in seconds. Mr Cootes had to assess the risk of collapse occurring in the several seconds he needed to retrieve the drill when there had not been a major or dangerous collapse for 3 days. Mr Cootes had to balance that risk against leaving the drill to be buried or damaged, delaying him and his crew's work. If he did not act to retrieve the drill he would be not fulfilling his role as a spotter nor would he be fulfilling his role as a foreman who was instructed to run the jobs.

[74] In determining the respective departures from standards required of a reasonable person, the degree of blame in the first defendant is very high as it had permitted a worker to perform work tasks in an area with an unsafe excavation face which had been constructed in a manner which was against well-known safety principles and the site safety plan. Mr Cootes' misjudgement was momentary but it was not inattentive, that is, Mr Cootes was extremely concerned about a risk of injury to himself or others (including Barry Judd) from the collapse of the excavation face yet knowingly exposed

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67 T2-41/33.
68 T2-33/22-47 and paragraph 9(u)(iii)
69 T2-81/7.

himself to that risk for a matter of seconds in order to retrieve Barry Judd's drill so that work could continue upon the site. The comparative examination in respect of fault for each party must be judged by reference to the whole conduct of each negligent party[70]. In *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 310, Mason, Wilson and Dawson JJ said:

> "A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage"

[75] Counsel for the plaintiff submits there ought to be no finding of contributory negligence because Mr Cootes' action amounts to mere momentary inadvertence or mere momentary misjudgement. The actions of Mr Cootes entering into the trench as he did, in full recognition of the risk cannot be said to be inadvertent, it was in truth a calculated risk undertaken by Mr Cootes. There is no doubt that Mr Cootes entering the trench involved a "misjudgement" because, in hindsight, the face collapsed. Mr Cootes' actions ought not, however be judged with the benefit of hindsight. It was a serious momentary misjudgement, but applying the requirements of s 305B(2) do not call for an apportionment for contributory negligence.

Liability of Second and Third Defendants

[76] The second defendant was the principal contractor for the construction. The third defendant was the principal contractor's representative and site manager. The director of the second defendant, Mr Scott Jennison, gave evidence of his weekly site meetings throughout the construction project with Lance Judd, director of the third defendant. Lance Judd fulfilled the third defendant's responsibilities as site manager for the construction works. Lance Judd held the responsibility for managing the risks associated with excavation collapsing.[71] The second and third defendants have identical pleadings on the issues raised in the statement of claim. By paragraph 8 of their defences, the second and third defendants (in paragraphs 8(a) to (d) inclusive) deny the content of the duty of care alleged by the plaintiff against the defendants. In paragraph 8(e) the defences provide:

> "If the second defendant did as a matter of law owe a duty of care to the plaintiff at any material time, that duty was no more [than] to act reasonably to prevent injury to a worker on the Site from a risk, danger or hazard which was known to the second defendant or ought to have been known to the second defendant."

[77] As pointed out by counsel for the second and third defendants, the high, personal and non-delegable duty of care owed by an employer to its employees is a more stringent

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[70] *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492, 494.
[71] T2-43/24.

obligation of duty of care owed by a principal contractor. In *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 at paragraph 21 the plurality said:

> "21 It is common in the construction industry for the principal contractor to arrange for the works to be carried out by subcontractors rather than by employing its own labour force. Among the advantages that accrue to the principal contractor in adopting this model for its undertaking is that it does not incur the obligations that the law imposes on employers. An employer owes a personal, non-delegable, duty of care to its employees requiring that reasonable care is taken. This is a more stringent obligation than a duty to take reasonable care to avoid foreseeable risk of injury to a person to whom a duty is owed. While an employer is not vicariously liable for the negligent conduct of an independent contractor, it may incur liability where the negligent conduct occasions injury to its employee. This is because it will have failed to discharge the special duty that it owes to its employees to ensure that reasonable care be taken, whether by itself, its employees or its independent contractors, for the safety of its injured employee. In this case, if the pipe had struck the forklift driver, an employee of Leighton, there may be little doubt as to Leighton's liability in respect of the injury to him. The distinction that the common law draws between independent contractors and employees has been the subject of criticism. However, as five Justices of this Court observed in *Sweeney v Boylan Nominees Pty Ltd* , whatever the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the concept of distinguishing between independent contractors and employees is one too deeply rooted to be pulled out."

[78] In *Stevens v Brodribb Sawmilling Co Pty Ltd*[72], Brennan J said:

> "An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury."

[79] Framed in the *Brodribb* matter or as pleaded in paragraph 8(e) of the amended defences or by reference to the more general duty referred to in *Leighton Contractors Pty Ltd v Fox*, it is accepted by the second and third defendant that they do owe a duty of care to

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[72] (1986) 160 CLR 16, 47-48.

Mr Cootes.[73] As identified above in *Modbury,* it is important to define the content of the duty of care and that ought to be done pragmatically by reference to the risk of injury. As stated above, the risk of injury was the risk of a severe personal injury or death resulting from the collapse of the excavation face. The risk of injury was foreseeable as expressed above and was the subject of specific obligations in pages 9 and 10 of the Site Safety Plan[74]. The content of the second and third defendants' duty of care to Mr Cootes was to use reasonable care to avoid the unnecessary risk of injury caused by a collapse of the excavation face.

