SUPREME COURT OF QUEENSLAND

CITATION:	*Appleyard v Maryborough City Council* [2004] QSC 429
PARTIES:	**ROBERT APPLEYARD** (plaintiff) **v** **MARYBOROUGH CITY COUNCIL** (defendant)
FILE NO/S:	SC No 7 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	2 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	7 and 8 September (in Maryborough) and 10 September 2004 (in Brisbane)
JUDGE:	White J
ORDER:	**Judgment for the plaintiff against the defendant in the sum of $400,327.57**
CATCHWORDS:	WORKERS' COMPENSATION – WORKERS' COMPENSATION – EMPLOYMENT RISKS – "ARISING OUT OF AND/OR IN THE COURSE OF EMPLOYMENT" – where plaintiff injured in the course of working as a labourer – where plaintiff identified four incidents at work which caused, contributed to, or aggravated his back problems – where plaintiff received no manual handling training about the safe way to go about the heavy labouring tasks he performed — whether the defendant failed to provide a safe system of work WORKERS' COMPENSATION – WORKERS' COMPENSATION – EMPLOYMENT RISKS – "ARISING OUT OF AND/OR IN THE COURSE OF EMPLOYMENT" – whether the injuries were foreseeable – whether the plaintiff has discharged the onus imposed by s 312 of the *WorkCover Queensland Act* 1996 WORKERS' COMPENSATION – ASSESSMENT AND AMOUNT OF COMPENSATION – whether the plaintiff contributed to the injury sustained – where the plaintiff has a degenerative condition – the period which degeneration overtakes the effects of the injury

WorkCover Queensland Act 1996 (Qld), s 6, s 11, s 253, s 312, s 313, s 314, s 588
Workplace Health and Safety Act 1995(Qld), s 26, s 28, s 41
Workplace Health and Safety (Advisory Standards) Notice 1995 (Qld)

Bonser v Melnacis and Ors [2000] QCA 13, followed
Caird v State of Queensland [2004] QSC 217, considered
Campbell v CSR Ltd [2002] QSC 266, followed
Karanfilov v Inghams Enterprises Pty Ltd [2002] QSC 141, considered
Karanfilov v Inghams Enterprises Pty Ltd (2004) 2 Qd R 139; [2003] QCA 242, followed
Martin v Mackay City Council [2001] QSC 433, cited
Plumb v State of Queensland [2000] QCA 258, applied
Schiliro v Peppercorn Childcare Centres Pty Ltd (No. 2) [2001] 1 Qd R 518; [2000] QCA 18, considered

COUNSEL: M P Amerena for the plaintiff
R C Morton for the defendant

SOLICITORS: Suthers Lawyers for the plaintiff
Gadens Lawyers for the defendant

[1] The plaintiff is a 37-year-old married man with three young children and lives in Maryborough. He left school in year 10 and was in mixed employment thereafter mostly in labouring positions such as concreting and sawmilling until he commenced work as a labourer with the defendant, Maryborough City Council ("the Council") in February 1992. His employment was terminated in August 2000 due to back problems. By then he was unable to carry out even light duties.

[2] It is the plaintiff's contention that his physical condition precluding him from engaging in labouring work has been brought about by a want of care for his safety and well-being by the Council in the course of his employment. He identifies four incidents at work which cumulatively have brought about his present condition.

[3] These incidents occurred after 1 February 1997 and prior to 1 July 2001. Accordingly, fault is to be considered by reference to the *WorkCover Queensland Act* 1996 (reprint no 3) ("the Act"). Some of its provisions, relevantly ss 312-14, were repealed by substantial amendment to the *WorkCover Queensland Act* 1996 in 2001. By s 588 of that Act an injury occurring before July 2001 is governed by the provisions in force immediately before that date.

[4] The provisions in Chapter 5 were introduced into the new *WorkCover Queensland Act* 1996 covering, to quote the Minister for Training and Industrial Relations, the Hon S Santoro, in his second reading speech

> "... a wide range of reform measures to workers' compensation in Queensland to address financial, regulatory and operational difficulties identified in the Kennedy Inquiry ..." Hansard 27 November 1996 at p 4456.

[5] Part 2 of the Act sets out its objects. Section 6 provides

> "**(1)** This Act –
>
> (a) provides for the protection of employers' interests in relation to claims for damages for workers' injuries; and
>
> (b) makes changes to the law to strengthen workers' obligations for their own safety in employment.
>
> **(2)** It is intended that employers and workers should both endeavour to ensure the safety of workers in the workers' employment and the law of injury liability should reflect this shared obligation."

