SUPREME COURT OF QUEENSLAND

CITATION:	*Sweeney v Attwood Marshall* [2002] QSC 276
PARTIES:	**PETER JOHN SWEENEY** (plaintiff) **v** **ATTWOOD MARSHALL** (a firm) (defendant)
FILE NO/S:	S 1410 of 2002
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	11 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2002
JUDGE:	Ambrose J
ORDER:	**I give judgment for the plaintiff against the defendant in the sum of $10,000;** **I order that the defendant pay to the plaintiff his costs to be assessed on the appropriate Magistrates Court scale of costs, which is, scale F. I certify that the attendance of both Counsel and solicitor during the trial was necessary. I give liberty to apply for any necessary certification that steps taken in respect of which scale F specifies a fee, were reasonably necessary or proper in the event that the parties are unable to reach agreement that they were.**
CATCHWORDS:	NEGLIGENCE – professional negligence – claim for damages for professional negligence against solicitors for loss of chance – where plaintiff injured during duty with voluntary association – where plaintiff injured by truck and trailer rolling backwards – where solicitors failed to give notice under s37 *Motor Accident Insurance Act* – whether plaintiff had prospects of success in original action – whether plaintiff lost chance DAMAGES – Loss of chance – where plaintiff claims for loss of chance – whether Court would have found contribution by plaintiff for his injury – amount of contribution – calculation of lost chance

WORDS AND PHRASES – "worker" – where plaintiff claimed professional negligence prevented him from pursuing action for breach of statutory duty of care under s28 *Workplace Health and Safety Act* – whether plaintiff "worker" under s 11 of Act

Associations Incorporation Act 1981 (Qld), s 14, s 21(c), s 25(2)(d), s 27
Motor Accident Insurance Act 1994 (Qld), s 37
Workplace Health & Safety Act 1995 (Qld), s 9(1), s 10(2), s 11, s 11(2), s 11(3), s 26, s 27(3), s 28, s 28(1)

Griffith v Kirkemeyer (1976) 139 CLR 161, considered
Wyong Shire Council v Shirt (1980) 146 CLR 40, considered

COUNSEL: G Forde for the plaintiff
K N Wilson for the defendant

SOLICITORS: Quinn and Scattini for the plaintiff
McInnes Wilson for the defendant

[1] The plaintiff claims damages for professional negligence against the defendant, a firm of solicitors.

[2] On 17 August 1995 the plaintiff was a member of a voluntary association of persons who conducted a marine rescue facility at Currumbin ("the association"). It was registered under s 14 of the *Associations Incorporation Act* 1981 and could be sued as a body corporate under s 21(c) of that Act. For its general powers I refer to s 25(2)(d) and to s 27 for the liability of its members to meet or contribute towards its liabilities.

[3] The plaintiff had been a member of that association for about 18 months. He had previously worked at various occupations in Emerald requiring physical strength and agility. He had had a lot of experience over the years in driving trucks of various sorts, tractors and earthmoving machinery. Eventually he sold a trucking business he was conducting at Emerald and shifted to the Gold Coast where he invested the proceeds of sale in a motel. He and his wife managed the motel between them and he took the opportunity to join the association. His experience in driving vehicles of various sorts was a skill appreciated by the association because as well as from time to time launching and retrieving a twin hulled vessel mounted on a trailer towed by a truck at its Currumbin base, he also, from time to time, towed the trailed vessel from Currumbin to various places on coastal waters of Southern Queensland.

[4] The members of the association were not employed by it. They volunteered their services. The funds of the association seem to have been used largely to maintain and operate the shark cat vessel and radio equipment used in the course of various marine operations.

[5] On 17 August 1995, which was a mid weekday, the association was asked either by one of its members or former members to use the shark cat vessel to scatter in the ocean, near Currumbin Creek, the ashes of a former friend. It appears that, from

time to time, at the request of such people, the association made the vessel available for such purposes.

[6] According to the plaintiff, when he arrived at the boatshed, where the shark cat was housed on a trailer attached to a F100 V8 four wheel drive Ford utility truck ("the truck"), he opened the doors at either end of the shed and in preparing to reverse the truck, trailer and vessel down a ramp towards Currumbin Creek discovered that the battery used to start the truck was flat. He said that he used a jumper lead from a second battery, used apparently to power an electric winch to enable the engine battery to operate. He said that he started the truck engine in this fashion. It emerged in the evidence, which I accept, that two other men with the plaintiff were to crew the shark cat for its operation that day. One man named Craig was to be skipper of the vessel and another man Saunders was to be one of the crew. The plaintiff was to be the third crew member. There was a fourth man who attended the association premises for the purpose of manning a radio facility. It was one of the rules of the association that as the shark cat crossed a bar into the ocean there had to be a man manning a radio ashore. The skipper or at least one of the other crew members on the vessel could advise that person as to the progress of the vessel as it passed over the bar whether it was going out to or coming in from the ocean. Although there was some conflict in the evidence as to whether Mr Gay actually travelled on the vessel that day, I find that a Court would probably find that Mr Gay did not attend the boatshed or board the vessel when it was launched but instead made his way to the shore radio operations room. Whatever may have been the fact, it seems to have little relevance to the issues in this case.

[7] The plaintiff was in the process of starting the truck as Mr Craig the skipper walked past it. I am satisfied that he heard the utility engine start and perceived nothing unusual about the way it was started. On the other hand, he became aware of a discussion at some stage before he heard the engine of the truck start concerning problems with its battery. When he heard the truck engine start, apparently as it usually did, as he walked past the truck/boat and trailer he gave the matter no further thought. Mr Saunders the third member of the crew on the shark cat when it was eventually launched walked to a jetty near the launching ramp. The skipper climbed into the vessel and took steps to make it operational when it reached the water. The plaintiff reversed the truck and trailer down the launching ramp and the vessel on it was launched. He then drove the truck to which the trailer was still attached up to and into the boatshed and closed the doors. He then made his way to the jetty near the launching ramp from where he and Mr Saunders boarded the vessel. The vessel then headed for the open sea, one of the crew advising somebody on shore, Mr Gay – by radio – of the safe negotiation of the Currumbin Creek bar. The ashes were scattered and the vessel then made its way back to the launching ramp. When it reached the jetty near the launching ramp the plaintiff and Mr Saunders left the vessel and made their way to the boatshed. The plaintiff then opened the doors of the shed and reversed the truck with trailer attached down the launching ramp to a position where the trailer was partly submerged in the water to a depth, which would permit the skipper in effect to motor the vessel up out of the water onto rollers on the trailer using its outboard motors.