[80] In terms of *Leighton Contractors v Fox*, I find that the risk of Mr Cootes being injured by the collapse of the excavation face was a foreseeable risk of injury and that reasonable care required the second and third defendants to comply with the site safety plan, that is by battering the excavation face or benching, as occurred immediately post-accident. It is plain that the second defendant as principal contractor had control over the site. The second defendant was able, through its director Mr Scott Jennison to call Lance Judd away from his work to attend at a weekly site meeting at the time the accident occurred. It is also plain that from a day to day perspective Lance Judd as the site supervisor had control over the work and the manner which work was to be performed. Lance Judd's idea of creating the unsupported excavation face, contrary to the site safety plan[75] was discussed with Mr Scott Jennison.[76] As there is no evidence to suggest Mr Jennison took any steps to ensure the safe work plan was adhered to, I infer that Mr Jennison implicitly approved the construction. Both Lance Judd and Mr Jennison had power to control the work being undertaken, which is an important aspect of the totality of the circumstances which may cause a duty of care to arise.[77]

[81] Although the duty of care owed by the second and third defendants is more confined than the duty owed by the first defendant employer, I find, for the reasons detailed above, that by failing to bench or batter the excavation face, the second and third defendants are in breach of their duty of care to the plaintiff. I find that breach of duty of care has caused Mr Cootes to suffer a personal injury. I further find that, for the reasons expressed above, that Mr Cootes ought not to be held contributory negligent.

Quantum

[82] The damages awarded to Mr Cootes against his employer is regulated by Chapter 5 Part 9 of the WCRA. The damages to be awarded to Mr Cootes against the second and third defendants are to be assessed in accordance with common law principles as a result of the application of s 5(1)(b) of the *Civil Liability Act* 2003 (Qld).

General damages

[83] Pursuant to ss 306O and 306P of the WCRA it is necessary to utilize the *Workers' Compensation and Rehabilitation Regulation* 2003 (Qld) ('the Regulation') to calculate general damages by reference to an injury scale of value. The plaintiff's case is that he

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[73] Second and third defendants' written submissions at paragraph 19.
[74] Exhibit 1, document 3.
[75] Exhibit 1, document 3.
[76] T2-35/14.
[77] *Vella's Plant Hire Pty Ltd v Mistranch Pty Ltd* [2012] QSC 77 per McMeekin J.

ought to be assessed under Item 90 together with an uplift to allow for multiple injuries. In my view it is plain that the dominant injury is an Item 90 serious lumbar spine injury.

[84] Dr Scott Campbell, neurosurgeon, and Professor Richard Williams, orthopaedic surgeon, who have been afforded the opportunity of reviewing the radiological scans in respect of Mr Cootes' spine both consider there is a more than 50 per cent crush suffered at the L3 level which in turn classifies that dominant injury as a DRE IV category injury. The consequential effect is a level of permanent impairment at 23 per cent. As is made plain by Dr Campbell, Professor Williams and Dr John Cameron there is no neurological impairment associated with the crush injury but there is ongoing pain. The dominant injury does accord with the example of the injury and the comment provided in Item 90 of an injury "at or near the top of the range".

[85] The L3 fracture of itself ought to be assessed at the top of the Item 90 range, that is, at an ISV of 35. Technically the fractures of the L1 and L2 transverse processes each constitute an Item 92 moderate lumbar spine injury fracture with an ISV range of 5 to 15. It is common ground between the psychiatrists Dr Mathew and Professor Whiteford that Mr Cootes has suffered from post-traumatic stress disorder. Professor Whiteford considers that condition is in partial remission. I accept that opinion as it accords with my observations of Mr Cootes and medical records as discussed below. Dr Mathew also diagnoses an adjustment disorder with depressed mood and classifies that illness as being mild whereas Professor Whiteford accepts that Mr Cootes may have suffered from an adjustment disorder with depressed mood after the injury but by April 2016 Mr Cootes had no longer met the diagnostic criteria for the condition of an adjustment disorder with depressed mood. Upon assessment by Dr Mathew on 1 October 2015 Dr Mathew quantified Mr Cootes as having suffered from a 6 per cent PIRS impairment. On 11 April 2016 Professor Whiteford assessed Mr Cootes as suffering from a 4 per cent PIRS impairment. On reassessment by Dr Mathew on 1 October 2015, Dr Mathew concluded in respect of Mr Cootes' state of mind that "[s]ome things have improved and other things have gotten worse."[78] Dr Matthew did not offer any further PIRS assessment. There is evidently little difference in the opinion between the psychiatrists and appropriately the psychiatrists were not subject to cross-examination.

[86] In my own assessment Mr Cootes put on a brave face when swearing evidence concerning the incident particularly describing how he was buried up to essentially the top of his chest and how he considered that in the incident he would perish. Although Mr Cootes clearly did the best he could, he did suffer from one emotional break down whilst providing evidence. According to the Regulation an Item 12 moderate mental disorder is "[a] mental disorder with a PIRS rating between 4% and 10%". A moderate mental disorder carries an ISV range of 2 to 10. Both Dr Mathew and Professor Whiteford's PIRS assessment places the post-traumatic stress disorder as an Item 12.

[87] The finding of multiple injuries engages s 4(1) of Schedule 8 of the Regulation which provides that:

4 Multiple injuries and maximum dominant ISV inadequate

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[78] Exhibit 1 p 197.

> (1) This section applies if a court considers the level of adverse impact of multiple injuries on an injured worker is so severe that the maximum dominant ISV is inadequate to reflect the level of impact.

[88] I consider that the level of adverse impact of the multiple injuries on Mr Cootes is so severe that the maximum dominant ISV 35 is inadequate to reflect the level of impact. The reasons are the same as those which form the basis of the award for common law damages. I do not consider however that the present case is one of the "rare" cases[79] where the maximum dominant ISV ought to be more than 25 per cent higher than the maximum dominant ISV. In my view and considering the level of adverse impact of the injuries upon Mr Cootes a 25 per cent uplift is the proper level of uplift. Accordingly I quantify the ISV of 43 as fairly reflecting the level of adverse impact suffered by Mr Cootes as a result of the injuries he sustained. An ISV of 43 translates to an award of damages of $99,550.