[6] Sections 312 and 313, as they then were, are applicable to these proceedings and provide:

> '**312.(1)** In deciding whether a claimant is entitled to recover damages not reduced on account of contributory negligence, or at all, all courts must have regard to whether the claimant has proved such of the following matters as are relevant to the claim –
>
> (a) that the employer had made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable;
>
> (b) that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer;
>
> (c) that the worker did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen;
>
> (d) that the injury sustained by the worker did not arise out of a relevant failure of the worker to inform the employer of the possibility of the event giving rise to the injury happening, in circumstances in which the employer neither knew nor reasonably had the means of knowing of the possibility;
>
> (e) that the worker did everything reasonably possible to avoid sustaining the injury;
>
> (f) that the event giving rise to the worker's injury was not solely as a result of inattention, momentary or otherwise, on the worker's part;
>
> (g) that the injury sustained by the worker did not arise out of a relevant failure of the worker to use all the protective clothing and equipment provided, or provided

for, by the employer and in the way instructed by the employer.

(h) that the worker did not relevantly fail to inform the employer of any unsafe plant or equipment as soon as practicable after the worker's discover and relevant knowledge of the unsafe nature of the plant or equipment;

(i) that the worker did not inappropriately interfere with or misuse or fail to use anything provided that was designed to reduce the worker's exposure to risk of injury.

(2) If the claimant relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in subsection (1)(a), the court must dismiss the claim.

(3) If the claimant fails to prove the matter mentioned in subsection (1)(b), the court must dismiss the claim.

(4) If the claimant fails to prove any of the matters mentioned in subsection (1)(c) to (i), the court must –

(a) dismiss the claim; or

(b) reduce the claimant's damages on the basis that the worker substantially contributed to the worker's injury.

(5) In deciding whether a worker has been guilty of completely causative or contributory negligence, the court is not confined to a consideration of and reliance on the matters mentioned in subsection (1)(c) to (i).

Worker's breach of instructions

313. An employer is not liable for damages to a claimant because the employer failed to guard against breach by the worker of the employer's instructions."

[7] Section 314 concerns the approach which a court must take to contributory negligence. It provides

314.(1) A court must make a finding of contributory negligence if the worker –

(a) relevantly failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

(b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

(c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury unless the claimant can prove, on the balance of probabilities, that the failure did not cause or contribute to the worker's injury; or

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

(e) was at the relevant time adversely affected by the intentional consumption of a substance that induces impairment unless the claimant can prove that the adverse affect did not cause or contribute to the worker's injury; or

(f) has failed without reasonable excuse to attend on more than 1 occasion any safety training course organised by the worker's employer that is conducted during normal working house at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event giving rise to the worker's injury.

(2) If an injury sustained by a worker was caused or contributed to by 1 or more of the circumstances mentioned in subsection (1), the court must reduce the damages for the worker's injury under subsection (3).

(3) For subsection (2), the court must reduce the award of damages by at least 25% for each of the circumstances causing or contributing to the injury.'

[8] As Chesterman J observed in *Caird v State of Queensland* [2004] QSC 217, judgment delivered 30 July 2004 at [37], these provisions materially altered the onus and standard of proof in actions by injured workmen against their employers. It is with these provisions in mind that the facts and circumstances giving rise to the plaintiff's claim will need to be examined.

[9] The following are the four incidents which the plaintiff contends caused, contributed to, or aggravated his back problems.

(1) As a member of the sewerage gang in February 1999 the plaintiff was spreading soil with a rake to cover a sewerage "jump-up" line in Aldridge Street, Maryborough when he experienced pain low on the right side of his back.

(2) On or about 25 February 1999 the plaintiff lifted a box of pipe cutters off the back of a utility in the water gang shed at the Council's depot, carried the box about 6 metres to a counter and experienced sharp pain in his lower right back the next morning.

(3) In April 1999 in the course of excavating a sewerage trench to expose a pipe the plaintiff thrust a shovel into the wall of the trench at about waist height, kicked the blade in to its full depth with his foot and felt a sharp burning pain in his back on the right.

(4) About 3 days later the plaintiff removed a 50kg manhole cover manually and at about 3am the following morning awoke with severe pain in his right lower back.

[10] The Council did not suggest that the plaintiff had received any instruction or training about how to approach any of these tasks so as to eliminate or reduce any risk of injury which the activities may have entailed. In summary, the Council contends in respect of each incident,

(1) There was nothing about the task of raking which called for any particular instruction and there was therefore no breach of duty.

(2) The plaintiff has not discharged the onus imposed upon him by s 312 of the Act so far as the pipe cutter box is concerned.

(3) The shovelling incident did not require any special instruction or other arrangement, that is, there was no breach of duty, alternatively, the plaintiff has not discharged the onus imposed by s 312 of the Act.

(4) If there was any breach arising out of the manhole cover incident the Council contends that the plaintiff's damages ought to be reduced by 50 per cent to take account of his contribution to his own injury.

The Council contends that the amount of any loss which the plaintiff may have sustained due to any breach of duty is minor given the vulnerability to injury of the kind the plaintiff sustained due to inherent causes.