[8] Mr Saunders waited at the entrance to the boatshed with Mr Gay who by this time had made his way from the radio operations room to the boatshed to assist in cleaning the vessel preparatory to locking it up in the shed. The plaintiff in the meantime had fastened the vessel to the winch of the trailer and to a safety chain to

connect the two and had then driven the truck, trailer and vessel up to a position where the truck had proceeded into the shed so that the front of it was a metre or so from the front entrance. The trailer was brought to a halt on a gently sloping concrete access slab commencing perhaps 5 feet inside the rear entrance to the shed and extending a similar distance perhaps outside that entrance to where it joined the more steeply sloping concrete launching ramp.

[9] The reason for so positioning the vessel was to have the two outboard motors attached to its stern within 3 or 4 metres of a tap located 4 or 5 feet inside the building. Attached to this tap was a garden hose with a special fitting which permitted it to be attached to the outboard motors so that fresh water could be injected into them so that when started by the skipper any salt left in their cooling systems would be washed out. It would take a couple of minutes to clean out each engine. When the plaintiff brought the vessel to a halt both Mr Saunders and Mr Gay were on its portside and were preparing to attach the hose to one of the engines so that the skipper who was still in the vessel could start its engine to clean the salt out of its cooling system with the use of the tap water.

[10] According to the plaintiff, the procedure he had always followed in the past and which was prescribed by the association to make the truck, trailer and shark cat immobile while being cleaned before they were locked away in the boatshed, was to leave the truck in low gear in four wheel drive and switch off the engine; however, on this occasion he decided that he would depart from the prescribed procedure because he wished to disconnect the boat and trailer from the truck after the boat and trailer had been cleaned and take it for a short run to recharge the starting battery which he thought might be so flat that he might not be able to start the truck again if he again switched the engine off. He decided, contrary to all instructions and procedures required by the association, that he would simply apply the handbrake of the truck and leave the engine running so that the motor would not need to be started again. He decided that to do this he would take the truck out of gear so that the only braking device on the stationary trailer and boat would be the handbrake on the truck. I am satisfied that there was indeed a separate handbrake in the cab of the truck which could have been applied to render that trailer immobile if it were applied while the engine of the truck was left running. However he gave evidence that he decided for reasons, which I will deal with later not to apply the handbrake to the wheels of the trailer, which could only have operated while the engine of the truck was working.

[11] According to the plaintiff, he then decided that he would get a fire hose, which was kept at the front of the boatshed to assist in hosing down the trailer. It is clear in my view on the evidence that at some stage this fire hose would have to have been brought from the front of the shed along the portside of the vessel so that the trailer and the hull of the boat could be washed with fresh water. Either Mr Saunders or Mr Gay could have done this. For reasons which I will give later, I find that a Court would find this aspect of the plaintiff's account a little difficult to accept. The skipper of the vessel was in it waiting for advice that the hose was attached to one of the outboard motors so that he could start its engine and flush it of salt water. He was not particularly looking towards the truck or towards either Mr Saunders or Mr Gay. I mention merely that by the time of trial Mr Gay had died. Mr Saunders however said that he was certainly standing in a position preparing to attach the hose to one of the outboard motors at a time when the plaintiff said he was actually cleaning the trailer with a powerful fire hose. Mr Saunders was unaware of this

which seems a little surprising because he would have been standing, one would think, very close to the position where the plaintiff says he was commencing to hose down the trailer and perhaps the hull of the vessel which was then stationary. In any event, at some stage when the plaintiff was outside the truck doing something either on its portside or starboard side, the truck and trailer and vessel started to move backwards towards Currumbin Creek. According to Mr Saunders he and Mr Gay both noticed a slight movement and each attempted to push against the back of the truck to prevent it from further moving towards the launching ramp. In spite of their efforts they found it impossible to impede the movement of the truck. Perhaps that was because the vessel and trailer weighed something in excess of 3 tonnes and once the trailer which rolled from the slightly sloping access slab at the boatshed entrance onto the much more steeply sloping launching ramp the moving trailer gathered momentum.

[12] At some stage it is clear that the plaintiff attempted to get back into the moving truck through the drivers side door of the cab so that he could apply the footbrake. However by the time he did this, the truck had moved back a significant distance from where it had been left in a stationary position with the hand brake on. Apparently the drivers side door of the truck cab was open when he tried to climb back into it. However the door came into contact with a small cupboard on the wall of the boatshed which is depicted in photograph F in Ex 1A. When this happened the door was forced onto his right arm and he lost balance. I am satisfied that a Court would probably find that the events which led to his injury occurred very quickly. Once the trailer commenced to move down the slope of the launching ramp of course the more quickly it would travel. In any case the plaintiff contends that he was thrown off balance and at least one wheel of the truck passed over his right foot. He said that it also passed over his left foot. I assume that he would contend that he was not wearing shoes and significant injury was caused to his right foot although none apparently to his left foot. Significant injury was also caused to his right arm when the door of the truck cab came into contact with it.

[13] In any event, the truck together with the loaded trailer careered down the launching ramp and ended up in the water. Neither Mr Saunders nor Mr Gay was injured however they saw the plaintiff lying injured on the other side of the concrete slab giving access to the rear of the boatshed and gave assistance to him and eventually he was taken to hospital.

[14] The plaintiff says that he recovered completely from his arm injury.