[89] At common law general damages are awarded to a plaintiff who has suffered personal injury in recompense for the pain, suffering and loss of the amenities of life suffered by the plaintiff. Mr Cootes swore, and I accept, that he suffers from lower back pain every day as a consequence of his injuries. As is common in lower back injuries Mr Cootes' lower back pain fluctuates according to the activities which he performs on any day. Mr Cootes rated his pain at its lowest as being at a level of four out of 10 rising depending upon what he did, to eight out of 10 at its worse. Mr Cootes swore that his average pain is usually four or five out of 10. Mr Cootes is prescribed and consumes Lyrica and Panadol in order to assist with his pain. Mr Cootes swore that because of his pain he lives on Panadol consuming it "all day every day". Mr Cootes swore and I accept that he is struggling emotionally and in particular his anxiety worsens if he is driving a motor vehicle or observes any job sites. Mr Cootes does however still derive some pleasure out of life related both to his exercise regime, swimming 30 minutes per day twice a week, walking 20 minutes per day two to three times per week and engaging in fishing, in a sedentary manner, once per week. Importantly, Mr Cootes would appear to have had a life long association with Australian rules football. It is that part of his life and his family which continues to provide him with some joy. Mr Cootes has two adult sons and suffered from a marital break down as a much younger man. Mr Cootes summarised his pre-accident life as follows:

> "Working and sport were my life, mate. That was just – it's all I've ever known."[80]

[90] It is to be recalled that when Mr Cootes was injured he was only 51 years of age. He was then and remains the team manager for the seniors and reserves of the Coomera Magpies AFL club. Prior to the accident, in order to keep fit, and although aged 51, Mr Cootes would train every Thursday night with the senior and reserve grade teams performing the same training that those teams performed. That is, running laps and doing "the ball work".[81] It was Mr Cootes' evidence that he would perform the same training as men 20 and 30 years his junior finishing early so he could "then get behind the bar before they'd finish". In addition to training with the team members on the

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[79] Schedule 8 s 4(3)(b) of the Regulation.
[80] T1-44/33-34.
[81] T1-44/11.

Thursdays and running as team manager at the games on Saturdays Mr Cootes played tennis with his son once or twice each week.

[91] Prior to the accident Mr Cootes was very fit, did not have any health concerns and does not recall visiting any doctor in Queensland for many years. In addition to his very active sporting life Mr Cootes usually worked six days a week. In respect of what he has lost Mr Cootes swore[82] that apart from playing darts he "can't do nothing" which I will strip of its first negative and interpret Mr Cootes as suggesting that he "can do nothing". Prior to the accident Mr Cootes had a very healthy sex life however since the accident, which is now approaching six years, Mr Cootes has suffered from erectile dysfunction which according to the urologist Dr Heathcote is likely caused by chronic pain and the psychiatric disorder that Mr Cootes suffers from.

[92] As in most personal injury cases it is impossible to find a closely comparable factual case to assist in the quantification of general damages. I have had some regard to some earlier decisions[83] however I consider that it is the matters which I have referred to above which guide me in my assessment as to the proper level of general damages at common law being assessed at $110,000.

[93] Interest cannot be awarded upon general damages against the employer.[84] Section 58(3) of the *Civil Proceedings Act* 2011 (Qld) allows interest to be awarded upon the general damages assessed at common law in the usual manner that is at 2 per cent upon a half (representing the past award). Presumably as Mr Cootes had suffered from a serious injury as defined in the WCRA the first defendant's insurer WorkCover Queensland paid Mr Cootes a permanent impairment lump sum of $69,282.40 on 24 September 2015. As this payment exceeds the past part award of damages for pain and suffering, Mr Cootes has not suffered from any loss of interest.[85]

Past economic loss

[94] The statement of claim somewhat ambitiously claims an ongoing loss of earnings at the rate of $1,345.29 per week. Although Mr Cootes was an employee of Concrete Panels Mr Cootes was paid an hourly rate by Concrete Panels and rendered a weekly invoice to Concrete Panels who paid Mr Cootes according to the number of hours he worked. No income tax was deducted by Concrete Panels. Rather Mr Cootes operating under his own ABN declared his income and payed his own tax. Exhibit 2 is Mr Cootes' Westpac Bank account for the month of August 2013 showing most payments from Concrete Panels totalling $6,850 which calculates average gross earnings for the month of August at approximately $1,712.50 per week. I am conscious however that Mr Cootes did only work until lunch time on the last Monday of the week when he was injured. I am also conscious that the first deposit in August was the sum of $1,575 deposited on 1 August 2013 which evidently relates to work performed by Mr Cootes in July. Therefore three weeks prior to Mr Cootes being injured he earned $5,275 gross which is an average of $1,758 for each of the three weeks.

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82 T1-41 – T1-45.

83 *Syben v Mackay TFS Pty Ltd* [2009] QSC 367 ($100,000); *Cameron v Foster & Anor* [2010] QSC 372 ($80,000); *McClintock v Trojan Workforce No 4 Pty Ltd & Anor* [2011] QSC 216 ($80,000); and *Baig v AWX Pty Ltd & Anor* [2017] 325 ($80,000).

84 Section 306N(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

85 *Mahoney v GEC Australia Ltd* [1994] 1 Qd R 397, 398.

[95] Exhibit 1 document 25 contains a summary of Mr Cootes' income for the financial years 2011 to 2015 inclusive. In the 2011 financial year Mr Cootes had business income of $44,192 (average $850 gross per week) from which $3,900 was deducted in business expenses. I calculate a taxable income of $40,292 which after deducting income tax results in a net income after tax of $35,138 which is an average of $676 per week. According Mr Cootes' evidence,[86] in the 2011 financial year Mr Cootes was working for Coastcrete. Mr Cootes then in either late 2011 or 2012 left Coastcrete and went to Victoria for 14 months. In that period, the 2012 financial year Mr Cootes business income was $57,420 ($1,104 per week). Mr Cootes claimed $3,900 in lump sum business expenses to calculate a taxable income of $53,520 which resulted after the deduction of tax and Medicare of $43,653 ($840 per week).

