# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Walz Construction Co P/L v ASP Ship Management (A Firm) & Ors; Qld Alumina Ltd v Walz Construction Co P/L & Ors; Walz Construction Co P/L v Suncorp Insurance & Finance* [2002] QCA 136 |
| PARTIES: | **WALZ CONSTRUCTION COMPANY PTY LTD**<br>ACN 010 354 908<br>(plaintiff/appellant)<br>**v**<br>**ASP SHIP MANAGEMENT (A FIRM)**<br>(first defendant/first respondent)<br>**QUEENSLAND ALUMINA LIMITED**<br>ACN 009 725 044<br>(second defendant/second respondent)<br>**GARDNER PERROTT (A FIRM)**<br>(third defendant/third respondent)<br><br>**QUEENSLAND ALUMINA LIMITED**<br>ACN 009 725 044<br>(plaintiff/second respondent)<br>**v**<br>**WALZ CONSTRUCTION COMPANY PTY LTD**<br>ACN 010 354 908<br>(first defendant/appellant)<br>**ASP SHIP MANAGEMENT (A FIRM)**<br>(second defendant/first respondent)<br>**GARDNER PERROTT (A FIRM)**<br>(third defendant/third respondent)<br>**SUNCORP GENERAL INSURANCE LIMITED**<br>ACN 075 695 966<br>(third party/fourth respondent)<br><br>**WALZ CONSTRUCTION COMPANY PTY LTD**<br>ACN 010 725 908(plaintiff/appellant)<br>**v**<br>**SUNCORP INSURANCE AND FINANCE**<br>(defendant/fourth respondent) |
| FILE NO/S: | Appeal No 2989 of 2001<br>SC No 120 of 1995<br>SC No 124 of 1995 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Rockhampton |

DELIVERED ON: 16 April 2002

DELIVERED AT: Brisbane

HEARING DATE: 1 November 2001

JUDGES: McMurdo P, Davies JA and Ambrose J
Separate reasons for judgment of each member of the Court;
Davies JA and Ambrose J concurring as to the orders made,
McMurdo P dissenting in part

ORDERS:

**1. Dismiss the appeal by Walz and the notice of contention by Queensland Alumina in the proceedings between Walz, Gardner Perrott and Queensland Alumina;**
**2. Allow the appeal by Gardner Perrott to the extent of adjusting the apportionment of liability between Walz and Gardner Perrott to 50 per cent each;**
**3. Adjourn the further hearing of those proceedings for seven days to permit the parties, within that time, to agree upon or make submissions upon the appropriate orders which follow from an apportionment of negligence equally between Walz and Gardner Perrott and upon costs;**
**4. Dismiss the appeal by Walz against the judgment in favour of Suncorp and Suncorp's notice of contention;**
**5. Order that Walz pay the costs of this appeal so far as they relate to the appeal against the judgment in favour of Suncorp.**

CATCHWORDS: TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES - where appellant's crane capsized while moving an excavator from one hold in a ship to another – where two lifting ropes required for operation and crane operator failed to adjust load indicator to account for this – where failure to adjust load indicator resulted in a load indication of about half the excavator's actual weight – where evidence that crane operator was told by employees of the third respondent that excavator was a similar, lesser weight to loads moved on a previous occasion – where crane operator relied on this information and failed to personally ascertain weight of excavator – where crane operator admitted a negligent failure – whether crane operator primarily responsible for negligent failure

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – WHERE INFERENCES OF FACT INVOLVED – WHERE FACTS IN DISPUTE - where trial judge found that the weight of the excavator would not alone have been sufficient to tip the crane – where radius at which the boom of the crane was being operated at the relevant time

determined the safe working load of the crane at its most unstable point – where conflicting evidence as to the radius of the boom at the relevant time – where trial judge adopted an estimate of the radius of the boom at between 19.72 metres and 21 metres – whether open to the trial judge on the evidence to adopt this estimate

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES - where trial judge concluded that one or more of three dynamic forces contributed to the tipping- where responsibility of the third respondent's employees to ensure these dynamic events to did not eventuate – where a negligent omission by third respondent's employees resulted in a failure to do so – where negligence of crane operator and negligence of third respondent's employees resulted in the crane tipping - whether proper apportionment of negligence between appellant and third respondent respondent

INSURANCE – POLICIES OF INSURANCE – CONSTRUCTION - where appellant claimed indemnity from fourth respondent insurer – where insurance contract excludes cover for loss or damage incurred when conveying a load more than the vehicles designed carrying capacity – whether "convey" excluded lifting and was restricted to transporting a load by means of a moving vehicle

*Allied Mutual Insurance Limited v Kearneys Services Limited* (1994) 8 ANZ Insurance Cases 61–229, considered

*Houghton v Trafalgar Insurance Co Limited* [1954] 1 QB 247, distinguished

*Ferrcom Pty Ltd v Commercial Union Insurance Co of Australia Ltd* (1989) 5 ANZ Insurance Cases 60-907, considered

COUNSEL: J S Douglas QC, with J A McDougall, for the appellant
K Fisher *(sol)* for the first respondent
H Barlow for the second respondent
H B Fraser QC, with P A Hastie, for the third respondent
J A Griffin QC, with R T Whiteford, for the fourth respondent

SOLICITORS: Lyons O'Shea & Co for the appellant
Thynne & Macartney for the first respondent
Carter Newell for the second respondent
Minter Ellison for the third respondent
Heiser Bayly & Mortensen for the fourth respondent

[1] **McMURDO P:** At Gladstone's Boyne Smelter wharf on Sunday, 4 June 1995, a crane capsized whilst moving an excavator from one hold to another on the cargo

ship *TNT Carpentaria*. This case concerns liability for the ensuing damage to the crane, excavator and ship.

[2] The second respondent and plaintiff by counterclaim, Queensland Alumina Ltd ("QAL"), chartered the *TNT Carpentaria* from Bulkships and under a management agreement appointed Bulkships to manage or arrange management of the ship. Bulkships appointed ASP Ship Management ("ASP"), the first respondent and second defendant by counterclaim, as the manager under an agency agreement. ASP in turn appointed Gardner Perrott (a firm) ("GP"), the third respondent and the third defendant by counterclaim, to conduct all maintenance on the ship. QAL also had a standing rental agreement with Walz Construction Company Pty Ltd ("Walz"), the appellant and plaintiff, as to the hire of a crane used to lift and transfer an excavator from one of the ship's holds to another.

[3] The learned primary judge gave judgment for Walz against GP for 85 per cent of the agreed damage and dismissed Walz's claim against ASP and QAL. On QAL's counterclaim, his Honour gave judgment against Walz and GP, apportioning the contribution for liability as 85 per cent to GP and 15 per cent to Walz. Walz's claim for indemnity against its insurers, Suncorp General Insurance Limited, ("Suncorp"), also the third party in QAL's action by counterclaim, was dismissed because of general exclusion cl 2(d) of the policy.

[4] Walz appeals from his Honour's conclusion that it was liable at all to QAL, the apportionment of liability as between it and GP and claims that on the proper construction of its insurance policy with Suncorp, Suncorp was obliged to indemnify it.

[5] GP cross appeals, claiming the trial judge erred, first in concluding that the negligence of GP's employees caused the accident and, alternatively, in the apportionment of liability against GP.

[6] QAL, in a notice of contention, claims first that regardless of any negligence on the part of Walz, Walz was liable to indemnify it under the rental agreement and second that his Honour erred in finding that the accident occurred because of a dynamic event; rather the tipping of the crane alone demonstrated negligence on the part of either or both Walz and GP (res ipsa loquitur) so that either or both were liable to QAL for its damage.

[7] Suncorp, in its notice of contention, claims that even if his Honour were wrong in his interpretation of general exclusion cl 2(d) of the policy, Suncorp was not liable to Walz because of s 5A(C) of the policy.

[8] ASP takes no active role in this appeal, merely reserving its position as to costs in the event of any change in the apportionment of liability.

**The background facts**

[9] The critical question in the main action was what caused the crane to capsize.

[10] On Sunday, 4 June 1995 the crane was moved to the wharf and positioned under the supervision of Walz's crane coordinator, Mr Elliott, a crane driver with more than 20 years experience, whose evidence was generally accepted by the trial judge. Because of the pressure that could be exerted by this crane, it was positioned with its outriggers over the load bearing piles of the wharf.

[11] QAL had hired Walz's crane and driver on prior occasions to move the same model excavator and other machinery from one ship's hold to another hold or on to a wharf; as on this occasion, Mr Elliott was the crane driver and those assisting in the hold and on the deck were GP employees.

[12] On this occasion, Walz did not place the excavator into hold no 1. Mr Elliott did not see the excavator before he commenced the lift or before the crane tipped. A sticker on the excavator's side indicated its manufactured weight was 13,700 Kg. Mr Elliott said that had he known the excavator was over 13 tonnes he would have boarded the ship, descended the vertical 60 feet into the hold, checked the load himself, and removed some counterweights to reduce its weight to about 12 tonnes. That was essentially what he did when moving a heavy cherrypicker for QAL on a prior occasion.