[15] The medical evidence discloses that he may have sustained an injury to a metatarsal bone in the right foot. The evidence also indicates that probably as a consequence of the type of heavy work he had performed for many years he was then suffering from arthritic degeneration in various parts of his body – including probably the metatarsal joints in his right foot, one in his left foot and in his right ankle and in both knees and also in his cervical and lumbar spine.

[16] Eventually the plaintiff managed to sell the motel which he had been attempting to sell prior to his injury and which had been trading unprofitably for some time. He then purchased another business on the North Coast but it failed also.

[17] It is the plaintiff's case that had it not been for the professional negligence of the defendant in failing to give a timely notice required under s 37 of the *Motor*

Accident Insurance Act 1994 he would have had a chance of recovering damages for negligence against the association on a number of grounds: –

(a) Negligence of some unidentified member or members of the association in failing to take steps to ensure that the battery used to start the utility did not run flat before the plaintiff attempted to start it on 17 August 1995.

(b) Negligence of some unidentified member or members of the association in failing to ensure that the handbrake of the utility was adjusted so that it would prevent the truck, trailer and boat moving down the slope on which the trailer wheels had been positioned to enable the trailer, boat and engines to be cleansed of salt water etc.

(c) Failing to have chocks available to put under the wheels of either or both the truck and trailer when off the launching ramp and stationary at the end of the boatshed so that it might be cleaned.

(d) The failure of the skipper to properly watch and supervise the plaintiff and observe that he had left the truck out of gear with the engine running so that obviously the foot brake of the truck was not being applied so that he could warn the plaintiff not to leave the truck in that condition – at least without applying the handbrake of the trailer to immobilise it while the engine of the truck was running.

(e) When the skipper learnt that the plaintiff proposed to do what he gave evidence he did do, failing to warn him not to do what he proposed but to comply with the required procedure normally adopted when cleaning up the boat before storing it which was to leave the truck in gear in four wheel drive, switch the engine off and apply the handbrake.

[18] While it is unnecessary and indeed inappropriate for me to consider the plaintiff's evidence as if I were conducting the trial of an action which should have been properly commenced by the defendant on his behalf, it is of course essential to evaluate the prospects of success which the plaintiff had in pursuing any such action to determine what he lost as a consequence of the professional negligence of the defendant. It is the case for the defendant that upon careful examination of his evidence and that called on behalf of the defendant the plaintiff had no prospect of success in his action. Alternatively it is contended that if he had any prospect of successfully recovering judgment against the association that prospect was so minimal and the award of damages likely to be recovered after making refunds of benefits received as a consequence of his injury so low that although he may have lost the chance of pursuing such an action he suffered no financial loss as a result.

[19] It is convenient to deal with each of the bases of liability advanced by the plaintiff –

(a) Negligence of some member of the association in not taking steps to avoid the starter battery of the truck becoming flat.

[20] I have significant reservations about the evidence given by the plaintiff that it was in fact the usual procedure adopted by members of the association to disconnect the positive terminal of the starter battery on the truck before storing it away in the boatshed. No expert evidence was called to explain why such a procedure might be adopted. Neither the skipper nor Mr Saunders had heard of such a required practice

and it would seem somewhat inconsistent with all the steps taken in cleaning up the vessel and refuelling it to ensure that it would be ready at a moments notice to cope with any rescue emergency at any time of the day or night.

[21] While it might be arguable that the failure of some member of the association to disconnect the battery was negligent – if the evidence of the skipper and Mr Saunders was rejected and it was held that the invariable practice and required procedure was to disconnect the starter battery – the next question would be whether some member's failure to conform with that practice would create a foreseeable risk of personal injury of the sort suffered by the plaintiff. While undoubtedly being wise after the event, one may argue that any consequence of a failure to comply with usual or required practice which leads to personal injury or damage to somebody must entail foreseeability of such injury or damage, such an approach to liability is inconsistent with that required by *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

[22] In my view, even if his unsupported evidence were preferred to that of Mr Craig and Mr Saunders the plaintiff would have a significant difficulty in persuading a Court that the injury he suffered to his foot in the circumstances when the front wheel of the truck ran over it while it was left unattended with its engine running and restrained from rolling down a steep slope only by its handbrake was a foreseeable consequence of a failure to disconnect the positive lead from the starter battery when it was parked in gear with its engine off and handbrake applied after last being used.

[23] With respect to the question of causation it seems to me the plaintiff would also have problems in persuading a Court that failure to disconnect the positive terminal of the starter battery was a *causa causans* of the plaintiff's foot injury rather than merely a *causa sine qua non* of that injury. In my view, the plaintiff would have difficulty in persuading a Court that the action he took to overcome the problem that the flat battery gave to the operation of the truck and shark cat on the trailer attached to it did not break any chain of causation linking the failure to disconnect the starter battery with the injury occasioned to his foot as he attempted to climb into the moving truck to apply the footbrake as it gathered speed descending the launching ramp. In my view it is likely that a Court would hold that the real and indeed only causes of his injury were his own actions.

[24] (b) **Failing to ensure handbrake of truck was so adjusted as to hold it stationary on an incline when applied.**

In my view there was no evidence whatever adduced that the handbrake was defective. The plaintiff gave evidence that there was an adjustment device which he thought had rusted, the absence of which prevented the cable of the handbrake from being shortened so that greater pressure to the brake pads would be applied upon application of the handbrake. There was no expert evidence at all adduced to support this aspect of the plaintiff's claim. There was no evidence that any member of the association had ever detected any deficiency in the handbrake system when the handbrake was applied as it normally was and in particular when the engine of the truck was switched off and it was left in gear. It was contended that the truck was really not designed to tow a loaded trailer weighing three tonnes. Reference was made to the specifications of the truck. There was no expert evidence called to support this contention. The plaintiff in using the handbrake

had never detected any fault in its operation. Indeed Mr Craig gave evidence that the handbrake was so adjusted that it was only with very considerable effort that he was able to exert enough pressure to apply it.

The whole procedure adopted for years by the association and followed by its members was designed to avoid the driver of the truck with the loaded trailer on a slope relying upon the handbrake alone to prevent the truck and trailer from moving. In my view, the plaintiff would have very slender if any prospect of succeeding on this particular of negligence.