[96] In late 2011 or 2012 Mr Cootes returned to Victoria to work with his "same mate" performing industrial construction work. It is apparent that Mr Cootes worked until approximately April 2013 with his "same mate" and then was off work for "a month or so" commencing work in about May 2013 with Concrete Panels. Mr Cootes says that after obtaining the employment with Concrete Panels through his brother, Mr Cootes worked for approximately two weeks "just doing sub-grading and steel-fixing, and he give me like a foreman job. He said, 'you can run the jobs. Go and do them'."[87] The 2013 financial year appears to represent an amalgam of performing construction work in Victoria with Mr Cootes "same mate", a period of time of approximately a month off, a period of approximately two weeks in May 2013 performing labouring type duties and then from a period from perhaps mid-May 2013 until 30 June 2013 performing foreman type duties. In that period, Mr Cootes earned a total business income of $42,607 ($819 per week) from which he again deducted $3,900 in business expenses, and calculated a taxable income of $38,707 and a net income after tax and Medicare levy of $34,419 ($662 per week).

[97] In the eight weeks between 1 July 2013 and 26 August 2013, Mr Cootes summary of income tax records[88] shows that Mr Cootes earned a business income of $11,840 [89]or $1,480 gross per week. If Mr Cootes had continued to earn that average of $1,480 gross per week and assuming a period of four weeks off on holiday or otherwise, Mr Cootes would have earned $71,052 total business earnings ($1480 x 48). From this sum it is reasonable to deduct $4,000 in business expenses, the sum in fact claimed according to income tax records to quantify taxable income of $67,052. Deducting tax of $13,339 and Medicare (1.5 per cent) at $1006 quantifies net after tax earnings of $52,707 or an average of $1,014 per week.

[98] A consideration of Mr Cootes' work history that he deposed to[90] is consistent with the work history provided to Mr Siebel. Mr Siebels' report shows that Mr Cootes has a general history of long term employment with an employer.[91] It would appear that approximately 21 years ago Mr Cootes moved from Victoria to Queensland where he was employed by Rimco for six or seven years from approximately 1998/1999 to 2004/2005. It appears that from about 2004/2005, for a period of approximately seven years Mr Cootes was employed by Coastcrete. In late 2011 early 2012 returning to

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86 T1-10 - T1-11.
87 T1-11/44-46.
88 Exhibit 1, document 25.
89 $11,842 rounded to $11,840.
90 T1-10 - T1-11.
91 Exhibit 1, pp 134-135.

Victoria where he worked for 12 to 14 months with the "same mate", before returning to Queensland in or about March 2013 to obtain work in April 2013 with the first defendant (also trading as Panel Logistics). Utilising this general history of steady long term employment I consider it more likely than not that had Mr Cootes not been injured he would have continued working in the employ of the first defendant, Concrete Panels for several years. As Mr Cootes' demonstrated income from Concrete Panels was $1,014 net per week I consider a measure of a loss of $1,000 per week more adequately reflects Mr Cootes' economic loss rather than his historical earnings in the 2011/2012 and 2013 years which were, for him, unusually disruptive years.

[99] Dr Mathew[92] and Professor Whiteford[93] agree that from a psychiatric perspective Mr Cootes is permanently disabled from performing construction work. Dr Mathew adds that from a psychiatric perspective Mr Cootes is unable to work in any job that requires driving. Mr Cootes is a 57 year old male who has excellent construction skills and knowledge however he suffers from a low formal level of education, he has no qualifications, he is computer illiterate and has worked almost exclusively within the construction industry all of his life. It is commendable that the first defendant's insurer has made a thorough effort to attempt to rehabilitate Mr Cootes. The first defendant's insurer, WorkCover Queensland has spent almost $20,000 in rehabilitation expenses on Mr Cootes in addition to approximately $35,000 of medical treatment afforded to Mr Cootes. Mr Cootes has attended upon multiple medical experts, including orthopaedic surgeons, psychiatrists, pain specialists and neurosurgeons. Mr Cootes has attended pain clinics conducted at the Wesley Hospital. Mr Cootes has attended multiple sessions of physiotherapy and occupational rehabilitation and a psychologist (Ms Theiler) as well as another psychologist apparently at World Futurity Fitness. Mr Cootes has undertaken test and tag training and attempted return to work schemes both at a caravan park and at his AFL club but all to no avail.

[100] An earlier expert opinion was to the effect that Mr Cootes ought to be able to return to work within perhaps 12 months of his injury. Time has shown, despite Mr Cootes earnest efforts and the extraordinary rehabilitation services provided to him, this is not so. I find that absent the incident of 26 August 2013 and absent other illnesses as discussed below it is more likely than not that Mr Cootes would have continued in his employ with Concrete Panels earning $1,000 net per week. I further find that Mr Cootes does not have a residual income earning ability as is demonstrated by the history of the last almost six years and despite the very best of rehabilitation services being offered to Mr Cootes. I accept the occupational therapist Mr Siebel's opinion in this regard.

[101] Each of the defendants plead that Mr Cootes' past economic loss and loss of economic capacity ought to be reduced as a result of unrelated bilateral osteoarthritis of his hips and a cardiac condition. In respect of the bilateral osteoarthritis of his hips I find, for the reasons discussed below, that condition would not have prevented Mr Cootes from earning his usual income in the period prior to trial. It is plain however that Mr Cootes' cardiac condition would have prevented Mr Cootes from working a period of time. The defendant's case is that from April 2015 the cardiac condition has permanently rendered Mr Cootes unfit for work.

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92 Exhibit 1, pp 115 and 196.
93 Exhibit 1, p 163.

[102] Mr Cootes' cardiac conditions have been diagnosed as severe mitral regurgitation secondary to mitral valve posterior leaflet prolapse and a mildly dilated ascending aorta causing mild aortic incompetence. Both conditions were the subject of surgery on 15 December 2015 which achieved an excellent result. The nature of the surgery to treat the severe mitral regurgitation and mildly dilated ascending aorta is to require open heart surgery which involves the splitting of the sternum, rendering the patient unable to engage in manual work for a significant period of time. Dr Kenneth Hossack a cardiologist for over 35 years estimates a period from three months prior to the surgery of December 2015 through to a period of six months post-surgery that Mr Cootes would have been unable to perform manual work. Professors Howes a physician who specialises in cardiovascular medicine and has done so for over 35 years opines that the usual period of recovery from such surgery is between six weeks and three months. Professor Howes records in his report from Mr Cootes' history that after a period of approximately six weeks post-surgery Mr Cootes had returned to his usual exercise regime of working 20 to 30 minutes every day and swimming for half an hour three times per week. Accordingly Professor Howes has provided his reasons, namely, Mr Cootes' self-report of a good recovery within six weeks of the accident to opine a shorter period of disability consequent upon the heart surgery for a period of six weeks up to three months.