[11] There are some disputed issues of fact particularly about the pipe cutter incident and differences amongst the medical opinion about the cause of the plaintiff's back condition when he ceased working and the period of time he would have been able to work had there been no intervening incidents.

Background

[12] The plaintiff was born on 11 November 1966. He is 38 years of age. He is married and has three young children. He was educated to grade 10 at the Hervey Bay State High School. He initially had sporadic employment when he left school as a shop

assistant in a plumbing supply shop then moved to labouring work – concreting, as a sawmill labourer and finally as a labourer with the Council starting on 17 February 1992. He enjoyed his work with the Council and took great pride in his fitness, strength and ability to work very hard. This is reflected in what he told numerous medical professionals, in his own evidence and that of fellow employees in this trial. There can be no doubt that his sense of worth derived from these things. He worked out at home with weights. He was regarded by the Council as a good worker.

[13] At the time of the subject incidents in 1999 he worked in the sewage maintenance gang of three men – Mr Brian Johnston, a plumber and drainer, Mr Shayne Lovell, a leading hand and the plaintiff. Sometimes the gang would be only two if Mr Johnston's duties carried him elsewhere. The work in the sewerage gang entailed many different tasks in and around Maryborough to do with the maintenance of sewerage lines and drains. Mr Johnston noted that the Maryborough sewerage system is the second oldest in Queensland after Brisbane having been installed in the mid 1930s and requires a great deal of maintenance. For example, Mr Johnston, who had become the Council's plumbing inspector by the time he retired in about 2002, said that it was not uncommon to have 14 blockages reported on a Monday morning.

[14] The work involved unblocking pipes – water, storm water and sewerage; driving trucks; operating equipment such as whacker packers, jackhammers, the electric eel machine, shovels, crowbars and picks; digging trenches prior to laying pipes and filling in trenches. It was recognised as very hard work and the members of that gang were paid an extra loading. The plaintiff was the designated labourer in the gang although the very hard tasks were rotated where possible.

[15] The plaintiff had previously worked in the curbing and channelling and water gangs.

[16] As at February 1999 the plaintiff had lost no work time due to back problems nonetheless conceding that because of the physically demanding nature of the work he experienced "niggling pain" from time to time in his back (exhibit 16). Mr Johnston said that all who worked in the sewerage maintenance gang complained from time to time about stiff, sore and tired backs.

The raking incident in February 1999.

[17] Sometime prior to 22 February 1999 the plaintiff was working alone in Aldridge Street, Maryborough filling soil in a trench where sewerage works had occurred. It was not unusual for him to be working alone. The plaintiff filled his wheelbarrow with soil from the trailer and tipped it into the trench in one pile. He used a steel rake with a handle about 5 or 6 feet in length to spread the soil. The plaintiff threw the rake forwards to embed it in the dirt with the tines of the fork face down and, with his arms fully extended, pulled the rake towards him. He immediately felt a particular sharp pain different to back pain he had experienced before down low in the right hand side of his back. He stood still and stretched his back but did not stop work. When he returned to the depot at the end of the working day he put ice on his back.

[18] Thereafter the pain came and went. The plaintiff took two days off on sick leave, 15 and 16 February (and perhaps another day or two) which suggests the incident occurred before 15 February. He underwent Bowen therapy administered by a fellow worker accredited in that therapy and consulted a chiropractor. Towards the end of February he was concerned about the pain in his lower back. Sometimes he was pain free for two days and at other times it was quite sharp.

[19] The plaintiff reported his back pain on 22 February although by trial he had no independent recollection of doing so nor of how long after the raking incident this report was made. Exhibit 1 is the personal injury report which he completed on 22 February. For the item "Date of injury" he wrote "over a period of time". He identified the part of the body as "Lower Back & Buttock" and the place of injury as "work sites". His response to the question "Do you think you will have to stop work because of the injury?" the plaintiff circled "UNSURE".

[20] The plaintiff reported to his supervisor, Mr Allan Hill, who had been a plumbing inspector with the Council for some 20 years, at 7:30am on Monday 22 February. In answer to the question "Are you satisfied the injury occurred as stated?" Mr Hill wrote

> "Apparently the injury is a recurring problem that has progressed over a period of time."

He signed the document on 23 February. When Mr Hill, who had retired in 2001, was approached by the loss adjuster some 3 years after signing the report he said the plaintiff told him that a piece of wood had rolled under his foot while spreading soil causing him to hurt his back. Mr Hill had a hazy recollection of what the plaintiff had said to him in February 1999 when he spoke to the loss adjuster and could offer no explanation as to why he did not mention the rolling log in the form. I accept the plaintiff's account of the incident.