[13] Prior to the lift, Mr Elliott noted GP employees preparing the excavator with four chains rather than the three used for the previous lifts of similar excavators. He queried the GP labourers as to why four lengths of chain were being used and asked them about its weight. They said the weight was "about the same as the other one". He was unsure of the names of these employees but in cross-examination was adamant that they had not told him the weight to be lifted was 13 or 13.5 tonnes. He remembered the earlier lifts involved excavators of something like 8.3 tonnes and thought this excavator was about the same or slightly larger than those.

[14] Mr Elliott calculated, but did not measure, the working radius of the crane (the distance between where the boom joins the main part of the crane and the item to be lifted) at about 17 metres. This is an important calculation because the weight which can be safely lifted varies with the working radius. The load chart[1] fitted to the crane set out the maximum lifting capacity at various working radii. But those ratings allow for a margin of stability and do not exceed 75 per cent of the load which could cause tipping on firm, level ground.

[15] A lift indicator inside the crane cabin provided the crane driver with an approximate weight of the load based on the number of ropes used in the lift. The weight of the load the subject of this action required two ropes, not one; but Mr Elliott forgot to change the load indicator from the single rope mode used earlier in the day on some light lifts to the two rope mode which was required for this lift. As a result, he received an incorrect reading from the load indicator which showed only 7.3 tonnes rather than the actual 13 tonne weight of the load. Unfortunately, this reading approximately corresponded with the weight of the similar excavators he had lifted on prior occasions and with the information provided by the GP labourers as to the weight of this excavator.

[16] The relative positions of excavator and crane meant that the lift was performed "blind" by Mr Elliott: a dogman in the hold gave signals to an assistant on deck who in turn relayed these signals to another who was in line of sight of the driver. The signal to commence the lift from hold no 1 was given and passed on in this fashion to the crane driver. The excavator was lifted a short distance before the driver was signalled to stop and lower the load to hold no 1. The load was adjusted and the lift recommenced until the driver was again signalled to stop and to slew the load to the right towards hold no 2. As he began to slew the boom, Mr Elliott was thrown

---

1 Set out in Dr Grigg's report, exhibit 13, p 3, AB824.

without warning onto the cabin floor. The crane had tipped, the boom hit the ship and the excavator suddenly dropped back into hold no 1.

[17] The excavator and attachments weighed 13,400 Kg at the commencement of the lift. The load was at its heaviest when the lift commenced because as the heavy winching rope is wound in and the load raised, the load became lighter with less winching rope. At the time of the capsize the load was 13,300 Kg. This weight exceeded the maximum loading capacity set out in the load chart fitted to the crane at any of the possible working radii here. But because of the 25 per cent margin of stability this did not necessarily mean the weight of the excavator caused the crane to tip.

[18] Mr Channell, an inspector of the Division of Workplace Health and Safety, investigated the accident on the evening of 4 June 1995 and subsequently. He formed the opinion that although there appeared to be an overloading of the crane, this in itself did not cause the crane to overturn. Rather, the collapse of the jib and the subsequent fall of the load occurred after the jib had contacted the side of the ship; a shift in the load occurred which created a sudden dynamic loading at the hook sufficient to cause the jib to tip and precipitate the ensuing collapse and fall; the dynamic loading may have been caused by one of the chain slings coming off the hook but it was more likely that a chain shortener became dislodged. He also observed some unsatisfactory procedures adopted to control the lift, including the fact that the load was out of the crane operator's sight; the dogman on the deck relaying signals from the dogman in the hold to the crane operator had to move between the coaming of hatch no 1 and the ship's side, a distance of approximately 10 metres and was not able to see the crane operator and the dogman in the hold at the same time; the dogman in hold no 1 left the hold to return to the deck whilst the load was still being hoisted up, making it possible for the load to be in motion with no person in control of it; the person appointed to act as dogman on deck was a trainee who was not under supervision during the course of the lift. The dogmen were GP employees.

[19] Walz relied on the expert evidence of Dr Gilmore, a mechanical engineer. In his opinion, the crane did not tip because of an overload. Its stability was disturbed by an unknown dynamic force most probably generated physically on the load being lifted. Dr Gilmore postulated a number of potential causes of the incident, which included the slipping or dislodgment of one of the shorteners used on the chain lines holding the excavator or the tag line becoming entangled in some fixture in the hold or on the ship. Both these functions were the responsibility of GP employees.

[20] Mr Kohner, an engineer experienced in cranes, observed that many of the proposed causes of the mishap cannot be totally discounted; a number of small factors may have combined to influence the incident. Because there was no noise noted at the time of the accident, he dismissed the possibility of failure of chain shorteners; once the excavator was lifted free of the bottom of the hold, the centre of gravity of the system would be directly under the boom tip; any rotation of the excavator would not shift that centre of gravity to increase the tipping moment on the crane unless some part of the excavator contacted an obstruction. In his opinion the crane tipped because it was overloaded. But Mr Kohner seemed to reach that conclusion because he could find no other explanation; he then calculated that the crane and the excavator were positioned so that the working radius was such to have permitted

this to occur. He was adamant that no dynamic event could disturb a freely suspended load so as to cause a properly operating crane to suddenly overturn.

[21] Dr Grigg, a forensic engineering consultant relied upon by GP, concluded that it was highly probably the excavator fell as a result of the crane being used to hoist a load which at the radius concerned was so close to its stability limit that even though it was able to lift the load satisfactorily with the boom positioned towards an outrigger, as the boom slewed towards the rear of the crane the stability margin decreased and the crane capsized so that the boom contacted the side of the ship and collapsed.

[22] Mr Love, a workplace health and safety consultant, also gave evidence for GP. Accepting Dr Grigg's conclusion that the working radius of the boom at the time was between 19.5 and 22 metres, he concluded that the crane was grossly overloaded and failed during a simple lifting operation in which the weight of the load was easily determinable and the movement of the load was not complex.

[23] At trial, a further possibility was raised; that the excavator may not have cleared all obstacles before the slewing commenced.

**The Judge's findings**

[24] The learned primary judge noted that of the experts he preferred Mr Kohner, but his Honour did not accept Mr Kohner's final conclusions as to the position of the crane and excavator at the time of the lift and the size of the working radius and hence the cause of the capsize.

[25] His Honour found that the working radius of the crane would have been between 19.72 and 21 metres and that at this radius the weight of the load (13.3 tonnes at the time of the accident) should not have caused the crane to tip. Although at this radius the weight of the excavator exceeded the maximum lifting capacity in the crane's load table, the 25 per cent margin of stability on level, firm ground was not exceeded and would not cause tipping, irrespective of slewing.[2] As the boom slews 45 degrees to the perpendicular the load capacity increases to its most stable point. The slewing here of just a few degrees could not have made the crane less stable. Something else was the primary cause of the capsize. After considering the possible external factors proffered by Dr Gilmore, some of which he excluded on the evidence, and the additional possibility that the excavator may not have cleared all obstacles before the slewing commenced, his Honour was unable to find any particular dynamic event responsible. The judge found that there was no satisfactory evidence that the excavator was clear of all obstacles before the slewing started and that GP employees had conducted the exercise in a "particularly casual manner with little real attention being paid to what was a potentially dangerous activity". The judge concluded on the balance of probabilities that it was either the failure of a chain shortener or some contact between the excavator and some part of the ship or some form of snagging of the tag line which ultimately caused the accident. Any one of these three causes was the sole responsibility of GP's employees.[3] GP was liable for the damage caused by the failed lift.[4]

---

2 Judgment, [36].
3 Judgment, [50].
4 *Loxton v Vines* (1952) 85 CLR 352, 388; *TNT v Brooks* (1979) 23 ALR 345.

[26] His Honour also found that on the balance of probabilities the lifting of a load in excess of the safe load limit at the working radius reduced the margin of safety sufficiently to influence the failed lift; the failure of Walz's Mr Elliott to adjust the load indicator and independently verify the load, although contributed to by GP, justified an apportionment of liability of 15 per cent to Walz and 85 per cent to GP.[5]

**Walz's appeal as to its liability to QAL**

[27] Walz contends that the judge's findings, that the weight of the lift alone was insufficient to cause the crane to tip and that the excess weight reduced the margin of safety sufficiently to influence the failed lift, are inconsistent; the first finding has the result that Walz was not liable at all or was liable to a lesser extent than found.

[28] There is clear evidence that the weight of the load exceeded the manufacturer's maximum load in the load chart at the radius found by the judge. Mr Elliott accepted it was his obligation as crane driver to cross-check the weight of the load and the radius with the load chart. Dr Gilmore conceded that a crane lifting a load greater than the rated load is closer to its tipping point than otherwise.[6]

[29] Mr Elliott did not independently and accurately establish either the mass of the load or the working radius. This was compounded by his failure to correctly adjust the load indicator.

[30] In this case, the precise dynamic final cause of the failed lift is not known. Mr Kohner noted that a number of factors may have combined to influence the capsize. The crane was overloaded according to the crane's load tables at the working radius found by his Honour and Mr Elliott was partly responsible for this. Commonsense dictates that as the weight of the load made the crane closer to its tipping point, the crane was more vulnerable to tipping in the event of an unexpected incident of the type that his Honour found probably occurred. In those circumstances, his Honour was entitled to infer that this significant overload was a factor, albeit not the dominant factor, in causing the accident.