[103] Dr Hossack's opinion concerning Mr Cootes' inability to work for a period of three months prior to August 2015 and from six months after surgery of December 2015 is premised upon an assumption that Mr Cootes was employed "as an industrial labourer".[94] This is not an accurate assumption. There is no criticism of Dr Hossack in this regard. As expressed above, Mr Cootes is extremely poor at articulating and verbalising his thoughts. Mr Cootes habit of imprecise speech has, in this case, led to some difficulty. Mr Cootes own description of the type of work is vague. He describes himself as "a site supervisor or foreman or whatever … Yeah. Yeah. Hands on".[95] When asked a precise question "doing what type of work specifically?" Mr Cootes' answer was "footings, formwork, helping the concreters, steel-fixing, just running other trades. When we got to a certain stage, I'd organise the sparkies and plumbers, all that kind of stuff."[96] Mr Cootes did however explain that he was not a concreter and in fact:

> "I'd never been in the concrete. I was just always running the job, doing the formwork, doing the building of the panels, steel fixing and just sort of – mostly footings, doing all the footings for the slabs to sit on."[97]

[104] In a further attempt by counsel to obtain information from Mr Cootes as to what he actually did Mr Cootes said:

> "Yeah. Mostly like – it's site-supervisor, hands on. If the job that Dave'd sent me to need four or five blokes, they'd come with me, and I'd be in charge of them, and we'd be doing like footings, pier holes, bloody – everything like that." [98]

[105] When asked how physical the work was that he was performing Mr Cootes said:

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[94] Exhibit 1 p 2013.
[95] T1-10/25-31.
[96] T1-10/35-40.
[97] T1-11/4-8.
[98] T1-12/5-10.

> "Yeah. Yeah; pretty physical. Steel-fixing, form-working, all that kind of stuff."

[106] Mr Cootes confirmed that he was not involved in quoting for the work undertaken by the company. After his company had secured a quote he would go to the job site with the plan. It would appear that an important and significant part of Mr Cootes' role was the organising of the job in that he was provided with the plan he would "show up on site and I'd see the site foreman, and they'd show me the plans and go through everything with me."[99] Importantly it is apparent that Mr Cootes always took other staff with him to sites to perform the manual work and in that regard Mr Cootes' evidence was:

> "I'd go to the job site first and have a look and told Dave Love what was involved, and … if we needed steel tied to go in the footings, he'd send me two or three steel fixers or one concreter or a steel fixer, and we'd do that job. I'd do all the mark-out and set-outs"[100]

[107] Mr Cootes then described how he would organise equipment for the job, that is, arranging for concrete cutters or drillers or labourers. The detailed evidence provided by Mr Cootes[101] supports the description of Mr Cootes' job tasks as set out by the occupational therapist Mr Siebel.[102] He describes Mr Cootes' role as a:

> "Tilt panel construction supervisor (supervising the construction of tilt panels and formwork, coordinating machine operators and labourers, and performing general civil construction labouring and earthworks) ..."

[108] I conclude that Mr Cootes' description of his work tasks as recorded in his evidence and recorded by Mr Siebel, and his quick two week promotion by Mr Love, director of the first defendant, from labourer to supervisor supports the conclusion that the vast majority of Mr Cootes' actual tasks were supervisory and organisational in nature, and that ordinarily he would be required to perform only limited amounts of unspecified manual work.

[109] Dr Hossack is of the opinion that despite Mr Cootes' heart condition, his heart condition would not have prevented him, after his recovery, continuing to work as a supervisor to age 67.[103] However Professor Howes is of the view that there was "no impairment of cardiovascular function which would limit him working in a full-time supervisory role including some occasional hands-on work … at least until the age of 67 and probably beyond that."[104]

[110] Both Professor Howes and Dr Hossack are extremely experienced experts both having more than 35 years' experience. Both gave their evidence in an impressive manner. The difference concerning future prognosis, namely, that Professor Howes considers that Mr Cootes could perform "some occasional hands on work" was not specifically put to Dr Hossack and so I do not have Dr Hossack's assistance in this regard. I do

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99 T1-12/35-40.
100 T1-12/44-50.
101 T1-10 - T1-13.
102 Exhibit 1. p 219.
103 T2-72/14.
104 Exhibit 1, p 213.

however accept Professor Howe's opinion that Mr Cootes' cardiac condition would not prevent him from performing some occasional hands on work as part of a full time supervisor's role because of Mr Cootes' excellent recovery from his heart surgery as discussed below.

[111] Dr Hossack has undertaken a careful and accurate review of the medical records.[105] The records show that by 8 September 2015 Mr Cootes was suffering from exertional dyspnoea but also show that on 13 August 2015 there were no signs of shortness of breath. On 18 August 2015, there was mild shortness of breath recorded, with a probable worsening by 25 August 2015 with Dr Brazil recording that Mr Cootes reported that "he was short of breath walking down the beach one time."

[112] I conclude that the medical records support a finding that by the commencement of September 2015, Mr Cootes' cardiac condition had caused sufficient shortness of breath such that absent the index accident he would have been unable to return to work from the commencement of September 2015 through to the successful surgery in December 2015 and a period of time thereafter. With respect to the period of time that Mr Cootes would have been disabled post-surgery there is a significant difference between Professor Howes' opinion of six weeks to three months and Dr Hossack's opinion of six months. In this regard I prefer the opinion of Professor Howes because not only does Professor Howes' suggestion of an inability to work for six weeks post-surgery accord with Mr Cootes' self-report of his symptoms it also records with the contemporaneous medical records of Mr Cootes' care in January 2016. Additionally, Dr Hossack's opinion is based on the incorrect assumption that Mr Cootes was an "industrial labourer".