[25] (c) **Failing to have chocks available to put under the wheels of the truck and/or trailer while stationary at the top of the ramp for cleaning**.

On the whole of the evidence I am satisfied that the association and its members were very safety conscious. While it seems clear that in another location when the truck and loaded trailer were parked on an incline which I infer was significantly steeper than the very slight incline where the wheels of the trailer were positioned at the time of the plaintiff's injury, bricks were used as an added precaution to chock the wheels of the truck/trailer when the truck was left in gear with its engine off and handbrake on.

While it is true that on the day after the plaintiff's injury a couple of rubber wheel chocks were ordered I think it unlikely in the circumstances that a Court would treat that action as evidence that the association was negligent in failing to get wheel chocks prior to the events of 17 August 1995. To my mind this contention really amounts simply to being wiser after the event. Had the practice which had been adopted and followed almost religiously for many years prior to 17 August 1995 been followed by the plaintiff, wheel chocks would have been quite unnecessary. Indeed accepting that they were purchased shortly after the plaintiff's injury one would wonder what conceivable use they would be if the proper and previously uniformly applied procedure were adopted. While out of an abundance of caution persons performing a cleaning operation on the vessel near the entrance to the boatshed may have applied wheel chocks if they had been available I think it would be very difficult for the plaintiff to persuade a Court that the failure to provide such wheel chocks for use when the boat was being cleaned at the top of the launching ramp when the truck and most of trailer were inside the boatshed amounted to negligence on the part of the association.

[26] (d) **Failure of the skipper to properly supervise the plaintiff so that he might direct him not to do what he did leading to his injury.**

If one accepts that of the four members of the association involved with the operation of the vessel on 17 August 1995 Mr Craig as skipper had the last say as to how the operations of that day were to be performed, I take the view that there would only be a remote prospect of a Court holding in the circumstances that instead of idly watching someone fishing on the jetty nearby for a minute as he waited for Mr Saunders and/or Mr Gay to attach the hose to an outboard motor so that he could switch it on to flush the salt from it, he should have been watching the plaintiff carefully to ensure that he did not depart from a procedure which had been adopted and followed for many years by members of the association and which he had previously followed over a period of 18 months. The plaintiff himself was regarded as a good truck driver with many years of experience; to

everybody's knowledge he was well aware of the procedure that he was required to follow. In my view, any contention by the plaintiff upon trial of a properly instituted action, that having regard to the age and experience of both the skipper Mr Craig and the plaintiff that the skipper should have watched the plaintiff to ensure that he conformed with and did not depart from the procedure which had been adopted by the association and implemented for many years relating to the immobilisation of the truck and trailer when it and the vessel were to be cleaned preparatory to being stored in the boatshed is fanciful and I believe that any Court before which such an argument was advanced would be quite unlikely to accept it. There was no employer-employee relationship between the association and its members and while it might be arguable that had the skipper observed a crew member embark upon a course of conduct which was obviously contrary to accepted procedures and dangerous either to himself or to anybody else for that matter and had he failed to take reasonable steps to halt that conduct, his failure as "skipper" to take such steps may have rendered the association liable for injury caused to any person as a consequence of that behaviour, this was not an occasion when youthful or inexperienced people constituted the crew. Clearly, Mr Craig as skipper of the vessel for the day had great confidence in the plaintiff's ability and experience from his observations of the way he went about performing the task of driving/reversing the truck with the trailer and boat attached to it. A very short time must have elapsed between when the trailer was positioned near the entrance to the boatshed and when it started to move backwards towards the launching ramp. If one accepts the evidence of Mr Craig, instead of looking towards where the truck was parked well inside the boatshed he glanced momentarily at some fisherman on the jetty – presumably that which Saunders and the plaintiff had used to get off the shark cat when it approached the launching ramp – while he was waiting for the hose to be attached to one of the engines so that he could start it. In my view it is a fanciful contention that he was breaching his obligation to the plaintiff to supervise what he was doing and how he was doing it to ensure that the universally adopted procedure for rendering the truck and boat trailer immobile was being applied by the plaintiff on that occasion in the same way as it had always been adopted and applied apparently on the plaintiff's evidence on prior occasions. In my view, this ground of negligence advanced by the plaintiff would have slender if any prospect of being accepted upon trial.

[27] (d) **Failure of the skipper to warn the plaintiff not to do what he did when the plaintiff told him he proposed to do such a thing.**

Success upon this ground of negligence would involve the plaintiff persuading a Court that his evidence as to what he told his skipper was to be preferred to what the skipper said on this matter. Mr Craig denied completely any such conversation with the plaintiff. In my view, any Court would find it most unlikely that the plaintiff did tell his skipper that he proposed to do what he did in fact do which led to his injury. It was obviously a very dangerous procedure which the plaintiff adopted that day. It was a procedure quite contrary to that which had been adopted and followed for many years. The very procedure that was universally adopted and indeed that had been adopted by the plaintiff earlier that day assumed that the mere application of the handbrake of the truck was insufficient to prevent it from rolling backwards with the loaded trailer when its wheels were on a gentle slope towards the top of the loading ramp. I think it most unlikely that any Court would prefer the evidence of the plaintiff to that of Mr Craig on this issue. I think it much more likely that a Court would attribute the plaintiff's injury to his own

inadvertence or error of judgment. In my view, it is likely that a Court would conclude that the movement of the truck and attached trailer down the gentle slope commencing inside the boatshed and finishing at the top to the steep launching ramp should be attributed to the momentary inattention or error of judgment of the plaintiff who could quite easily have applied the brakes to the wheels of the trailer as long as the truck engine was operating. I find that it is quite unlikely that a Court would accept the plaintiff's evidence that a former skipper had advised him not to use the trailer hand braking system. I find that a Court would probably prefer the evidence of Mr Craig, that the device used to apply the trailer brakes was regularly adjusted for use when the truck was to tow the trailer down hill to ensure that the trailer brakes commenced to operate momentarily before the truck brakes to avoid the trailer jack knifing as the truck driver reduced speed by applying the foot brakes of the truck and the attached trailer as they proceeded down hill. The regular use of the trailer braking device in the cab of the truck when the truck and loaded trailer was being driven down road inclines and its regular careful adjustment to avoid the trailer brakes "locking" makes it quite improbable that any former skipper would have advised the plaintiff not to attempt to apply the trailer hand braking system because it did not work. Upon the evidence, I am persuaded that the probability is that a Court would reject the plaintiff's contention had he had been informed not to apply the trailer brakes as "hand brakes" because the system did not work properly.