[31] Although GP employees contributed to this overload, and his Honour found they actively misled Mr Elliott as to the actual weight to be lifted, his Honour was entitled to conclude that Mr Elliott's omissions were a breach of the standard of care expected of the reasonable crane driver and, on balance, contributed to the failure of the lift. The finding of 15 per cent contributory negligence on the part of Walz reflects GP's primary responsibility for the accident and their contribution to Mr Elliott's shortcomings; it is not one which justifies the interference of this Court.[7]

[32] Walz's appeal against liability and apportionment must fail.

**GP's cross-appeal**

---

5 Judgment, [51].

6 In addition, Mr Love gave unchallenged evidence that under the Australian Standard for crane operation published in January 1995, a workplace operations plan should be developed (1.2.1) and the weight of the load correctly estimated in consultation with relevant workplace personnel (2.1.1). Mr Love also referred to Australian Standard AS 2550.1-1993 (Cranes - Safe Use) which notes:"6.3.1 *Load chart* – It is critical to establish both the working radius and the mass of the load. Where the assessed load is greater than 50 per cent of the safe working load for the working radius involved, the load shall be carefully determined by weighing or calculation."

7 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867, [28]-[38], [60], [64].

[33] GP contends that the learned trial judge erred in concluding that the substantial cause of the incident was the negligence of GP employees.

*(a) finding as to a dynamic event*

[34] GP first submits that the learned trial judge erred in finding that some unknown dynamic event resulting from GP's negligence caused the failed lift.

[35] It is true that the GP employees who fastened the chain shorteners and were responsible for the tag line and the supervision of the lift gave no direct evidence of their negligence in attending to these tasks. Indeed, one of the difficulties for the experts and the judge was that it seems probable on the facts found that no-one was observing the excavator immediately at the time it fell back into the hold. This in itself is concerning; the lift should have been constantly supervised by GP employees who were responsible for placing the chains on the load and for directing the crane driver during the "blind" lift. According to the statement given by the dogman in hold no 1 to Mr Channell, the dogman left his position in hold no 1 during the lift for some minutes and moved the 60 vertical feet out of the hold towards hold no 2. The lift was conducted in the dark and the bright lights above eye level in hold no 1 made it difficult for those on the floor of the hold to see the excavator during the lift. Water blasting in hold no 1 during the lift was an additional distraction. His Honour was not satisfied the excavator was clear of obstacles before the crane driver, who was totally dependent on the instructions of GP employees, was signalled to slew the load. On these facts, his Honour was not precluded from finding that GP employees were responsible for one of the three possible dynamic events causing the accident simply because those GP employees did not give evidence of their own negligence.

[36] Whilst there was a body of expert evidence in favour of GP's contention that the fall was caused by too heavy a lift, his Honour was not compelled to accept that evidence which largely turned on the expert's conclusion as to the size of the working radius. Providing the judge's finding as to the working radius of the crane at the time of the lift was reasonably open, there was credible evidence from which the learned primary judge was entitled to conclude that the miscalculation as to weight of the excavator was alone insufficient to make the lift fail and to look for another cause. Having rejected for stated reasons the other potential causes raised on the evidence, the judge was entitled to find either failed chain shorteners, contact between the excavator and the ship or snagging of the tag line (all of which were the responsibility of GP) was the operative cause of the accident. This was not mere conjecture or surmise but a rational conclusion from a careful consideration of all the relevant evidence.

*(b) finding that overloading did not cause the accident*

[37] GP next submits that the learned trial judge erred in concluding that the overloading of the crane was not of itself sufficient to cause the lift to fail because the judge miscalculated the working radius.

*(i) the position of damage to the ship rail*

[38] The judge found that the point of impact of the crane boom with the ship's rail was close to midway between holds nos 1 and 2. From this, his Honour calculated the approximate position of the crane to calculate the working radius of the crane as

between 19.72 metres and 21 metres. This finding was central to his conclusion that the weight of the excavator alone did not cause the lift to fail. GP submits that the point of impact of the boom with the rail was in fact closer to hold no 2 than hold no 1 and that the judge's finding as to the radius was therefore unreliable; the crane was further from the excavator than the judge calculated and the working radius was beyond 23 metres, supporting Dr Kohner's conclusion that overloading caused the capsize.

[39] GP contends that his Honour misunderstood the evidence of Mr Fleming, the Gladstone superintendent of ASP, as to the position of damage to the ship's rail and as a result miscalculated the radius. Mr Fleming travelled to the wharf shortly after 8pm on the evening of the accident and inspected the scene. In cross-examination by counsel for GP, Mr Fleming noted the damage to the rail was between the two holds. He was shown photographs[8] of this damage and marked the position of the most extensive damage to a rail in one of the photographs[9] with an "x" on a diagram[10] prepared by Mr Channell, showing the positions of the two holds relative to the front rails of the ship. Mr Fleming's "x" was between holds nos 1 and 2 but closer to hold no 2.

[40] Were this the only evidence, there may be something in GP's contention. But, in further cross-examination by counsel for QAL, Mr Fleming was shown a photograph of some less extensive damage to the ship rail between holds nos 1 and 2 but slightly closer to hold no 1. He marked this on the diagram[11] with an oval around the relevant ship rail upright. His Honour noted this in his reasons for judgment[12] and later concluded that:

> "Mr Hastie's careful consideration of the photographs … clearly showed the point of impact of the boom with the rail to be close to midway between holds nos 1 and 2. This would put the crane at the time of the incident somewhere between the positions shown on Figures 2 and 3 to Dr Grigg's report of 8 July 1997 (ex 13). The working radius would have been between 19.72 metres and 21 metres."[13]

[41] The learned judge did not find the point of impact between the boom and ship rail was either precisely at the "x" or precisely at the oval marked on the diagram.[14] The evidence was that the ship's rail was damaged at both points. His Honour's finding that the point of impact was close to midway between holds nos 1 and 2 is consistent with a point of impact in the area covered by the circle and the "x" in the diagram, an area midway between the two holds, between the positions shown on Figures 2[15] and 3[16] to Dr Grigg's report of 8 July 1997.[17] Further precision was unnecessary. The damage to the rails can only indicate the approximate position of the boom prior to the crane's capsize. The evidence supports his Honour's conclusion that the boom impacted "with the rail close to midway between holds 1

---

8 Exhibits 2, 18, 19 and 23.
9 Exhibit 18. See lower photograph at AB912, replicated at AB931.
10 Exhibit 35, AB 972.
11 Exhibit 35, AB 972
12 Judgment, [28].
13 Judgment, [36]
14 Exhibit 35, AB 972.
15 Exhibit 9, AB819.
16 Exhibit 10, AB820.
17 Exhibit 13, AB822.

and 2". His Honour was then entitled to conclude from Dr Grigg's report that the working radius was between 19.7 metres (figure 2) and 21 metres (figure 3).

[42] Other photographs emphasised by GP in its written submissions[18] as showing the most extensive damage to the rail as apparently closer to hold no 2 than hold no 1 were taken at an angle so that it is impossible to accurately assess the position of the damaged rails in relation to the holds; some of these photographs were taken in November 1996, 18 months after the incident.[19] These photographs do not make the judge's finding as to the position of the damage unsupportable.

[43] The damage to the rail at about this mid point was also consistent with the evidence of Messrs Elliott, Walz and Buchanan as to the position of the crane midway between holds nos 1 and 2 and with the uncontested finding that the crane had only commenced to slew a couple of degrees before the capsize. The judge's finding was open.

*(ii) position of the excavator in the hold*

[44] GP next contends that his Honour did not consider the position of the excavator in the hold of the ship but only the position of the crane in relation to the ship in determining the radius; if the position of the excavator had diverged as little as a couple of metres from the position postulated by Dr Grigg, then the radius would have been greater than that found by his Honour, and the weight of the load alone could have caused the crane to tip as it commenced to slew.

[45] The evidence of the dogman in hold no 1, Mr Buchanan, and his labourer Mr Richards and the position recorded by Mr Channell in his diagram on Mr Richards' instructions on the evening of the accident, are largely consistent with the position accepted by Dr Grigg. His Honour was entitled to accept that evidence and to use it to determine the working radius of the crane. This contention also fails.

*(b) Did GP employees tell Mr Elliott the weight of the excavator?*

[46] GP contests his Honour's finding that GP employees did not tell Mr Elliott the weight of the excavator.