[113] The Gold Coast Discharge Summary[106] records that on 15 December 2015 Dr Benjamin Anderson performed a mitral valve repair and aortoplasty. Six days later Mr Cootes was discharged from the Gold Coast Hospital.

[114] On 12 January 2006 Dr Greg Aroney, consultant cardiologist, examined Mr Cootes.[107] Dr Aroney noted that Mr Cootes was "looking very well four weeks post mitral valve repair and aortoplasty", that his wounds were well healed, and that although there was complaint of some shortness of breath there had been improvement over the last couple of weeks. Dr Aroney concluded that there was not "any need to further investigate" and Dr Aroney advised Mr Cootes "to get in touch with me if he hasn't gotten back to pretty much normal activity in a couple of months." Dr Aroney recorded that "all being well I will review him in a year, but he will be in touch if his breathing is not back to normal in a couple of months." Dr Greg Aroney further reviewed Mr Cootes on 10 January 2017 recording[108] "[h]e has now made a very good recovery, with no symptoms attributable to his mitral valve disease and his main limitation is due to back pain from a previous work injury". Dr Aroney reviewed the scans and a recent ECG commenting:

> "I am very pleased with his result from the cardiac surgery, and at this point will not make a specific follow up appointment, but have stressed to him the importance of good dental hygiene to prevent endocarditis, and to report any symptoms of unexplained shortness of breath so we can review him then."

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[105] Exhibit 1, document 27 pp 620-623.
[106] Exhibit 1 p 418.
[107] Exhibit 1 p 428.
[108] Exhibit 1 p 434.

[115] Thereafter, in 2016 and 2017 there is no suggestion Mr Cootes had any difficulty with shortness of breath as a result of his cardiac condition. Mr Cootes attended upon his general practitioner at Pacific Pines on 9 October 2017, 30 October 2017 and 5 and 19 December 2017 with no suggestion of any dyspnoea. On 3 January 2018 Mr Cootes attended upon his general practitioner Dr Vinothan Paramanathan complaining of shortness of breath and accordingly Mr Cootes was referred for specialist assessment. Additionally an immediate ECG was performed which Dr Paramanathan reviewed. It was recorded that Mr Cootes was denying any chest pains but had "some SOB". Mr Cootes was then placed in the care of a cardiologist Dr Assad Jadeer. At subsequent consultations on 16 January 2018, 22 January 2018, 30 January 2018, 21 February 2018, 27 February 2018 Dr Paramanathan does not record any symptoms of shortness of breath but does record symptoms of back pain, anxiety, post-traumatic stress disorder, and nightmares. It was recorded that Mr Cootes "screams in the night time, remembers the accident again and again, [was] frustrated … that he couldn't be active as before, [was] unable to find a job [and] play sports."[109]

[116] On 21 February 2018 Dr Paramanathan records that after seeing the cardiologist the exertional dyspnoea cardiac causes were excluded. It appears to accord with Dr Paramanathan's view as his action plan included referral to a psychiatrist and a mental health care plan. A different general practitioner Dr McLellan recorded on 14 May 2018 that Mr Cootes was "not able to work with back – [unlikely] to ever be able to work again."[110] In the subsequent consultations with Dr McLellan on 21 May 2018, 22 May 2018 and 23 May 2018 no complaints were made of any cardiac symptoms or shortness of breath. No recordings were made of pain in the last six months into the right leg or tenderness over the right greater trochanter. Dr McLellan ordered x-rays which showed bursitis and osteoarthritis secondary to overall gait changes and osteoarthritis bilaterally in Mr Cootes' hips. Dr McLellan advised conservative therapy, namely, an injection into the hip and physiotherapy.[111] Dr Paramanathan on 23 May 2018 provided the same advice.[112]

[117] On 12 January 2018, Dr Jadeer conducted and reported upon a stress echocardiogram.[113] In summary it was a good result for Mr Cootes. Specifically, Dr Jadeer records a good exercise tolerance, a symptomatically negative exercise stress for chest pain and dyspnoea, electrically negative exercise stress test for ischemia and arrhythmias, and no obvious regional wall motion abnormalities on resting non-stress echocardiogram. Dr Jadeer concluded that the risk of a finding of obstructive coronary artery disease was low, and no acute ischemic changes were noted. There was a satisfactory mitral valve repair, trace residual mitral regurgitation, no mitral stenosis but mild aortic regurgitation. Importantly, Dr Jadeer recorded a normal ascending aorta diameter. Dr Jadeer specifically records:

> "Exercise Stress was performed using the Bruce protocol. The resting heart rate was 75 BPM and the resting blood pressure was 129/91 mmHg. The patient exercised for 11:44 minutes with 13.1METS achieved. The reasoning for stopping the test fatigue. The peak heart rate achieved was

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[109] Exhibit 1, p 445.
[110] Exhibit 1, p 447.
[111] Exhibit 1, p 449.
[112] Exhibit 1, p 450.
[113] Exhibit 1, p 509.

> 162 bpm, which was 98% of the predicted maximum heart rate. The peak blood pressure during exercise was 150/98 mmHg. The patient denied any chest pain during the test."

[118] On the day prior to the stress echocardiogram, on 11 January 2018, Dr Jadeer did record Mr Cootes complaining of a shortness of breath even whilst talking on the phone. Dr Jadeer recorded that Mr Cootes looked tired and was mildly short of breath and because of his concerns Dr Jadeer organised the stress echocardiogram. Dr Jadeer also organised for an echocardiography on 21 January 2018 which he interpreted as being normal with no abnormality with an adequate mitral valve repair.[114] On 12 February 2018 Dr Jadeer again reviewed Mr Cootes, and his conclusion was:[115]

> "Mr Cootes is a gentleman who has been having dyspnoea on minimal exertion and investigation for cardiac conditions were unremarkable. His lung function test showed small air way disease that does not explain his dyspnoea. I think it is generally his fitness level after his back surgery and his mitral valve surgery, he has not worked on his fitness. I will review him in 2 months' time and I will update you of his progress."