[21] The plaintiff also reported his back pain to Ms Cara Williams, an occupational therapist and a case manager employed by Jardine Lloyd Thompson, administrator of the Local Government Act Work Care Scheme for the Local Government Association. She operated out of the office of the Workplace Rehabilitation Coordinator, a Mr Gerrard Mulholland, who was most likely present in the office when he did so and some conversation was probably had with him. The plaintiff told Ms Williams that he had been experiencing pain in the lower back and buttock which had increased over time. He did not specify a particular incident to Ms Williams. He said he was not keen to claim compensation for the injury but thought that if he could continue to the end of the week when he was due to start five weeks' holiday leave he would be able to recover.

Lifting the box of pipe cutters at the end of February 1999.

[22] On the last day before he went on leave at the end of the shift the plaintiff lifted a box of pipe cutters off the back of a motor vehicle and carried it to a counter at the back of the water gang shed, a distance of about 6m. This may have been Thursday 25 or Friday 26 February depending on whether Friday was his rostered day off. His holidays started on 1 March. The shed was located in the old Council depot in Kent Street. The evidence about the size of the wooden box was unclear. It is noted in exhibit 9 (engineer's report) that the loss adjuster's report (not tendered)

identified the box as having dimensions of 860mm x 525mm x 240mm height and weighing 75kg. Counsel said it was agreed to weigh about 70kg. It was said to be the same as or very similar to that shown in photographs tendered through Mr Ken Godfrey which probably formed part of the loss adjuster's report. The photographs were not shown to the plaintiff but were not objected to.

[23] The plaintiff was working in a gang led by Mr Shayne Lovell. Mr Godfrey was also present with other men in the shed. Mr Godfrey had worked as a level 5 ganger with the Council for some 10 years and retired in August 2002. In 1999 he was the head of a five man water gang. Whilst the plaintiff was not usually a member of his gang, from time to time he had worked in it but not that day. Mr Godfrey said that his truck had been reversed partially into the shed and he had pulled the box of pipe cutters towards the back of the tray waiting for the men in his gang to return to lift the cutters off and place them on the bench. The plaintiff was adamant that the box was on his utility but quite certain he had never seen the box lifted before, not even, if he was correct, onto his gang's utility. Mr Johnston said that various sized pipe cutters were used, those most frequently used related to 100mm or 150mm earthenware pipes. If the sewerage maintenance gang needed to cut pipes between 225mm to 300mm a set of pipe cutters would be borrowed from the water shed. Over this size a power saw would be used. Since the plaintiff said he had not seen this box lifted before the inference may be drawn that this was a box housing cutters for the larger pipes. Although Mr Godfrey was not asked to recall this incident for some years and it was of no importance to him, nonetheless I think the plaintiff was mistaken in his recollection that the box was on the tray of his utility.

[24] The plaintiff said he heard some heckling from people in the background. Mr Godfrey said he heard someone say, "Don't be a wimp". Mr Godfrey could not say who had said those words. The plaintiff said he did not. Shortly after, the plaintiff came up on Mr Godfrey's left side and took the box containing the pipe cutters and carried it to the counter at the back of the shed. Mr Godfrey did not ask the plaintiff to lift and carry the box and the plaintiff does not say that he did. The plaintiff had not carried this box before. Mr Godfrey expected two men to carry it. The plaintiff told Mr McDougall, an engineer, that it was much heavier than he had expected it to be.

[25] The plaintiff did not experience any immediate pain but the following morning he experienced sharp pain in his lower right back. For the first three weeks of his holiday he rested hoping to recover. He saw Dr Funch, his general practitioner, on 24 March. Dr Funch was not available to give evidence at the trial but his notes were tendered. He noted that the plaintiff had experienced right buttock pain for about a month previously although in a letter to Mr Etherington, the claims officer with the Council, dated 6 May 1999, he wrote that the pain had been present for a month prior to starting his holidays. The original note should be preferred and is consistent with the plaintiff's evidence.

The digging incident on 6 April 1999.

[26] The plaintiff returned to work after Easter on 6 April 1999 with the sewerage maintenance gang and on that day was digging down to the sewer main to expose pipes. Some preliminary digging had been done mechanically by a backhoe but the plaintiff was required to dig around the pipe so that it could be cut in order to rectify

damage to the pipes. The trench was approximately 8 ft x 10 x 8ft deep. The plaintiff was using a long handled standard post hole shovel and digging in to hard clay at about waist height. He turned the shovel over, put it into the bank and kicked it in with his foot so he could lever it up to get the earth out from around the pipe. He immediately felt a sharp burning pain across his lower back. He worked until the end of the week but doing different duties. Mr Johnston said of the plaintiff's method of working with a shovel

> "I have had people in the crew who would either not have the strength or the attitude to push a shovel more than half the depth of the blade into the ground, but as I have said, Bob Appleyard was aggressive in relation to his work and had no hesitation in standing on a spade to bury the blade to its full depth into the ground." (exhibit 26 para 62)

[27] On 8 April the plaintiff reported to Ms Williams ongoing back symptoms since returning from holidays and that he was using Dencorub on his buttock muscles.