[47] Counsel for GP emphasises that there is no evidence that GP, through ASP's Mr Fleming, informed the crane driver, Mr Elliott, that the excavator was about the same size as the ones lifted on the earlier occasions. This is conceded by counsel for Walz. But that was not his Honour's finding. His Honour found that only after he arranged to hire the crane and driver from Walz was Mr Fleming told that this excavator was "a slightly bigger one" than the previous excavators lifted by Walz; he was not told its actual weight. Mr Fleming could not recall what information about the weight of this excavator he passed on to Walz, QAL or Mr Elliott; his usual procedure was to inform QAL that a crane was required, the type of equipment to be lifted and its weight. His Honour found that if Mr Fleming "had followed his usual procedure he had probably already told [Walz] through QAL that the same or a similar excavator was to be lifted before he found out about the change."[20] GP does not contend that this was an error on the part of the judge;

---

18 See photograph 2 in ex 5, AB 705 and photograph 36 in ex 6, AB 792.

19 See photographs part of ex 18 (AB 913-914) duplicated in ex 23 (AB 929-930).

20 Judgment, [48].

indeed, it is consistent with the evidence. His Honour was entitled to use this evidence in support of the finding that GP did not inform Walz and the crane driver of the weight of the load. It is also consistent with Mr Elliott's contention that he was told by two GP employees that the excavator was about the same weight as those lifted earlier.

[48] Mr Elliott's evidence on this point was also consistent with GP employee Mr Tormey's "impression" that Mr Elliott did not know the weight of the excavator. Whilst there was a conflict between Mr Elliott's evidence and that of GP employee Mr King as to their conversation about the weight of the excavator, his Honour gave sound reasons for rejecting Mr King's evidence.

[49] GP emphasises that Mr Elliott did not mention to Mr Channell, the Division of Workplace Health and Safety inspector, in his statement of 4 June 1995 that GP employees had told him that the weight of this load was about the same as the earlier loads. Mr Elliott conceded that he would have known by then that the actual weight of the excavator was between 13 and 14 tonnes. His only explanation for failing to give this information to Mr Channell was that he confined his answers to Mr Channell's specific questions. Although this is perhaps a little surprising, it does not prevent his Honour from accepting Mr Elliott's evidence on this issue.

[50] None of those contentions, alone or in combination, precluded his Honour from finding that GP must have known the excavator was significantly heavier than the earlier lifts; its weight was clearly displayed on it; GP employees should have given this information to Mr Elliott; had this been done, Mr Elliott, as he did on other occasions, would have removed items from the excavator to reduce its weight before attempting the lift. Walz did not plead reliance on GP employees' misstatements, but Mr Fraser QC, who appeared with Mr Hastie, for GP, concedes the trial was conducted on this basis. His Honour was entitled to infer that Mr Elliott acted on those misstatements as to weight in not inspecting the excavator, in not realising the crane's load indicator was incorrectly adjusted and in not removing weight from it before attempting the lift.

[51] His Honour was therefore entitled to find Mr Elliott's failure to adjust the load indicator was not an intervening event even though if properly adjusted a correct load indicator reading might have averted the accident which was caused by the chain of events already set in place by GP's negligence and which was substantially added to by the inattention of GP's employees during the lift. His Honour was entitled to attribute the substantial cause of the accident to the negligence of GP employees.

*(d) Apportionment*

[52] GP also questions the learned primary judge's apportionment of liability.

[53] His Honour found that the lifting of an excess load reduced the margin of safety sufficiently to influence the failed lift; both the negligence of Mr Elliott and the negligence of GP contributed to this; the latter was the substantial cause of lifting a load in excess of the safe limit.[21] His Honour also found that the primary cause of the accident was the negligence of GP employees during the lift. For the reasons

---

21 Reasons, [48].

already given, those findings were open on the evidence. These findings justified the apportionment.

[54] It follows that GP's cross-appeal should be dismissed.

[55] As both the appeal and the cross-appeal are dismissed, it is unnecessary to consider QAL's notice of contention.

**Was Suncorp required to indemnify Walz under Walz's insurance policy?**

[56] Walz contends that the learned primary judge should have found that Suncorp was obliged to indemnify it under its insurance policy for damage caused in the accident.

[57] Walz insured the crane with Suncorp under a motor vehicle insurance policy. Under the policy Suncorp agreed to insure Walz, subject to the policy, against loss, damage, theft or legal responsibility if "caused by an accident … during the Period of Insurance; and … (the) vehicle (was) being used for the purpose described on the Certificate of Insurance and defined in the Policy".[22] It is not contentious that the crane was a vehicle insured under the policy: it is described in the schedule to the Certificate of Insurance as "1980 American 7530 Boom Crane 810 3 A02750F $400 000.00"[23] and is listed there with registered motor vehicles and registered and unregistered items of heavy machinery. The crane was unregistered and was incapable of being driven on the open road.

[58] The policy included the following relevant general exclusion:

> "**We will not pay:**
>
> …
>
> 2. For loss or damage caused or contributed to, or legal responsibility incurred:
>
> …
>
> (d) while Your Vehicle is used to … convey a load more than Your Vehicle's designed carrying capacity."[24]

[59] It is not contentious that the damage to the crane for which Walz seeks indemnity was "caused by an accident" under the policy and that, because Walz's appeal against its liability to QAL has failed, Walz has incurred "legal responsibility" as that term is used in exclusion cl 2(b).

*(a) The onus of proof*

[60] For the reasons already given, his Honour was entitled to conclude that it was "more likely than not that the lifting of a load in excess of the safe load limit reduced the margin of safety sufficiently to influence the ultimate event."[25] Walz contends that this tentative conclusion on the part of the judge required the further consideration of whether Suncorp had discharged its onus of proof to show that the exclusion clause applied: *Trickett v Queensland Insurance Co Ltd*;[26] *Lombard Insurance Co (Aust) Ltd v Harris*[27] and *Legal & General Insurance Australia Ltd v Eather*.[28]

---

22 Insurance policy, exhibit 4, p 3, AB 645.
23 Ibid AB 667.
24 Ibid, exhibit 4, p 13, AB 655.
25 Reasons, [49], AB 1087.
26 [1936] AC 159, 164.
27 (1989) WAR 341, 343.
28 (1986) 6 NSWLR 390, 393.

[61] The judge did not directly advert to the onus of proof. But once he concluded that the excess load probably influenced the accident and that Walz was 15 per cent liable, it follows that, subject to the other points raised in this appeal, Suncorp had discharged its onus of proof.

*(B) meaning of "designed carrying capacity"*

[62] Walz next contends that the load being lifted by the crane was within its "designed carrying capacity" under exclusion cl 2(b) because, on the judge's findings, it did not exceed the maximum carrying capacity of the crane at its working radius and did not cause the crane to tip; it was irrelevant that the load exceeded the specified lifting capacity in the load table displayed in the crane.

[63] Walz relies on *Houghton v Trafalgar Insurance Co Limited*[29] which involved the interpretation of similar words in an exclusion policy relating to a private motor car built to carry five people. The car was in an accident when it was carrying six people. The court held that the exclusion clause applied only when a specified weight was exceeded, as in the case of overloaded trucks and vans; the contra preferentum rule required a construction in favour of the insured.

[64] That case is plainly distinguishable. Here, the load table referred to the maximum capacity at various working radii and the weight of the excavator exceeded that specified weight. Mr Elliott understood his responsibility as a crane driver was not to ensure loads did not exceed that specified weight. Unlike in *Houghton*, the load table provided specific loads which were not to be exceeded. Although the load table is specified by the manufacturer as allowing for a 25 per cent stability margin on level, firm ground, to accede to Walz's submission would be to render the exclusion clause virtually meaningless. How could a driver calculate simply, quickly and with certainty whether a load was within "the designed carrying capacity" but by referring to the load tables? Mr Elliott would have operated within the load tables but for his misconception as to the weight, contributed to in part by his negligence. As *Houghton* recognises, the load table set out the specified weights which were not to be exceeded; these are the types of specified weights to which a policy of this type refers. In exceeding the specifications of that table, the crane was conveying a load more than the crane's "designed carrying capacity". His Honour rightly rejected this submission.

*(c) Meaning of "convey"*

[65] Walz next submits that the crane, in lifting the excavator from one hold to another, was not being used to "convey a load" as that term is used in exclusion clause 2(d); it is not being used as a mobile crane in its vehicular function. Walz receives support for that contention from *Allied Mutual Insurance Ltd v Kearneys Services Ltd*.[30] McGechan J there found that an excavator being lifted by a mobile crane from one level to another in the bear pit of the Wellington Zoo was not "being carried by any insured vehicle" under that policy. McGechan J found that a crane loads or unloads, and lifts, raises or picks up and lowers or puts down goods; it does not "carry" goods; the restrictive term of the policy did not apply to a crane lifting and lowering goods as the goods were not "being carried" by the crane. McGechan J's approach was rejected by his Honour, who found that here the crane, in lifting

---

29 [1954] 1 QB 247.

30 (1994) 8 ANZ Ins Cas 61-229.

the excavator from one hold to another, was being used "to convey a load" under exclusion cl 2(d).