[119] Dr Jadeer's reports were tendered by consent and I accept Dr Jadeer's opinion that the most recent investigation shows that Mr Cootes cardiac conditions are unremarkable and that any shortness of breath that he suffers, which has not been recorded was a consequence of his lack of fitness which in turn is a consequence of his back surgery in the subject incident.

[120] I reject Dr Hossack's suggestion that the stress echocardiogram conducted by Dr Jadeer was conducted somewhat improperly. There is simply no basis for his suggestion. Dr Jadeer, specifically recorded that he conducted his stress echocardiogram according to the Bruce protocol. I cannot accept that Dr Jadeer allowed Mr Cootes to hold the side bars of the walking machine as it was suggested by Dr Hossack.

[121] In respect of economic loss I accept Dr Hossack's evidence in that I find that from the commencement of September 2015 as a result of his cardiac condition Mr Cootes would not have been able to work. I find that the cardiac condition could have rendered Mr Cootes unable to work until the end of February 2016 which accords with Dr Aroney's assessment.[116] In the 301 weeks between 26 August 2013 and present (11 June 2019) and with the exception of the six months from 1 September 2015 to the 29 February 2016 I find that Mr Cootes has sustained a net weekly loss of $1,000 per week. I accordingly find that Mr Cootes has sustained a past economic loss of $275,000 (301 weeks minus 26 weeks x $1,000 net per week).

[122] As Mr Cootes was not paid any superannuation benefits "for many years" and in the future "would have continued to operate like that"[117], there can be no loss of superannuation benefits allowed as damages.

[123] It is necessary to account for interest on past economic loss. Since September 2015, Mr Cootes' WorkCover benefits have ceased. Mr Cootes has been certified eligible for

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[114] Exhibit 1, pp 514-515.
[115] Exhibit 1, p 515.
[116] Exhibit 1, p 428.
[117] T1-86/4-5.

Centrelink benefits. The parties agree that Mr Cootes has received $50,196 in Centrelink benefits to the date of trial (27 May 2019) and $280 per week since then, an extra $560. A total of $50,729 for past Centrelink benefits must be taken into account.

[124] Centrelink benefits ought to be taken into account in calculating interest.[118] In respect of WorkCover benefits, I adopt the approach of Thomas J in *Mahoney v GEC Australia Ltd*[119] in taking into account both the net weekly loss of earnings payment and the lump sum disability payment. This results in different interest calculations against the first and second and third defendants. As against the first defendant the WCRA statutory scheme to compensate for general damages is to allow for the loss of value of money over time by increasing the value of the ISV in schedule 7 of the Regulation and not by an award of interest on general damages which is prohibited under s 306N of the WCRA. As the award of interest under s 58 of the *Civil Proceedings Act* (Qld) is compensatory in nature and discretionary, and as Mr Cootes has had the use of the lump sum payment it ought to be taken into account in full. It cannot be "nominally allocated" to the general damages award in part or in full. However, it can be nominally allocated against the second and third defendants who are not subject to the WCRA in the manner set out by Thomas J in *Mahoney* at page 398.

[125] Interest is allowed at the WCRA rate against the first defendant of 0.93% and at s 58 of the *Civil Proceedings Act* rate of 2.75 per cent against the second and third defendants. As against the first defendant I allow interest on $275,000 less $50,729 (Centrelink) less $104,321 (net weekly benefits) less $69,282.40 (lump sum payment) at 0.93% for the 5.8 years, a sum of $2733. As against the second and third defendants I allow interest on $275,000 less $50,729 less $104,321 less 14,282.40 (($69,282.40 (lump sum payment) – $55,000 (past portion of general damages)) at 2.75% for 5.8 years, a sum of $16,854.

Loss of economic capacity

[126] In respect of loss of economic capacity, I find Mr Cootes' economic capacity to be $1,000 net per week and that Mr Cootes has no residual income earning ability. Mr Cootes swore in evidence[120] and it is not challenged that 6 months prior to being injured he had purchased a house and was in the process of paying off the house. There is no doubt that would have provided sufficient motivation for Mr Cootes to continue working as long as he could have in the absence of injury. With respect to longevity in the building industry I note that the director of the third defendant Lance Judd was continuing to work in his supervisory role at aged 71 years. In addition Lance Judd's older brother Barry Judd was called as a witness. Barry Judd who worked as a labourer in construction is retired however there is no evidence as to what age Barry Judd retired. Mr Cootes did not swear to any age that he had planned to cease working. Mr Cootes rather said that he wished to continue working as long as it was possible. As discussed above, Mr Cootes suffers unrelated medical conditions, however there is no suggestion that any defendant has discharged its *Watts v Rake*[121] onus. It is appropriate, therefore, to consider whether any discount ought to be made for the comorbidities.[122] As I accept the evidence of Professor Howes that absent the index accident, the effect of Mr Cootes'

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118 *Camm v Salter* [1992] 2 Qd R 342.
119 [1994] 1 Qd R 397.
120 T1-48/8
121 *Watts v Rake* (1960) 108 CLR 158.
122 *Hopkins v WorkCover* [2004] QCA 155.

cardiac condition is that he would have been able to continue working in a supervisory role with occasional hands on work to age 67 or beyond. I conclude that the cardiac condition is to be treated as a minor discounting factor.