[28] The plaintiff also contends that as a consequence of the defendant's professional negligence he lost the opportunity to pursue a properly instituted action for damages for breach of a statutory duty of care which the association owed to him pursuant to s 28 of the *Workplace Health & Safety Act* 1995 ("the Act").

[29] The plaintiff did not point to any regulation made pursuant to s 26 of the *Workplace Health & Safety Act* 1995 relevant to his claim. On the assumption that the association's obligations to the plaintiff were to be found in s 27(3) of the Act, it would have to show that it took reasonable precautions to prevent workplace related injury to him and exercised proper diligence to ensure that those precautions had been taken.

[30] One of the problems in the way of the plaintiff pursuing any alleged breaches of statutory duty under the *Workplace Health & Safety Act* would be to demonstrate that he was a "worker" under s 11 of the Act.

[31] Under s 11(3) it is provided –

> "**(3)** However, a person is not a **"worker"** merely because the person does work for an organisation of which the person is a member."

[32] It is contended however that it is arguable that the plaintiff was a "worker" within s 11(2) which provides –

> "**(2)** A person may be a **"worker"** even though the person is not paid for work done by the person."

[33] In my view, the plaintiff in this case was clearly injured in the course of doing work for the voluntary association of which he was a member for no remuneration. While it is clear that if one looked only to s 11(2) he might be categorised as a person who

did work for the association and was not paid for that work, that seems to me not to take the plaintiff very far because the work that he did for the association was plainly done by him as a member of it. In my view, he clearly comes within s 11(3) of the Act.

[34] In my view, although the work which he was doing as a member of the association at its boatshed launching ramp was done for no remuneration at a "workplace" under s 9(1), and even though the association might be said to have "engaged" the plaintiff to do the work he was doing at the time of his injury on a voluntary basis within s 10(2) of the Act, neither of those provisions in my view can be called in aid by the plaintiff to overcome the express provision under s 11(3) of the Act to which I have referred.

[35] In my view, the plaintiff would be unlikely to persuade any Court that he was a "worker" to whom the association owed a statutory duty under s 28(1) of the Act.

[36] Even if the plaintiff in the circumstances were able to persuade a Court that he was a "worker" within the meaning of the *Workplace Health & Safety Act* in spite of s 11(3) of that Act, in my view he would face difficulty avoiding, on the evidence led in this case, a finding that the association had taken reasonable precautions and exercised proper diligence not to expose him to risk of a workplace injury.

[37] If it did become necessary for the association to mount a defence against the plaintiff under Division 4 of the Act on the evidence which emerged upon this trial it would be strongly arguable that the association did choose an appropriate way to ensure that the truck and trailed boat did not move as it did after the plaintiff had brought it to a halt only a metre or so from the front of the boatshed.

[38] I have dealt at some length with the plaintiff's activities which in my view a Court would hold directly led to his injury. In my view, a Court would not be persuaded that there was any lack of "proper diligence" on the part of the skipper of the boat in failing carefully to watch the plaintiff to see that he did not depart from the normal and time hallowed procedure followed in bringing the boat trailer to a halt to clean it and the boat.

[39] In my view, the prospect of the plaintiff's success upon any statutory cause of action pursued under the *Workplace Health & Safety Act* is as remote as, if indeed not more remote than, the prospect of his success in a cause of action based upon negligence.

[40] Even if the plaintiff did succeed in establishing liability against the association under one or more of the causes of action he sought to pursue, in my view upon the whole of the evidence – including his own – a Court would find that essentially he was the author of his own injury. Essentially it was his fault that the truck was brought to a halt and left unattended at the top of a steep slope and immobilised in a way quite contrary to the procedures adopted and followed for many years by the association and indeed followed by him on previous occasions.

[41] In my view, if it ever fell to a Court to determine questions of contribution it is probable that the plaintiff would be required to bear a significant part of the responsibility for his injury.

[42] Although it was contended on behalf of the plaintiff that he ought be regarded as a "rescuer" who put himself at risk endeavouring to stop the runaway truck and loaded trailer I am unpersuaded that such a contention would find favour with any Court in the circumstances canvassed in this case. It was the plaintiff who was really the cause of the truck and loaded trailer running out of control down the loading ramp. I am persuaded that it is quite unlikely that a Court would accept the proposition that the plaintiff ever told the skipper that he intended to do what he did do which was obviously very dangerous and which any reasonable person of the plaintiff's age and experience must, if he gave it a moments consideration, have perceived it to be very dangerous; on the evidence the plaintiff did not even check to see whether the trailer wheels were on a slope before he left the cab of the truck or afterwards. I think that a Court would take the view on the evidence that if the plaintiff did in fact do what he gave evidence of doing with respect to walking down the passenger side of the unattended truck with a hose and then as the truck and trailer started to move down the slope, jumping across the trailer to the drivers side of the truck and then running up that side and trying to climb through its door to apply the footbrake, that conduct would establish such a reckless disregard for his own safety in attempting to avert the consequences of his departure from the safe and time hallowed method of immobilising the truck and loaded trailer in the circumstances as to lead it to hold him at least 70% responsible for the injury that he suffered to his arm and foot.

[43] **Quantum**

With respect to the quantum of damage which the plaintiff may have shown flowed from the injury to his arm and foot suffered on 17 August 1995, in my view a Court would probably have preferred the evidence of Dr Morris to that of Dr Saxby.