[66] There are points of distinction between this case and *Kearneys*. The mobile crane the subject of that policy had a vehicular function, whereas the crane here could not be driven on the road; it was unregistered and was moved to the wharf on a prime mover which was in turn floated to the wharf. It is true that the exclusion clause could have been worded so as to be more apposite to a crane: compare the clause discussed in *Ferrcom Pty Ltd v Commercial Union Insurance Co of Australia Ltd*.[31] But this crane was only one of many vehicles and items of machinery listed under the policy. The Certificate of Insurance was for vehicles for "business use". "Business" is defined under the policy as being "in connection with Your occupation or business".[32] The schedule of vehicles insured under the Certificate of Insurance included registered and non-registered vehicles, mobile cranes, other cranes, including this crane, and other unregistered machinery. Both the policy in its definition of "Your Vehicle"[33] and the Certificate of Insurance[34] in endorsement 51A refer to the "standard tools supplied by the vehicle's manufacturer or similar substitutes for them". The crane was ordinarily used to lift heavy loads and move them from one position to another. This suggests that the policy was intended to cover items like this crane, performing its normal working functions. These considerations favour a different conclusion to *Kearneys*.

[67] But in any case, the ordinary meaning of "convey", namely, "to carry or transport from one place to another"[35] supports the view taken by the primary judge. The crane, in transporting the excavator from hold no 1 to hold no 2 was carrying a load greater than specified in the manufacturer's load table; the crane was being "used to … convey a load more than [its] designed carrying capacity". Under exclusion cl 2(d) Suncorp is not liable for Walz's loss, damage or legal responsibility.

[68] Walz's appeal as to indemnity must also fail.

[69] That being so, it is unnecessary to consider Suncorp's notice of contention as to s 5A(C) of the policy.

[70] I would dismiss both the appeal and the cross-appeal. The parties have requested to make submissions as to the costs order. I would allow seven days for the filing of those submissions.

[71] **DAVIES JA:** I have read the reasons for judgment of the President. I disagree, with respect, with her Honour's conclusion as to the appropriate apportionment of negligence between Walz Construction Company Pty Ltd and Gardner Perrott and consequently with her Honour's conclusion in the proceedings between those parties and between those parties and Queensland Alumina Limited. And though I agree with her Honour's conclusion in the proceedings between Walz and Suncorp General Insurance Limited, my reasons for doing so differ somewhat from her Honour's. Accordingly I find it necessary to set out my reasons and conclusions at

---

31 (1989) 5 ANZ Ins Cas 60-907.
32 Policy, exhibit 4, p 5, AB 647
33 Policy, exhibit 4, p 4 , AB 646.
34 Schedule, exhibit 4, AB 664.
35 The Macquarie Dictionary, 2nd revised ed, The Macquarie Library, 1991.

some length notwithstanding that it involves some repetition of matters which her Honour has already stated.

**1. The parties and the proceedings**

[72] These are an appeal and a cross-appeal from a judgment given in an action in the trial division of the Supreme Court on 8 March 2001. The appellant in each case is Walz Construction Company Pty Ltd the plaintiff in that action. The appeal involves two proceedings. The principal respondent in the first of those proceedings is Gardner Perrott, a firm, the third defendant in the action; it is also the cross-appellant. The respondent in the second of those proceedings is Suncorp Insurance and Finance the defendant in a separate action by the plaintiff. Notices of contention were filed in respect of the first proceeding by the second respondent Queensland Alumina Limited the second defendant in that action and in respect of the second by Suncorp. In order to explain these proceedings it will be necessary to say something about the relationship between the parties.

[73] Walz was the owner of a large crane which on 4 June 1995 tipped over whilst lifting a Caterpillar excavator from a hold of the "TNT Carpentaria" at the Boyne Smelters wharf, Gladstone. In consequence the crane, the excavator and the ship were damaged, giving rise to the proceedings referred to.

[74] Queensland Alumina was the charterer of the ship. By a management agreement it appointed another company as the manager of the ship. That company in turn appointed ASP Ship Management, a firm, the first defendant in the first action, as its agent to perform its duties under the management agreement. No judgment was obtained at trial against ASP and the appellant and the third respondent Gardner Perrott were ordered to pay its costs. No relief is sought against it in this appeal and it is only concerned to protect its costs order.

[75] ASP in turn engaged Gardner Perrott, an independent contractor to carry out maintenance work on the ship. Queensland Alumina hired the crane from Walz, an independent contractor, on terms which included that it would be operated and maintained by Walz. On the evening in question the operator of the crane, Mr Elliott, was an employer of Walz. All others engaged in the lifting operation referred to earlier were employees of Gardner Perrott.

[76] The actions below were by Walz, principally and relevantly now only against Gardner Perrott,[36] for damage to the crane; by Queensland Alumina against, now relevantly only, Walz and Gardner Perrott for damage to the ship and associated costs; and by Walz against Suncorp Insurance and Finance with which Walz had insured the crane against liability to third parties. Walz' action against Gardner Perrott was one for negligence. That by Queensland Alumina was alternatively in contract and negligence.

[77] In the actions by Walz and Queensland Alumina the learned trial judge found both Walz and Gardner Perrott negligent and apportioned contribution to the damages of both Walz and Queensland Alumina as to 15 per cent to Walz and 85 per cent to Gardner Perrott and gave judgment for Queensland Alumina and Walz accordingly. Walz appeals and Gardner Perrott cross-appeals against those judgments, the former

---

[36] It also sued ASP and Queensland Alumina. The action against those defendants was dismissed and Walz does not appeal against that part of the judgment.

contending that the whole or a greater proportion of liability should be attributed to Gardner Perrott, the latter contending that the whole or a greater proportion of liability should be attributed to Walz. Queensland Alumina, whilst supporting the judgment of the learned trial judge, contends, in the alternative in its notice of contention, that Walz was liable on the basis of res ipsa loquitur and in contract.

[78] The action by Walz against Suncorp was dismissed, the learned trial judge concluding that the case fell within general exclusion 2(d) of the Suncorp policy. Walz appeals against that judgment. Suncorp resists that appeal but also, by its notice of contention, contends that the case came within an exclusion contained in section 5A(C) of the policy.

**2. The event**

[79] On the evening in question Mr Elliott was engaged in an operation which involved lifting the excavator from hold 1 on the ship and depositing it in hold 2. On that morning he had, he said, positioned the crane and fixed it, by means of outriggers over load bearing piles, on the wharf adjacent to the ship and about halfway between holds 1 and 2.[37]

[80] Because the deck of the ship was substantially higher above its waterline than was the deck of the wharf, the cabin of the crane, once it was so positioned, was also well below the level of the deck of the ship. Consequently Mr Elliott could not see even the hold from which the excavator had to be lifted. The hold was, in turn, approximately 18 metres deep. He was therefore more dependant on a dogman for directions than if he could see his load from the beginning of the lift.

[81] The lifting ropes of the crane was fixed to the excavator by Gardner Perrott employees by means of chains at four points and the load was then lifted a short distance. It was then, at the request of the dogman, lowered and the chains readjusted. It was then lifted above the top of hold 1. The crane then commenced to slew the load towards hold 2 and almost immediately it tipped.

[82] Three employees of Gardner Perrott, the dogman, Mr Buchanan, who was stationed inside the hold of the ship, a second unnamed man positioned on the deck to whom he gave signals and a third, Mr Fraser, to whom that man in turn relayed signals, were involved in the lifting operation. Mr Fraser was positioned at the ship's rail where he had a line of sight to Mr Elliott. No question was raised as to the appropriateness of relaying signals in this way and, though there was some evidence about unsatisfactory aspects of the way in which this was done, they were not relied on in this Court as constituting negligence.

**3. Negligence of Elliott conceded**

[83] Inside the operator's cabin of the crane was a device known as a load indicator which indicated the approximate weight of the load being lifted, provided that the indicator was adjusted according to the number of lifting ropes being used, and a chart which indicated the safe working load at various stated lengths, radii and angles of the boom of the crane. Earlier on the day in question Mr Elliott had operated the crane at a different location on that wharf lifting relatively light loads.

---

[37] He used the phrases "between holds 1 and 2", "in the middle of the holds" and "in the centre of the holds".

One lifting rope had been used for that operation. Two lifting ropes were used in this operation.

[84] Before Mr Elliott commenced to lift the excavator on the day in question he knew that two lifting ropes were required. However he omitted to adjust the load indicator to take account of this. The result was that when the crane commenced to lift the excavator the load indicator indicated a load only about half that of the weight of the excavator. It was common ground in this Court that the excavator's manufactured weight as appeared on a plate on its side was over 13 tonnes but that the load indicator reading, already referred to, was 7.3 tonnes.[38] It was conceded in this Court by Mr Douglas QC for Walz, that the failure by Mr Elliott to adjust the load indicator for two lifting ropes before the commencement of this lift was negligent.

**4. Responsibility for ascertaining the weight of the load and the discharge of that responsibility**

[85] There was considerable discussion in this Court as to who was primarily responsible for the lifting operation. However that question is resolved, it seems reasonably clear that the primary responsibility for ascertaining that the weight of the load was within reasonable safety limits was with Mr Elliott. It was not suggested that any other person was apprised of the information, contained in the chart in the operator's cabin of the crane, as to what was its safe working load at specific radii of the boom.