[127] Evidence concerning Mr Cootes' bilateral hip osteoarthritis is more uncertain. Whilst Mr Cootes has received some treatment and is on a waiting list at the Gold Coast Hospital, little additional information has been provided concerning the hip condition. In particular, there is no expert evidence on this issue. It is however important to record that Mr Siebel has tested Mr Cootes in two thorough functional capacity evaluations. Although Mr Cootes indicates hip pain on Mr Siebel's pain diagrams.[123] Mr Siebel detected only a minor indication of any hip disability. As Professor Luntz records[124] ordinarily discounts for the contingents of life including illness ought to be assessed statistically at approximately 4 per cent. The proper level of discount, if any, is a matter that must be assessed with respect to the personal circumstances of each plaintiff and in each case. Although Mr Cootes' heart condition of itself calls only for a small discount above and beyond the normal contingents of life I would conclude that in respect of Mr Cootes' bilateral osteoarthritis in his hips that there ought to be a further discount.

[128] I conclude that upon the evidence and in particular the evidence of the general practitioners in respect of the problems recorded of Mr Cootes' right hip, the placing of Mr Cootes on a waiting list at the Gold Coast Hospital leads me to conclude there ought to be a discount in respect of the osteoarthritic condition. The nature of Mr Cootes' work was to supervise on building sites, which as can be seen in the photographs of the work site, may consist of largely unbroken ground, that is, ground which is difficult to traverse upon and which may be more difficult if a person is suffering from osteoarthritis in their hips. In these circumstances and given that the period of time is only 10 years it seems to me there ought to be a discount of 20 per cent to take account of all contingencies including Mr Cootes' bilateral osteoarthritic hips and Mr Cootes' cardiac condition. I quantify Mr Cootes' damages for future economic loss at $1,000 per week for the next 10 years to age 67 discount factor 413 less 20 per cent for contingencies a sum of $330,400. I am conscious that a 20 per cent discount from the 10 year 5 per cent discount factor of 413 suggests that absent the injury Mr Cootes would have only worked for a further 7 and a half years that is until age 64 years.

Griffiths v Kirkemeyer

[129] Mr Cootes does not bring any claim for damages for care against his employer Concrete Panels. There is agreement between Mr Cootes and the second and third defendants to quantify past care at $15,000 and to agree to a rate of future care at $40 per hour. By paragraph 15(ii)(i) of the amended statement of claim, Mr Cootes brings a claim for the cost of gratuitous services in the future "calculated or estimated on a global basis in the amount of $50,000.00". Mr Cootes has a statistical average life expectancy to age 87 being 30 years then an award of $50,000 which would represent 1.5 hours care per week at $40 per hour for the next 30 years (discount factor 822). There is no specific evidence by which Mr Cootes' life expectancy has been attempted to be quantified. The evidence from Dr Hossack, namely, that statistically 30 per cent of patients who undertake a mitral valve repair die within 15 years suggests there ought to be some discount however, optimistically, Dr Hossack's research shows that the majority, being

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[123] Exhibit 1, page 137, 221.

[124] H Luntz, *Assessment of Damages for Personal Injury and Death* 4th ed pages 386-387.

70 per cent, survive for more than 15 years. If Mr Cootes were assessed as having a reasonable need for 1.88 hours per week for care for the next 20 years (discount factor 666) at the rate of the care at $40 per hour then that would quantify damages for future domestic assistance at $50,000.

[130] On the basis of his functional capacity testing, Mr Siebel estimates Mr Cootes' reasonable need for domestic assistance at six hours per week consisting of five and a half hours per week of heavy household tasks and half an hour for gardening. Since Mr Siebels assessment, Mr Cootes has undertaken his own gardening. Although there is an estimate as to the amount of care required to be provided there is an absence of evidence as to the amount of care that is currently being provided by Mr Cootes' current partner. Notwithstanding the paucity of evidence as to the actual amount of care being provided it is plain that Mr Cootes as a result of his back injury requires assistance with heavy household tasks.[125] In addition because of his psychiatric difficulties Mr Cootes has difficulty driving distances. I conclude that the evidence establishes that there is a reasonable need for care in the future limited to occasional heavy household assistance and occasional long distance driving. An award of less than a third of the reasonable need opined by Mr Siebel is conservative. I award Mr Cootes $50,000 for damages for future domestic assistance. Nominally, an award of 1.88 hours assistance per week at $40 per hour for 20 years (discount factor 666).

Other heads of damage

[131] *Fox v Wood* damages are agreed at $29,846. Future medical expenses $7,500. Special damages are agreed in the sum of $65,690.25 being paid by WorkCover Queensland, $2,649.70 being the Medicare refund and a further $4,000 in respect of travel, pharmaceutical and other expenses. Interest will be borne upon the $4,000 at the statutory rate of .93 per cent against the employer first defendant and at the ordinary rate at 2.75 per cent against the second and third defendants.

Damages totals

	First Defendant	**Second and Third Defendant**
General damages ISV 43	$99,550.00	$110,000.00
Statutory Interest	-	-
Past Economic Loss – 275 weeks x $1000 per week	$275,000.00	$275,000.00
Interest	$2,733.00	$16,854.00
Future economic loss $1000 per week for 10 yrs (413). less 20%	$330,400.00	$330,400.00
Past care	-	$15,000.00
Interest on $15,000 @ 2% for 5.8 yrs.	-	$1740.00
Future care	-	$50,000.00
Fox v Wood	$29,846.00	$29,846.00
Future medical expenses	$7,500.00	$7,500.00
Special Damages – WorkCover	$65,690.25	$65,690.25

[125] T1-44 – T1-48.

- Medicare	$2,649.70	$2,649.70
- Other	$4,160.05	$4,160.05
Interest on $4,160 @ 0.93 % for 5.8 yrs.	$224.00	$664.00
On $4160 @ 2.75% for 5-8 yrs.		
Subtotal	**$817,753.00**	**$909,504.00**
Less WorkCover refund	$269,140.05	-
TOTAL AWARD	**$548,612.95**	**$909,504.00**

Order

[132] I give judgment for the plaintiff against the first defendant in the sum of $548,612.95. I give judgment for the plaintiff against the second and third defendants in the sum of $909,504.00.