[44] According to Dr Fitzgerald who practices his profession at Palm Beach, the plaintiff attended him for medical treatment from about October 1993 until 1996. He said that the plaintiff advised him on 25 October 1993 that he had had an arthrodesis to his left big toe. He said that on 21 April 1994 the plaintiff told him that he was suffering from headaches. On 10 June 1994 an x-ray of the plaintiff's cervical spine demonstrated cervical spondylosis to which the doctor attributed the frontal occipital headaches in respect of which the plaintiff was consulting him. On 25 November 1994 the plaintiff complained to the doctor about pains in his legs that he experienced when attending a gymnasium and advised the doctor that he had previously had arthritis in his knees and osteoarthritis which caused some stiffness in them. He said that he concluded that the plaintiff was also then suffering from lumbar spondylosis which was probably causing occasional pain. X-rays examined on 29 November 1994 demonstrated osteoarthritis of the left knee and anti-inflammatory drugs were prescribed.

[45] On 29 November 1994, the plaintiff also complained that there was greater pain in the left knee than the right knee but both knees were swollen. Dr Fitzgerald said that the plaintiff consulted him in his surgery the day after his accident. He said that a car had accidentally rolled over both feet. He said that the plaintiff then suffered a fracture at the base of the fourth metatarsal in his right foot with soft tissue damage. He also complained of injuries to his thumb and right arm. Dr Fitzgerald said that the plaintiff had severe swelling in the whole of his right foot which caused him considerable pain for a long time, and that he walked with a severe limp. He said that by 10 November 1995 the plaintiff's fracture of the fourth metatarsal had

healed. He said that on 19 November 1995 the plaintiff was still complaining of his right foot swelling by the end of the day. Dr Fitzgerald expressed the view, similar to that held by Dr Morris, that with the arthrodeses to the joints in the plaintiff's right foot, pain should have disappeared.

[46] On 10 November 1995, Dr Ryan reported on an x-ray taken of the plaintiff's right foot and ankle – approximately 3 months after his injury.

[47] He observed that –

> "No bony injury is seen.
>
> There are osteoarthritic changes in the ankle joint and also in the first tarsometatarsal joint where there is very prominent spurring present."

[48] In a report from Dr Lisle (on a reference from Dr Saxby) it was observed on 25 January 1999, that –

> "there has been fusion of the first and second tarsometatarsal joints. There is quite marked irregularity of the adjacent articular surfaces of the medial and intermediate cuneiforms in keeping with quite severe degenerative change …
>
> There is evidence of degenerative change in the right first metatarsophalangeal joint with evidence of quite severe degenerative change in the right ankle joint. There has been previous fusion of the left first metatarsophalangeal joint. There are no other bony abnormalities identified".

[49] The medical evidence disclosed that the plaintiff probably suffered a fracture of the fourth right metatarsal on 17 August 1995. Dr Morris observed that it was difficult to know why he sustained degenerative changes in the tarsometatarsal joints. He expressed the view that degenerative changes in the tarsometatarsal joints quite commonly occur and expressed some doubt as to what bearing the crushing injury suffered by the plaintiff in August 1995 had on the degenerative changes on his right foot. He expressed the view that assuming the crushing injury to the foot had any effect on changes which in his view were probably degenerative – as were various other problems he was having in his left foot and both knees and his right ankle. The fracture to the base of the fourth metatarsal and soft injury to the right foot would merely have aggravated the pre-existing degenerative condition and this aggravation would have ceased to have effect after some months.

[50] On my evaluation of the medical evidence, it is likely that a Court would conclude that indeed the plaintiff developed degenerative arthritic changes in various parts of his body (including his left foot, right ankle, lumbar and cervical spine) probably as a consequence of the heavy work that he had done over the years. He was 45 years old at the time of his injury. He had sold up a trucking business in Emerald and invested the proceeds of sale in a motel on the Gold Coast where he was apparently not called upon to do the sort of hard work that he had been doing before he left Emerald. Although it was argued on behalf of the plaintiff, that had it not been for his foot injury, he could have obtained various jobs in the Emerald district involving presumably the sort of work he was doing before he sold up his trucking business and shifted to the Gold Coast, I take the view that a Court looking at his medical history would most probably conclude that even without having suffered any injury

to his foot, it was unlikely that the plaintiff at his age and in his physical condition would have returned to Emerald to do the sort of work which he ceased doing when he sold up his trucking business there.

[51] According to Dr Morris, there may well have been a degree of functional overlay in the disabling pain which the plaintiff says prevented him from working and led to his going on to a pension. According to Dr Morris, the extensive operative treatment he received from Dr Saxby which led to the fusion of metatarsal joints in the plaintiff's right foot, to which he attributed his pain, should really have taken the pain away. The association would not be responsible for any problem the plaintiff had with his agility resulting from his arthritic ankle which it is not suggested was injured in August 1995.

[52] Interestingly, the medical evidence showed that an x-ray report made on the day of the accident disclosed degenerative changes in the plaintiff's left foot but none in the right foot or ankle. That did not, on the evidence, demonstrate that such degeneration was not present. He had previously had a fusion of a segmented joint in his left foot for relief of pain generated by its arthritic degeneration.

[53] It was agreed between the parties that the notional trial date for an action properly instituted for the plaintiff by the defendant would have been March 2000 (i.e. nearly five years after he suffered his injury).

[54] In my view, upon the material evidence, it is not likely that the plaintiff would then have persuaded a Court that his past or future earning capacity at the time of his injury was about $1,000 gross per week. Although it was contended that had he returned to work driving trucks, heavy machinery etc he could have earned at an even higher rate and would have been able to do so for a period of approximately 20 years I think it improbable that a Court would accept his contention that his past economic loss between date of injury and notional trial date amounted to $136,604 with loss of superannuation entitlements amounting to $10,548. It is contended for the plaintiff that a Court would also be persuaded that future economic loss from the notional trial date would have been assessed at nearly $400,000 with future loss of superannuation at nearly $40,000.