[86] In addition, the National Occupational Health and Safety Certification Standard for users and operators of industrial equipment, which was published in 1995 and which was in operation at the relevant time, imposed on those operating cranes obligations to assess and secure their equipment and work area, to develop a workplace operations plan in consultation with relevant authorized work personnel and to check controls and lifting gear including ensuring that the operating radii of a crane for planned operations are verified and measured taking into account the estimated increase in radius due to boom deflection. It obliged the crane operator to ascertain the weight of the load correctly in consultation with associated personnel.

[87] Mr Elliott came to this operation having performed similar lifting operations for Queensland Alumina on two previous occasions, in February 1995 in respect of this ship and in May 1995 in respect of another ship. Both had been performed at a different wharf but on each occasion had involved lifting an excavator from one hold of the vessel into another hold or onto the wharf. As already mentioned, the operation proposed on this occasion was to lift the excavator from one hold, hold 1, into another, hold 2. It is plain from what Mr Elliott said during the course of a statement which he gave on the day of the accident that he was, at least to some extent, reliant on this lifting operation being of a similar order to that which he had performed on the other occasions. He was also reliant on measurements which he had taken at this scene before the ship had arrived at this wharf so that, for example, his estimate of the radius of the boom, which he gave in an interview on the day of the accident, of 17 metres, was an estimate made from his original calculations not an estimate made from his observation of the actual radius of the boom during the course of this lift.

---

[38] As subsequently indicated, his Honour found that the total weight, including chains, at the commencement of the lift was about 13.4 tonnes. That finding does not appear to be disputed.

[88] The learned trial judge found, and no party in this Court disputed, that Mr Elliott came to the lift unaware of the actual weight of the load. However he also found that it was probable that he had been told that the equipment to be lifted was similar to that on previous occasions. The excavator which he had lifted on previous occasions weighed 7.8 tonnes. He was therefore not surprised when his load indicator indicated only 7.3 tonnes. The learned trial judge also found, in effect, that it was probable that Walz had been told that the equipment to be lifted was similar to that lifted on previous occasions.

[89] The finding that Mr Elliott was told that the weight of this excavator was similar to that of the excavators he had previously lifted in a similar operation was based solely on his evidence which his Honour generally accepted. He said that when he noticed Gardner Perrott employees using four legs of a chain rather than three, as had previously been used, thus suggesting a different model excavator with different lifting points, he queried them about this and was told that he was lifting a different excavator. He said he then queried the weight and was informed that it was about the same as the other one. These employees were two labourers employed by Gardner Perrott. One of them could not recall any such conversation and the other, who was disbelieved, said that he told Mr Elliott that the excavator weighed around 14 tonnes. His Honour accepted Mr Elliott's evidence about this conversation and I do not think that this Court should go behind that finding.

[90] The finding that Walz was similarly told was based on the evidence of Mr Fleming from ASP who, although he could not recall having said any such thing, said that his usual procedure when ordering a crane would be to tell an officer of Queensland Alumina what the equipment to be lifted was and the weight thereof. His Honour found that Mr Fleming was told by Gardiner Perrott that the excavator was "slightly bigger" than had previously been lifted and found that if he had followed this usual procedure he had probably told Walz, through Queensland Alumina, that the same or a similar excavator to those which had previously been lifted was to be lifted on this occasion. But, as I have said, there is no evidence that Mr Fleming did tell an officer of Queensland Alumina.[39] Nor is there any evidence that Queensland Alumina passed any such information on to Walz. Neither Mr Walz nor any officer of Queensland Alumina[40] nor Mr Elliott gave any evidence of this. Nor was there any basis for concluding that Queensland Alumina was Walz' agent for the purpose of receipt of such information.

[91] With great respect to his Honour, I doubt whether the evidence upon which he relied was sufficient to permit him to infer that Fleming passed on to Walz, through Queensland Alumina, the information conveyed to him by Gardiner Perrott that the excavation was only "slightly bigger" than the ones which Walz had previously lifted. However I do not think that this finding, or a rejection of it, materially affects the conclusions which I reach.

[92] It by no means follows, from acceptance of the finding that Mr Elliott was told that the weight of this excavator was similar to that of the excavators which he had previously lifted in a similar operation, that Mr Elliott discharged his responsibility

---

[39] Mr Fleming had no recollection of any such conversation and could not even recall whether it was he or Mr Brown who spoke to a Queensland Alumina officer about obtaining the crane for this job.

[40] Mr Cruwys of Queensland Alumina said that he didn't know even what was being lifted.

of ascertaining the weight of the load he was about to lift by accepting a statement by one or both of two employees of Gardner Perrott, whom he did not know, that the weight was about the same as the other one. He did not speak to the dogman Mr Buchanan, or himself ascertain the weight by inspecting the plate on the side of the excavator, which displayed its weight, as he could have done.

[93] No doubt it was negligent of those employees to give him that false information. However in my opinion Mr Elliott was ultimately responsible for correctly ascertaining the weight of the load and for determining whether it would be safe to lift it at the maximum possible radius and angle at which the boom would be likely to operate during the lift. It was a simple matter for him to do so by examining the plate on the side of the excavator and he had been alerted to the probability that this excavator was different, with different lifting points, from those he had previously lifted. In my opinion he failed to discharge that responsibility and his failure to do so was negligent.

[94] It is then necessary to consider whether that and the admitted negligent failure were causes of the tipping of the crane and, if so, the extent to which, vis-à-vis Gardner Perrott, Walz should bear responsibility for that event. In order to approach that question it is necessary to consider a critical finding by the learned trial judge and the challenge of Gardner Perrott to that finding.

**5. A critical finding and the challenge to it**

[95] A finding by the learned trial judge which was critical to his apportionment of negligence between Walz and Gardner Perrott was that, at the radius at which the boom of the crane was being operated at the relevant time and in the movement of the excavator occurring immediately prior to the tipping of the crane, the weight of that excavator would not alone have been sufficient to tip the crane. This finding enabled his Honour to infer that other negligence by employees of Gardner Perrott had contributed to the tipping of the crane.

[96] Although Mr Elliott had thought that the radius of the boom at the relevant time was 17 metres, Mr Douglas for Walz, in this Court, accepted the estimate at which his Honour had arrived of between 19.72 metres and 21 metres at the time the crane tipped. Mr H Fraser QC for Gardner Perrott, on the other hand, contended for a longer radius, in the order of 23 metres. As will appear, the difference is significant.

[97] The safe working load of the crane at its most unstable point, according to the published data, was 14.4 tonnes at 17 metres, 13.2 tonnes at 18 metres, 12.2 tonnes at 19 metres, 11.4 tonnes at 20 metres and 10 tonnes at 22 metres. It can thereby be seen that, at either of the radii contended for by the competing parties on this question, the crane was carrying a load beyond its safe working load. It does not follow, however, that, carrying the load it was in fact carrying at either of the radii contended for, the crane would or even could become so unstable as to tip without some additional cause. On the contrary the evidence of Mr Kohner, an expert whose evidence his Honour accepted in this respect, was that the safe working load of the crane was no more than 75 per cent of the tipping moment of the crane at its most unstable position. His Honour then concluded, and there was no dispute about that before this Court, that the real tipping moment of the crane was no less than 19.2 tonnes at 18 metres, 17.6 tonnes at 19 metres, 15.2 tonnes at 20 metres and 13.3 tonnes at 22 metres. According to the evidence which the learned trial judge

accepted the total weight at the commencement of this lift was probably about 13.4 tonnes and about 13.3 tonnes at the point at which the crane tipped.

[98] From all of this the significance of the possibility that the radius may have been as much as 22 metres can be seen. At that radius the tipping moment of the crane in its most unstable position was less than the weight in fact being carried at the relevant time. If, therefore, the radius of the boom at the point of lift was 22 metres or more, the weight being carried, in the circumstances, was sufficient alone to tip the crane and consequently his Honour did not have to look for and consequently infer other causes.

[99] The estimate adopted by his Honour of the length of the radius of the boom at the time when the crane tipped at between 19.72 metres and 21 metres was based on the maximum and minimum distances in two diagrams prepared by Dr Grigg, a forensic engineering consultant retained by Gardner Perrott. These showed two alternative positions of both the crane and the excavator immediately before the lift. It is necessary then to turn to the evidence upon which those distances are based and to the alternative evidence upon which Mr Fraser contended for a longer distance.

[100] The position of the crane most favourable to the shorter of his Honour's estimates, one which was half way between the two holds, was supported by a considerable body of eye-witness evidence. I have already referred to that of Mr Elliott. Mr Walz, who observed its position from the deck of the ship shortly after the accident, gave similar evidence as did Mr Fleming and Mr Buchanan. His Honour set out the evidence of these witnesses in his judgment and appeared to accept it though, by his acceptance of the possibility of a position a little further towards hold 2, he accepted the possibility of some slight error in their estimates. The acceptance of any greater error, upon which Mr Fraser relied, depends on an interpretation of some photographs taken some time after the accident (by which time the ship may have moved on its moorings), an interpretation which, in any event, had room for error. His Honour was entitled to accept, as the position of the crane, that which he accepted.