The manhole cover incident on 9 April 1999.

[28] The plaintiff was working on a sewerage manhole at the end of Bazaar Street, his final job for the day, on 9 April 1999. He was, at trial, unable to recall whether it was to replace the cover or to pour a new surround around the manhole. Two types of covers were used by the Council – concrete covers and cast-iron covers. When replacement was necessary the Council replaced the concrete covers with cast-iron covers. To the plaintiff there were two types – heavy and light and this was one weighing, he thought, about 50 kgs. There was a device known as a T-piece – a piece of steel about 8 or 10 inches long with a curve at the end held between the hands – the T-piece – used to lift the cover. Sometimes it was hard to dislodge the manhole cover out of its surround but on this occasion he was able to do so using the T-piece. He picked the cover up with one hand on either side under the lip with his feet straddling the hole and threw it away several metres to his right. He thought he was standing fully upright when he threw the cover.

[29] The plaintiff did not immediately feel pain but did so before he went to sleep that night and awoke about 3am with such extreme pain in his lower right back that he drove himself to the Maryborough Base Hospital. He was prescribed strong pain relief.

After the incidents

[30] On Monday, 12 April the plaintiff saw Dr Funch complaining of aching in his right buttock area, hamstrings and right testicle. He was prescribed Panadene Forte and placed on workers' compensation. He was also very anxious and depressed and had been for a month or two over the health of his father who had been very ill, and the difficulty he was experiencing looking after his parents for whom he was responsible and caring for his wife and children because of the pain. The Hospital prescribed anti-depressant medication on 11 April and he underwent further treatment through the Mental Health Service. Throughout the Hospital notes are references to the plaintiff's concern about his continuing back pain. The plaintiff

does not make a claim for damages for psychiatric injuries but contends that his physical condition operated on his anxieties about his parents' situation.

[31] The plaintiff and his wife attended at Ms Williams' (and Mr Mulholland's) office and reported that in his first two days back at work after his five week holiday the plaintiff "felt great" but by the end of the week was experiencing niggling symptoms in his back in the right buttock down into the right groin/testicles. He mentioned his 3am visit to the Maryborough Base Hospital on 10 April and indicated that although he did not wish to claim compensation he was unable to continue doing heavy labouring work. He expressed his concern about his ability to support his family. He was told about his entitlement to lodge a claim.

[32] He had some weeks off work but was unable to return to his position with the sewerage gang. He was placed at the Council's recycling facility but that work included lifting bags of rubbish and tipping them into bins. Although the plaintiff wore a back brace he had continuous pain during the six months he carried out that work. He was transferred to parks work which involved watering and tending the gardens operated by the Council however his painful symptoms were aggravated by walking, climbing and raking. He then was transferred to work in the Council's rose garden but was unable to bend forward to carry out activities such as pruning, hoeing and raking. He had hoped for a truck driving position but this was competitive against physically able men and he was advised he would not be successful.

[33] He was retrenched from the Council in August 2000.

Liability

[34] Exhibit 2 is an undated memorandum ostensibly from Mr Mulholland to Mr John Arthur of the Council in the following terms

> "Robert Appleyard will be fit to return to work on alternate duties as from Wednesday 5th April 1999.
>
> Dr Darryl Funch has placed a number of restrictions on him. These include:
>
> No heavy lifting
>
> 8 hours/day only
>
> I have arranged alternate duties at the Boonooroo Road Recycling Depot and will advise you when Robert is permitted to resume normal duties."

When this document was tendered at the beginning of the trial Mr Amerena, for the plaintiff, expected to submit that it showed that the Council was aware of the plaintiff's back problem when he returned from holidays and the directive from his doctor but did nothing. It is now accepted that Wednesday 5 April 1999 is an incorrect date. It most likely should read "May" not "April" since 5 May was a Wednesday and the plaintiff worked at the recycling plant when he returned to work after being off on compensation. It clearly is not a reference to the time when the

plaintiff returned to work after his holidays. Dr Funch had made no recommendations then. Had it been, then it would suggest that the Council, through its workplace health and safety officer, was well aware of the need to put the plaintiff on light duties prior to the manhole incident.