[55] While undoubtedly the plaintiff if fit may have earned between $1,300 and $1,500 per week net driving trucks and doing heavy work, the real matter for consideration in March 2000 would be whether he would have been able to do such work having regard to the arthritic degenerative condition in various parts of his body. It is true that two potential employers of persons with the plaintiff's experience from Emerald indicated that they would no longer employ the plaintiff having regard to the injury which he had suffered because he would not physically be able to fulfill his work obligations. These obligations would involve him climbing on and over trucks and climbing up into and out of heavy earth moving equipment which would place significant stress on his right leg in its present condition. What stress it would place on arthritic degenerative change in his left foot was not canvassed. Ultimately, it was contended for the plaintiff that he would have received an award for past economic loss from May 1996 to March 2000 at the rate of $1,400 per week amounting to $280,000 and would have been awarded a sum of nearly $655,000 by way of a discounted present value of a future loss of $1,400 per week. In addition, it was contended that he would have received an award for loss of superannuation

benefits on past earnings in the sum of $22,400 and on future earnings in the sum of $58,947.

[56] In my view, it is quite improbable that the plaintiff would have persuaded a Court in March 2000 that he had suffered past and future loss of earning capacity in a figure anywhere in the vicinity of that contended for. In addition, the plaintiff claims that between date of injury and date of trial he received 1346 hours of care and assistance compensable under *Griffith v Kirkemeyer* (1976) 139 CLR 161. It was agreed that on the assumption that he did receive such care its value should be assessed at $12 per hour in assessing a past *Griffith v Kirkemeyer* award of $16,152 and at $15 per hour when assessing a future *Griffith v Kirkemeyer* award of $16,815.

[57] Special damages are agreed in the sum of $1861.25 and in respect of this sum the plaintiff has received refunds in the sum of $1650.06. He has a net out of pocket special damage entitlement therefore in the sum of $211.19.

[58] Had the plaintiff recovered any damages against the association he would have been obliged to refund approximately $40,000. The amount refundable under D.S.S. legislation would have varied between about $17,000 on a judgment recovered for $100,000 and about $20,000 on a judgment recovered for $500,000. In my view it is quite unlikely that the plaintiff would have recovered judgment in a sum greater than $75,000 in the circumstances of this case.

[59] According to Dr Saxby, as a consequence of the fusing of two joints in the plaintiff's right foot he has been left with a 10% loss of function of the lower leg which results from stiffness that ensued from that fusing.

[60] According to the evidence of an occupational therapist the arthritic deterioration in the plaintiff's right ankle – which the evidence does not suggest is in any way attributable to the injury he suffered on 17 August 1995 – would make it quite impossible or at least very undesirable that the plaintiff should attempt to do the sort of work that he had previously done in Emerald driving trucks and other heavy earthmoving equipment.

[61] The plaintiff had been living at Palm Beach on the Gold Coast for nearly two years prior to his injury in August 1995. I have already referred to the evidence given by Dr Fitzgerald as to his medical history during this period.

[62] By reason of his educational background and work history the plaintiff's only prospect of obtaining employment was in a labouring or semi-labouring field for which his experience had fitted him. At the time of his injury he was 45 years of age and, in my view, in spite of the evidence of persons acquainted with him over the years in Emerald, both his age and background would have made it difficult for him to obtain employment – quite apart from the arthritic deterioration which significantly reduced his capacity to maintain employment of the sort that he had maintained before he left Emerald to buy a motel on the Gold Coast.

[63] In my view, it is quite unlikely that the plaintiff would have been able to do the sort of work available to him in Emerald for which his past experience may have fitted him because of the impairment resulting from the arthritic deterioration of his cervical and lumbar spinal processes, knees, right ankle and left foot. The stress of such work on his degenerated joints would probably lead to him experiencing pain

in joints which had previously been pain free in any event. The plaintiff said that for a couple of days a week he sometimes drove earthmoving equipment at casual rates on the Gold Coast. Presumably his motel business was loosing money and it may well be that he took such casual machinery driving work when it became available to supplement the family income which was then apparently wholly dependant upon income earned in the motel business.

[64] The plaintiff said that he did not declare any of the earnings he made. He said however, that he earned one hundred dollars a day to drive heavy equipment for a week or two every six months. He said he worked this way in the years 1993, 1994 and "a little bit in 1995". All told, he said he would probably have worked about six weeks for five days a week over a year. Therefore, if this evidence were accepted in March 2000, he would have worked as a bulldozer driver or loader operator for a period all told of twelve weeks over two years or so. All told then, he would have earned in the vicinity of $6,000 cash which he did not declare for income tax purposes.

[65] While there may have been a desire in the plaintiff to maintain his skills, I think a Court would probably conclude that it was probably the failure of his motel business to produce an income sufficient to support his family which led to him doing casual work from time to time with bull dozers to supplement that income and that such activity was not inconsistent with his arthritic condition which made full time employment doing such work unattractive.

[66] On my evaluation of the evidence, in March 2000, the likely finding on the plaintiff's past and future earning capacity would have been as follows –

(a) From August 1995 until approximately August 1996, the plaintiff lost the capacity to work from time to time on earthmoving equipment in the Gold Coast Hinterland on casual rates when he felt up to it.

(b) By April 1998, when examined by Christine Hodgetts, an Occupational Therapist, the plaintiff's arthritic condition in his knees and right ankle made it undesirable, if not dangerous, for him to continue to do that sort of work. This incapacity was attributable to the increase in arthritic degeneration of various parts of his body (including that in his right foot) which by that time was probably not attributable to the injury he suffered in August 1995, which ceased to be operative within 12 months of that injury albeit that the arthritic degeneration in his right foot may have been accelerated to some extent by that injury.

(c) The effect of any aggravation of arthritic degeneration or the acceleration of arthritic degeneration in the plaintiff's right foot caused by the injury of 17 August 1995 would have been spent by April 1998, in so far as, its effect on his earning capacity in labouring activity was concerned.