[101] The two possible positions of the excavator accepted by his Honour are alternative inferences from the evidence of Mr Buchanan the dogman. An alternative position more favourable to Mr Fraser's contention, from the evidence of Mr Richards, a labourer who was also engaged in the lift, was plainly rejected by his Honour as he was entitled to do.

[102] It is impossible to say with any great degree of certainty what the radius of the boom was at the point of tipping. But I cannot be satisfied that his Honour was wrong in making the estimate which he did. The contentions advanced by Mr Fraser should, in my opinion, be rejected. There was adequate evidence to support the range which his Honour accepted. And at a radius of no more than 21 metres the boom of the crane had not, without more, reached its tipping moment. His Honour was justified in his conclusion that the weight being carried at the relevant time was not, without more, sufficient to tip the crane in the operation which was then being performed.

### 6. The inference of negligence by employees of Gardner Perrott in respect of a "dynamic event" was therefore correct

[103] That being the case Mr Fraser conceded that it was reasonable for his Honour to infer, as he did, that one or more of three dynamic forces specified by Dr Gilmore also contributed to the tipping. They were a failure of a chain shortener, contact between the excavator and some part of the ship and some form of snagging of the tag line. Each of these was a possibility which Dr Gilmore could not exclude. Nor does it seem to be contested in this Court that it was the dogman's responsibility or at least that of one of the employees of Gardner Perrott who was in or near the hold to ensure that none of these possibilities eventuated. Nor was it contested that, if any of them did eventuate, it was because of the negligence of one or more of those employees. His Honour was therefore correct, in my opinion, in concluding that Gardner Perrott was guilty of negligence which was a cause of the tipping in one or other or a combination of these failures.

### 7. Two negligent causes of the tipping

[104] On any view of the matter, however, the fact that the crane was operating beyond its safe working load increased the risk that, if some other contributing event occurred, the crane would be more likely to tip. That seems plain common sense but in any event one of the experts, Dr Gilmore, said that specifically. And it follows that the closer the weight of the load brought the crane to its tipping point the less other force was needed to cause it to tip.

[105] There were therefore two categories of negligence which together caused the tipping. The first was carrying a load which was beyond the safe working capacity of the crane and indeed so close to the tipping point of the crane as to make it a very dangerous lift. For this negligence Mr Elliott was primarily responsible, because of the two negligent omissions already referred to, though to a lesser extent so also was Gardner Perrott by its employees in negligently wrongly advising Mr Elliott that the weight of the excavator was much the same as that of the excavators which he had previously lifted in similar circumstances. And the second category of negligent cause was a dynamic event of one or other or a combination of the kinds I have mentioned, caused by a negligent omission on the part of one or more of Gardner Perrott's employees.

### 8. Apportionment of liability

[106] Of these the more serious, in my opinion, was the lifting of a grossly excessive load. But when one takes into account the fact that, in a significant but minor respect, the Gardner Perrott employees were at fault here also, I think an apportionment of negligence equally between Walz Construction and Gardner Perrott would have been appropriate. In my opinion his Honour's apportionment of negligence was so outside the range of what was appropriate that this Court ought to interfere, set aside that apportionment and substitute an apportionment of 50/50.

[107] Once that is accepted Mr Barlow, for Queensland Alumina, does not pursue his contention that res ipsa loquitur applies and does not need to pursue his claim based on contract. As the amount of damages in each case was agreed, that disposes of the issues between Walz Construction, Queensland Alumina and Gardner Perrott. It is necessary now to turn to the claim by Walz against Suncorp under its policy.

### 9. The claim under the policy

The policy was described as a motor vehicle insurance policy. It insured Walz against loss or damage to its vehicles described in a schedule to the policy and against legal responsibility which Walz incurred as a result of an accident for damages for loss of or damage to property. The schedule included a number of items of equipment which plainly were motor vehicles. It also included a number of cranes including this one. It is not clear whether any of the other cranes included in the schedule were intended to be operated only when stationary. This was a crane of a kind which could be driven, although it was not registered for driving on the road, but it was intended to be operated from a stationary position, at least usually, with outriggers stabilizing its base on the ground.

[108] The exclusion which the learned trial judge held to apply was general exclusion 2(d) which provided:

> "We will not pay:
>
> …
>
> 2. For loss or damage caused or contributed to, or legal responsibility incurred:
>
> …
>
> (d) while Your Vehicle is used to … convey a load more than Your Vehicle's designed carrying capacity".

[109] Walz submitted at the trial and its only substantial submission in this Court was that this exclusion had no application here because, in the lifting operation, the crane was not conveying a load. The term "convey", it was submitted, denoted transporting a load from one place to another by means of a moving vehicle. That was the way in which that provision should be construed, it was said, when it is read in the context of a motor vehicle insurance policy.

[110] Some support for this contention was derived from a New Zealand decision, *Allied Mutual Insurance Limited v Kearneys Services Limited* (1994) 8 ANZ Insurance Cases 61 - 229. There the Court accepted a contention that, when the crane in that case was lifting something, it was not carrying it within the meaning of a policy not dissimilar to this. It must be accepted that, if that case were followed here, this exclusion would not apply; there is no material difference between "carried" in that case and "conveyed" in this case and no relevant factual distinction between the two cases.

[111] However if that narrow construction were adopted then it is arguable, as Mr Griffin QC for Suncorp points out, that a similar narrow construction should be given to the primary obligation under the policy which is to insure if "Your Vehicle is being used for the purpose defined in the policy". The purpose is not, in terms, defined in the policy but if it is implicit in the policy, as the appellant contends with respect to general exclusion 2(d), that its purpose is limited to what might be thought of as the ordinary usage of motor vehicles, the conveyance of persons or the carriage of goods from one place to another by means of the movement of the vehicle, then the crane was not being used for the purpose defined in the policy.

[112] Whether or not that argument is correct it seems to me that the approach contended for by the appellant but rejected by the learned trial judge was too narrow a construction of the exception and should be rejected. Once it is accepted, as I think it should be, that the use of a crane of this kind for the purpose for which it was being used is appropriately within the ambit of insurability under a policy of this

kind, then the term "convey" should be also given a meaning which would include the lifting of goods or equipment at one point, carrying them or it from that point to another by means of the ordinary operation of the crane and the lowering of them or it into place at the second point. It does not require for that purpose that the crane should itself move from one place to another.

[113] In those circumstances it is unnecessary to consider the notice of contention of Suncorp that, in any event, s 5A(C)(a) applied so as to exclude liability.

[114] It follows from these reasons that the appeal in respect of the proceedings between Walz, Gardner Perrott and Queensland Alumina should be allowed and that the appeal in respect of the proceedings between Walz and Suncorp dismissed. I would invite agreement or submissions from the parties as to the appropriate orders which follow from allowance of the appeal in the first proceedings and the apportionment of liability which I would propose; and as to costs.

**10. Orders**

[115] 1. Dismiss the appeal by Walz and the notice of contention by Queensland Alumina in the proceedings between Walz, Gardner Perrott and Queensland Alumina;
2. allow the appeal by Gardner Perrott to the extent of adjusting the apportionment of liability between Walz and Gardner Perrott to 50 per cent each;
3. adjourn the further hearing of those proceedings for seven days to permit the parties, within that time, to agree upon or make submissions upon the appropriate orders which follow from an apportionment of negligence equally between Walz and Gardner Perrott and upon costs;
4. dismiss the appeal by Walz against the judgment in favour of Suncorp and Suncorp's notice of contention;
5. order that Walz pay the costs of this appeal so far as they relate to the appeal against the judgment in favour of Suncorp.

[116] **AMBROSE J:** I agree with the orders proposed by Davies JA and with his reasons for altering the apportionment for contribution made upon trial.

[117] I wish only to make some observations with respect to the appeal by Walz against the judgment in favour of Suncorp and Suncorp's Notice of Contention.

[118] The crane in respect of which Walz pursues its claim against Suncorp is described in the schedule of vehicles insured by Walz with Suncorp as –

> "1980 AMERICAN 7530 BOOM CRANE"

[119] The general exclusion of liability contained in the insurance policy reads relevantly –

> "We will not pay
>
> 1. …
> 2. For loss or damage caused or contributed to or legal responsibility incurred;
>
> (a) …
> (b) …
> (c) …

(d) While your vehicle is used to carry a number of passengers or convey a load more than your vehicles designed carrying capacity."

[120] Under the terms of the policy that exclusion in my view, must operate irrespective of whether it can be demonstrated that the conveying of a load in excess of the designed carrying capacity of the crane was in any way causative of the damage.

[121] For the reasons given by the learned trial judge and for those expressed by Davies JA on the facts of this case, the conveying of a load more than the mobile crane's designed carrying capacity was, in any event, causative of the damage in respect of which Walz seeks to recover an indemnity from Suncorp.

[122] In my view, the words "is used to convey a load" clearly mean "during the use of (the mobile crane) to shift a load from one place to another place."

[123] Whether the shifting of a load from one place to another involves conveying it at "more than" the designed carrying capacity of that crane must be determined having regard principally to the load limitation indicated by the manufacturer of that crane. Those limitations were placed before the learned trial judge and I will refer only to three of them.