[35] The plaintiff received no manual handling training about the safe way to go about the many heavy labouring tasks he performed. The Council did not suggest that he did. There were no disclosed documents from the Council concerning any attempt at risk assessment for manual handling tasks carried out by the Council's employees. Neither was there any settled practice, so far as the evidence revealed, of safe manual handling for heavy labouring enforced by the leaders of the gangs and the inspectors or supervisors. The impression gained was to leave it to the men to work out the most effective way to get the work done. For example, Mr Johnston said in his statement that a machine known as a whacker packer, used to compress soil in the sewerage trench weighing "twice a bag of cement", that is, upwards of 70 or 80 kg, was too heavy for him to lift alone so he moved it by dragging it around whereas the plaintiff would simply pick it up and carry it. Mr Johnston said in evidence that on occasions he would suggest to the plaintiff that they both lift the whacker packer but he never told him not to lift it alone and the nature of the work was such that the plaintiff lifted it by himself on numerous occasions when there was no-one else to assist. There is not any incident pleaded involving a whacker packer but it demonstrates the approach taken in the workplace to heavy lifting.

[36] Mr Morton submitted that much of Mr Johnston's statement (exhibit 26) was irrelevant to the matters in issue but did not revisit the objection to point to particular paragraphs. Mr Johnston was called by the defence although the statement was tendered by the plaintiff. Mr Johnston's references to power struggles between factions in the Council associated with different departments are not relevant. Those passages are his explanation for the non-availability to the sewerage maintenance gang of mechanical plant otherwise available to assist in carrying out the gang's tasks. Had those machines been used there would have been less physical wear and tear on the men in the gangs but that is not a pleaded ground of negligence. What Mr Johnston's statement does demonstrate is an attitude to manual handling which did not give priority, or any particular place, to reducing the need for unnecessary heavy labouring tasks by particular gangs and individuals in them.

[37] The plaintiff has been criticised for not relating his painful back symptoms to the specific incidents which have been identified in the pleadings as giving rise to a claim for damages for negligence when he first complained of back pain. It is a matter to take into account but my distinct impression was that the plaintiff is not much given to abstraction. As he expressed it often in the course of his evidence, he just did his work and knew from some time in February that his back hurt in a way different from the way in which it felt sore after heavy work in the past. He was not interested in compensation initially and expected to be able to return to work. When he attended at the Hospital on 10 April suffering acute pain he mentioned lifting sewerage hole lids.

[38] Dr Funch has noted "pushing on shovel" in his very brief consultation notes of 12 April 1999. Dr J Downes, orthopaedic surgeon, who saw the plaintiff on 4 May 1999 observed

> "It was very difficult to get a history from him today. I do not think that in the course of the three quarters of an hour he was with me that he answered specifically one question I asked of him."

Dr Downes' comment must be seen in the light of his further observation

> "Please note that the man presents as a very genuine man who is very proud of his work ethos and the fact that he has always worked very hard. This seems to correlate with the opinions expressed within the file you sent me." (exhibit 24)

In the history of injury whilst Dr Downes noted "there was no actual injury", he has also written

> "He first noticed the pain when he was raking, an activity he does not see as a heavy enterprise."

So, too, when the plaintiff consulted Dr McCombe in September 1999 he clearly attributed the onset of the pain to the raking incident.

[39] The plaintiff saw Dr G Staunton-Smith, rheumatologist, on 19 July 1999 and did not mention the raking incident so far as is recorded. But Dr Staunton-Smith has written "he can remember developing a burning pain in the low back when he stood on a shovel". It is well worth noting that the nurse co-ordinator at Belmont Private Hospital where the plaintiff was referred by Ms Williams in December 1999 wrote on 10 December 1999

> "Robert worked to the best of his ability and attended all sessions on the program. Initially he had difficulty in understanding his diagnosis and cause of his pain." Exhibit 8 A-2 p3.

[40] I am satisfied that the plaintiff was a truthful witness and, generally, a reliable one particularly when relating actual events but many years have passed since early 1999 and he has told his story to numerous health and allied professionals. He also had difficulty in responding to the sometimes subtle and, with respect, convoluted questions of both counsel.

[41] Each pleaded incident needs to be considered separately.

The raking incident

[42] It is tempting to dismiss this incident, as the Council contends, as not giving rise to legal liability on the basis that raking is commonplace and requires no particular instruction. When Mr Morton, for the Council, described this activity as "innocuous" to Dr P F McCombe, an orthopaedic surgeon, he responded

> "Well, what I would like to say, it's important to understand the forces that are applied to the spine and that reaching out over a long distance applies a long level arm and it can apply a long what we call moment, if there is any rotation occurring, and it's sort of the force multiplied by the distance that's important away from the body's

> centre of gravity and 5 or 6 feet with a rake could actually under some circumstances apply quite a large force to the spine."

Mr Morton then asked

> "Wouldn't it suggest that he is at great risk from activities reaching out?"

To which Dr McCombe answered

> "Correct."

Mr Morton asked

> "So that this was a spine that was an accident waiting to happen, so to speak?"