[67] Undoubtedly, the plaintiff in April 1998 was suffering pain in his right foot which he had not suffered prior to his injury. Although Dr Morris had difficulty in explaining how such pain could be caused from the metatarsal joints in the plaintiff's foot having regard to the extensive operative treatment he had received fusing those joints he did concede that sometimes inexplicably a fusion does not

relieve symptoms of pain. It seems to me that whether or not the pain can be explained on the basis of a functional overlay does not really matter.

[68] The plaintiff has received foot braces which he uses to relieve pain that he says he experiences. There is no analysis of the relief if any which the brace he displayed in Court is giving from pain from his arthritically degenerative right ankle, as well as from pain from his arthritic degeneration in the metatarsal joints in his right foot. This was a matter not investigated and it seems unprofitable to speculate on "what if" any support the plaintiff receives from the brace for the problem with his right ankle.

[69] I find that a court would look at the plaintiff's past and future economic loss on the basis that by April 1998, the effects of the injury he suffered in August 1995, had ceased to contribute to his loss of earning capacity. To the extent that it was impaired then, it was impaired as a result of his natural arthritic degeneration in those various parts of his body to which I have already referred.

[70] Giving the plaintiff the benefit of the doubt for a period of 12 months after his foot injury, a Court may have inferred that he lost the capacity which he formerly had to work for a couple of weeks every six months with heavy equipment because had he continued to do this until approximately August 1996, he would have lost in that period of time a sum in the vicinity of perhaps $3,000 on which he paid no tax. The Court may have inferred that between August 1996 and April 1998, his condition deteriorated to the extent observed in April 1998, by which time it is likely that he would not have been able to continue to work on heavy earthmoving equipment. He probably would have been able to do other work within his physical capacity if he could have found such work. Having regard however to his age and skills acquired before the arthritic degeneration had effect on him it is problematic whether he would have been able to obtain such employment, at least, on a regular basis even had he searched for it.

[71] The plaintiff and his wife sold their motel on 22 March 1996, and in July 1996, purchased a furniture store at Hervey Bay. This business venture also failed and the plaintiff and his wife walked away from it after 12 months, that is, in about June 1997.

[72] The plaintiff asserts that had it not been for the injury to his right foot he would have obtained a job driving trucks in Western Queensland as soon as he and his wife disposed of their motel. His case is that he could not do that because of his foot injury and that is the reason why he commenced to try to buy, sell and renovate furniture. He complains that his capacity to do this successfully was affected by his injury to his right foot. As late as the year 2000 he was attempting to acquire skills in furniture renovation at TAFE. He says, however, that pain from his right foot prevented him from completing the course.

[73] In my view, on the material, the maximum assessment of various heads of damage that the plaintiff would be likely to have obtained in March 2000 would be –

(a) General damages	$40,000.00
Interest for five years	$2,000.00
(b) Special damages	$1,861.25

(c)	Loss of income – August 1995 to March 2000 4.6 years	$93,000.00
	Interest thereon	$13,250.00
(d)	Future economic loss – present value of the loss of $400 per week for say five years (March 2000 to March 2005) until plaintiff was 55 years of age. Using a multiplier of 232 figure discounted by 25%	$69,668.00
(e)	Past *Griffith v Kirkemeyer* say three hours per day for three months at $12 per hour	$1,208.00
(f)	One hour per day for following nine months at $12 per hour	$3,276.00
(g)	Future *Griffith v Kirkemeyer*	.....
		$224,263.25
	Total:	**+$25,000.00**
(h)	Other possible awards of damage for loss of past and future superannuation, interest, future medication etc not assessed	

[74] The maximum assessment of quantum of the plaintiff's damage, in my view, would not exceed, $250,000. In my view, the plaintiff would be required to bear at least 70% of the responsibility for this loss. This would leave a maximum judgment of $75,000.

[75] Of this sum, of course, the plaintiff would be required to repay approximately $40,000 to Workers' Compensation and D.S.S. etc. This would lead to recovery of a maximum sum (ignoring any difference between standard and indemnity costs) of $35,000.

[76] In assessing the value of the loss of the chance which the plaintiff had to find himself in this financial position, I kept in mind that, in my judgment he would probably have failed to recover anything. But, of course, it is impossible to predict with certainty the outcome of litigation. The figure of $75,000, to which I have referred, assumes that he may have persuaded a Court that the association was in breach of one of the duties, which I have examined in detail and that he may have obtained employment returning about $400 net per week, but for, his injury.

[77] If he did succeed in obtaining any judgment, the value to him would be something in the vicinity of $35,000.

[78] Of course, cases of this kind are often settled. Had the plaintiff's action been properly instituted, he may have been able to negotiate with the association's insurer to achieve a settlement of his claim on the basis that he was prepared to bear a significant part of the responsibility for his injury – even in excess of 70%. I must say, in my view on the material advanced upon this trial, there would be only a faint prospect of the association accepting any responsibility for the plaintiff's injury.

However, it may have been prepared to make an offer of settlement rather than incur the expense of defending an action and run the risks inherent in all litigation.

[79] The real question to be answered then is, what is the value of the chance the plaintiff lost by virtue of the negligence of his solicitors of recovering a maximum award of damages in the vicinity of $75,000, keeping in mind that on my assessment of the case, he would probably have failed altogether on the issue of liability.

[80] Doing the best I can, I assess the value of the plaintiff's lost chance in the sum of $10,000 which is about one third of the maximum sum of $35,000 that he could have hoped to recover had his case proceeded to judgment, having regard to the quantum of the refund that he would be compelled to make out of an award of $75,000.

[81] I assess the value of the plaintiff's lost chance to sue the association successfully then in the sum of $10,000.

[82] I give judgment for the plaintiff against the defendant in the sum of $10,000.

[83] I order that the defendant pay to the plaintiff his costs to be assessed on the appropriate Magistrates Court scale of costs, which is, scale F. I certify that the attendance of both Counsel and solicitor during the trial was necessary. I give liberty to apply for any necessary certification that steps taken in respect of which scale F specifies a fee, were reasonably necessary or proper in the event that the parties are unable to reach agreement that they were.