[124] Keeping in mind the finding that at the time the crane tipped it was operating with a radius of between 19.72 and 21 metres and that it had a 48.77 metre boom length, reference to the load limitations advised by the manufacturer of the crane show permissible crane ratings in kilograms as follows –

AMERICAN HOIST & DERRICK CO.

MODEL 7530 TRUCK CRANE
RATINGS IN KILOGRAMS
59H TUBULAR BOOM W/TAPER TIP
15,468 KG CTWT – AMERCIAN CARRIER

| BOOM LENGTH | RADIUS IN METRES | BOOM ANGLE DEGREES | OUTRIGGERS SET | | METRES FROM BOOM POINT TO GROUND |
|---|---|---|---|---|---|
| | | | OVER SIDE (KILOGRAMS) | OVER REAR | |
| 48.77m | 19.0 | 68.7 | 12,240 | | 47.5 |
| | 20.0 | 67.4 | 11,350 | | 47.1 |
| | 22.0 | 64.8 | 9,980 | | 46.2 |

[125] The weight of the excavator being lifted was over 13 tonnes so it is quite clear that with a boom angle between 64.8 degrees and 68.7 degrees and with the boom point being between 46.2 metres and 47.5 metres above the level from which the load was being lifted the shifting of a load in excess of 13 tonnes with a boom radius of between 19.72 and 21 metres in this case would always come within general exclusion 2(d) of the policy.

[126] In my view, exclusion 2(d) was clearly intended to apply to the use of the insured boom crane or "truck crane" during its use for the purpose for which it was designed.

[127] The very nature of the crane indicated that it would be used to move loads when the truck body was in a stationary position with outriggers set in place – as this crane

was at the time when it tipped and was damaged and caused damage – and not be used to shift loads while it was mobile. In my view it is clear that general exclusion 2(d) was intended to exclude liability to indemnify against damage caused while the mobile crane was being used to shift a load of a weight greater than that indicated by the manufacturer in the Truck Crane Ratings to which I have referred.

[128] In *Allied Mutual Insurance Limited v Kearneys Services Limited* (1994) 8 ANZ Insurance Cases 61-229 McGechan J entertaining an appeal against a judgment of a District Court judge, considered the effect to be given to a special exception in an insurance policy limiting liability for vehicles or chattels being "carried".

[129] In that case the owner of an excavator damaged while the insured's mobile crane had been lifting it, recovered damages from the insured. The insured, in the District Court, then successfully recovered from the insurer, an indemnity in respect of that judgment.

[130] The insurer, in that case, sought to limit its liability to the insured under a special exception in its policy on the ground that when the insured's crane was negligently managed causing damage in the course of lifting the excavator it was "carrying" that excavator.

[131] The trial judge in adopting a contra proferentem approach held that the primary meaning of "carried" was "transported" in or on a moving vehicle and the insurer was therefore not entitled to avoid responsibility under the special exception which limited its liability to $1500 for that damage.

[132] I am unpersuaded that *Allied Mutual Insurance Limited v Kearneys Services Limited* in the circumstances of this case, is persuasive authority for the proposition advanced by Walz that the mobile crane in this case was not conveying the excavator as it was lifting from one hold of the ship to another. To the extent that any support may arguably be obtained from that case, in construing the exception in the policy in this case. I agree that it ought be disregarded.

[133] Upon appeal the insurer in that case sought to set aside the judgment in the District Court on three bases –

(1) the damage to the excavator had not resulted from the "use" of the mobile crane because at the relevant time the crane was being used as a crane and not as a vehicle;

(2) the damage caused by the crane fell within a policy exception because at the time the excavator was damaged it was in the care, custody and control of the insured; and

(3) the excavator was being "carried" by the crane which brought it within a special exception to the policy limiting the liability of the insurer to $1500.

[134] McGechan J considered all three matters raised by the insurer on appeal and dismissed it.

[135] With respect to the operation of the special exception limiting liability when goods were being "carried" by the crane, the District Court judge had construed part of the

policy indemnifying the insured against liability for damages arising "from the use of the insured vehicle".

[136] A general extension under this part of the policy was given in respect of –

> "3 An Employer's Liability while the Insured Vehicle is being driven on the business of an employer or while you are driving another vehicle as a servant or agent of your employer."

[137] His Honour referred to a special term contained in a schedule to the policy –

> "The maximum liability of the Company for the Insured's legal liability for damage to any vehicle or chattel being CARRIED by any insured vehicle is deemed to be $1500. This limitation does not apply to vehicles or chattels being salvaged".

[138] McGechan J's analysis of the surrounding circumstances which might be used to assist interpretation of the policy adverted to the fact that the insured was a tow and salvage operator which was well known to the insurer which had insured specified tow wagons and transporters as well as two mobile cranes. It was aware that the insured would be driving its mobile cranes to where they were needed and would then be using the lifting capacity of those cranes upon arrival at their destination. His Honour observed that liability cover would be wanted for both legs of mobile crane operations: travelling to and from site with attendant risk of collision enroute and also during operation as a crane on site with attendant crane risks.

[139] His Honour referred to the fact that the trial judge had –

> "Noted the special exception limiting liability to $1500 for vehicles or chattels being "carried"."

[140] He referred to s 15(1) of the *Carriage of Goods Act* 1979 which imposed a statutory limitation of a carrier's liability for damage caused to goods it carried in the sum of $1500 when damage occurred to goods in the course of carriage or "transportation" of those goods by that carrier.

[141] McGechan J observed that in the context of that legislation the trial judge had determined that "the ordinary meaning" of "carry" implied movement of both the carrier and the object carried from one place to another. He observed that a stationary crane remaining in one position was "more aptly described as lifting rather than carrying; but it is also a species of carrying". His Honour held that primarily the insurance policy covered damage to the insured's own vehicle; the extension of the liability cover for damage caused to another or to a carried object being "additional". The trial judge had held, that the "primary meaning" of "carry" in the circumstances to bring the exception into play was to transport in or on a moving vehicle and that exception did not extend to damage to a chattel being lifted by a crane which was immovable at the time".

[142] Upon appeal the insurer contended that "carriage" on the mobile crane could take place either vertically or horizontally while the crane "truck" was immobile.

[143] On the other hand the insured contended that the insurer knew that it was a major towing contractor and that there could be situations where if sued by the owner of damaged freight the insured could rely upon the $1500 limitation on damages recoverable against a carrier under s 15 *Carriage of Goods Act* 1979. It was contended that the insurer would not have been prepared to grant an insurance cover in excess of the statutorily limited liability of the insured under that Act for damage to goods it carried. It was contended that the special "carriage" limitation was introduced keeping in mind the statutory limitation on the liability of the insured under the *Carriage of Goods Act* 1979 and that the term "carriage" in the circumstances should for the purposes of the exemption involve a concept of "transportation" of goods by the insured vehicle where it and the carried goods move at the same time.

[144] It was argued finally on behalf of the insured that if ambiguity did exist (and it was contended that it did not) the contra proferentem approach was applicable and that consequently the exemption clause limiting the liability of the insurer should be construed so that it had no application to the facts of the case where during use of the mobile crane for the purpose for which it was designed the operator had negligently caused damage to goods it was lifting from one place to another.

[145] Even accepting that in dismissing the insurer's appeal McGechan J rejected its contention that "carriage" of goods by the mobile crane within the meaning of that policy might take place either vertically or horizontally, from an immobilised crane that lends no support to Walz's contention in this case. His Honour there observed –

> "However, assistance from precedent must never be allowed to obscure the crucial initial focus: *these* words, in *this* document, in *this* situation."

I adopt that approach in construing the exception clause in this case.

[146] Although the facts in that case relating to the occasion of the damage in respect of which the insurer was required to indemnify the insured bear striking similarities to the facts in this case, the circumstances in which the term "carriage" needed to be construed were strikingly dissimilar from those in the present case. In that case the mobile crane was capable of being driven in the business of the insured on a roadway, although it is unclear from the report whether it was capable of carrying goods by way of vehicular transportation while it was mobile whether or not on a roadway. I rather suspect that it could, having regard to the significance given to the effect of s 15 of the *Carriage of Goods Act* 1979, although the policy there under consideration, as that in the present case, covers various "tow wagons and transporters" and other vehicles as well as the specified mobile crane.

[147] On the facts of this case, it is clear that the mobile crane in issue could not lawfully be driven on roadways. It had in fact been transported to the dock where the accident occurred on a semi trailer so that presumably it might almost straight away be placed in a stationary position with its outriggers set in an appropriate place so that it could be put into operation. There is nothing to suggest that this particular mobile crane could ever lift, shift or "carry" a load as a mobile vehicular transporter of that load. Indeed all the indications are quite to the contrary.

[148] In my view, no support for the proposition advanced by Walz against Suncorp General Insurance can be derived from the decision of McGechan J in *Allied Mutual Insurance Limited v Kearneys Services Limited*, or indeed the approach adopted by the District Court judge under appeal in that case.

[149] For these reasons I would concur with order 4 proposed by Davies JA and with the reasons contained in paragraphs 65 to 67 inclusive of the President and the orders she proposes with respect to Walz's appeal as to indemnity.