Dr McCombe answered

> "Well, I suppose so, yes." T 71

[43] Dr P Winstanley, an orthopaedic surgeon, was of a similar opinion and expressed it in the following exchange in cross-examination by Mr Morton

> 'What he did in the raking incident, doctor, was to take a steel rake with steel tines on it, handle five or six feet long, reach it with his right arm, as I understand it, and put it into a barrow load of top soil and pull it towards him? - - Mmm.
>
> He may have done so hard, and that's what precipitated the onset of symptomatology. Does that description suggest to you that what we are dealing with here was a spine at some considerable risk of symptomatology from innocuous activities? - - Pulling a wheelbarrow load full of soil towards you with a rake is not an innocuous activity, in my opinion.
>
> Not a wheelbarrow load. Putting the rake into the soil – there was a wheelbarrow load of soil on the ground, puts it in the soil and then pulls it towards him? - - I still think that that's – if you are putting full weight behind that act with a six foot length of rake, significant force is going through your lumbar spine.' T 160

[44] A more detailed analysis of the mechanics of raking was given by Mr Brendan McDougall, a mechanical engineer with post-graduate qualifications from the University of New South Wales in industrial safety, who prepared a report relating to the mechanics of the various incidents (exhibit 9). The plaintiff was asked to rate the raking task at the time of pain onset in February 1999 in relation to standard perceived exertion scales. The scales provide the rater with figures and specific words to identify the exertion involved. The plaintiff rated the raking at 15 – very hard on the whole body effort scale although he did not regard it as hard work per se. Such a result indicated that the demands of the task exceeded published maximum criteria for pulling tasks and non-compliance with sound ergonomic principles. The incredulity of non heavy labouring members of the community that

such a task requires serious attention to correct ergonomic principles to maintain the physical safety of the worker is reflected in the following cross-examination of Mr McDougall

> 'And you are telling – are you telling Her Honour seriously that to ask a manual labourer to take a barrow load of top soil and – rake a barrow load of top soil is something which involves an unacceptable risk? -- To answer that I have to say that in any – whenever using these manual pieces of equipment, be it a rake, be it a sledge hammer, be it a lever or a bar, the force that's exerted by the person – the person normally doesn't have enough strength to break those pieces of equipment, but he can exert a whole range efforts in doing the task from relatively light effort to his maximum physical strength. So, it is – that's why I asked about the task because a range of different people can do things in different ways using a range of different exertions, so his insight is that he would describe the task as hard as how he approached the task and his physical effort in doing that work.
>
> It hardly involves, I suggest, the application of any great amount of force to put a steel tined rake with a handle of five or six feet through some top soil, does it? -- That depends on how hard you press it down into the ground and how much force you apply to drag it across the surface.
>
> No, not ground, top soil. You understand this man says he reached out, put it into some soil and pulled it towards him? Do you understand that? -- Yes.
>
> That hardly involves a great amount of force, does it? -- I could apply – depending on how hard I pushed down that rake, I believe I probably couldn't pull that rake, depending on how hard I push it down towards the ground.' T 147-8

[45] The plaintiff was well known amongst the Council employees, including those in a supervisory role, as a person who attacked his tasks with great gusto. Mr Johnston described him as "an aggressive person in relation to his work and would certainly not hang back" (exhibit 26). This was the very kind of employee who was most at risk from the way in which he undertook what might, at first sight, seem a very straightforward, undemanding task of raking.

[46] It is necessary, then, to relate these findings to s 312 of the Act. By s 312(2) if a plaintiff relies exclusively on a failure by the employer to provide a safe system of work and fails to prove the matter mentioned in s 312(1)(a) (that the employer made no genuine and reasonable attempt to put in place an appropriate system of work to guard the worker against injury arising out of events that were reasonably readily foreseeable) the court must dismiss the claim. This is a safe system of work case in respect of each of the incidents, *Karanfilov v Inghams Enterprises Pty Ltd* (2004) 2 Qd R 139 at 154.

[47] Section 33 of the Act defines 'event' as anything that results in injury including a latent onset injury to a worker. The event is the way in which the plaintiff carried

out the raking task or, less narrowly, the raking task. By s 312(3) if the plaintiff fails to prove the matter mentioned in s 312(1)(b) (that the actual and direct event giving rise to the worker's injury was actually foreseen or reasonably readily foreseeable by the employer) the court must dismiss the claim. Davies JA in *Plumb v State of Queensland* [2000] QCA 258 thought that the expression 'actual and direct event' might be given a wide or narrow meaning. He concluded that because of the expression's inclusion in s 312(1)(c), (d) and (f) contextually they could support only a narrow view, that is, a much more precise description of the facts and circumstances. His Honour concluded, obiter, that the effect would be to alter the common law test about foreseeability. With respect, I agree. I am satisfied that the evidence reveals that the Council made no genuine and reasonable attempt to put in place an appropriate system of work to guard the plaintiff against injury arising out of events which were reasonably and readily foreseeable. As to s 312(1)(b), the actual and direct event was the plaintiff's manner of raking and was reasonably readily foreseeable by the Council because the plaintiff's manner of approaching his work was well known.

[48] By s 312(1)(c) the plaintiff must prove that he did not know and had no reasonable means of knowing that the actual and direct event giving rise to the injury might happen. The plaintiff was a labourer who was valued for his strength and his ability to work very hard. Aches and pains were part of the normal workload of labourers employed by the Council. The plaintiff has satisfied the requirements of s 312(1)(c). So, too, (e) (the worker did everything reasonably possible to avoid sustaining injury). Section 312(1)(d), (f), (g), (h) and (i) are not relevant.

[49] The Council does not contend that s 313 is relevant (an employer is not liable for damages because it failed to guard against breach by the plaintiff of the employer's instructions).

[50] There is no basis for a finding of contributory negligence.

[51] The plaintiff has pleaded breach of the terms of the contract of employment. The question arises as to whether the provisions of the Act and particularly s 312 and following are applicable to an action for damages for breach of contract. Mr Amerena contends not. Notwithstanding a reference to 'contributory negligence', s 312 is couched in terms of a claimant being entitled 'to recover damages'. That expression is defined in s 11(1) as

> '… damages for injuries sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages to … the worker.'

Section 253 of the Act describes the only person 'entitled to seek damages for an injury sustained by a worker' as, relevantly, 'the worker'. In *Bonser v Melnacis and Ors* [2000] QCA 13 the Court of Appeal observed of s 11

> 'There is an express recognition of the familiar rights of action of workers against employers, including no doubt common law actions for negligence, breach of contract or breach of statutory duty'.

Dutney J concluded similarly in *Martin v Mackay City Council* [2001] QSC 433 and *Campbell v CSR Ltd* [2002] QSC 266 that s 312 applies to all proceedings to recover

damages contrary to the view expressed by Atkinson J in *Karanfilov* at first instance [2002] QSC 141 (this point not argued on appeal). I conclude that s 312 is intended to operate in relation to all claims for damages as defined in s 11 and the plaintiff has satisfied the requirements of the Act so far as his claim is also based on breach of contract.

[52] The plaintiff also alleges a breach of the *Workplace Health and Safety Act* 1995 by the Council. A breach of a statute such as this Act may give rise to a civil suit, *Schiliro v Peppercorn Childcare Centres Pty Ltd (No 2)* [2001] 1 Qd R 518. Section 28 of that Act provides that an employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking. By s 26 if a regulation or ministerial notice prescribes a way of preventing or minimising exposure to a risk an employer may discharge its workplace health and safety obligation only by following the prescribed way. Section 41 provides that the Minister may make advisory standards that state ways to manage exposure to risks common to industry. Relevantly this occurred by *Workplace Health and Safety (Advisory Standards) Notice* 1995. It provides for the continuation of the *Code of Practice for Manual Handling* (1991) which the plaintiff pleads as applicable to the incidents.

[53] The Council submitted that observations of the Court of Appeal in *Schiliro* are apposite. At [43] the court said

> 'The Code [for Manual Handling] provides guidance on the three key stages in the process of reducing manual handling injuries. Those three stages are identification of risk factors in the workplace *likely to cause manual handling injury*; detailed assessment of particular risk factors and principles and of control measures to eliminate or reduce the risk. The Code then sets out a detailed method of dealing with these three stages which is generalised enough to apply to all manual handling tasks requiring identification assessment and elimination or reduction of risk.'

The court concluded that the trifling nature of the activity in question of shovelling sand with a child's spade back into a sand pit at a child care centre did not call for the next level of risk assessment. The evidence of Drs McCombe and Winstanley and the report of Mr McDougall make quite clear that raking can lead to a real likelihood that there will be an injury. In my view it was 'likely' that injury would result if a person in the position of the plaintiff went about the work of raking in the vigorous style that was well known to be the manner of work of the plaintiff. There was no attempt to assess the risk factors or to introduce by way of training or otherwise measures to eliminate or reduce the risk.

[54] There has been a breach of statutory duty and, for the reasons given in the discussion on breach of contract I consider that the provisions of the *WorkCover Queensland Act* 1996 apply to such a cause of action and with the same conclusion.

Lifting the box of pipe cutters

[55] I have concluded that the plaintiff lifted the box of pipe cutters from the back of Mr Godfrey's water gang truck. The exigencies of work did not require him to do so. He agreed that he could easily have got help from another worker to lift the box

which, if it is the box depicted in the photographs, was fitted with handles at each end. Nonetheless, the attitude to lifting heavy weights manually by individual workers was condoned by the Council and, indeed, necessary if the work was to be done in some circumstances. This the Council knew through its leading hands and inspectors. It was aware of the plaintiff's pride in his strength. Such an incident where a group of men were waiting to finish work for the day was reasonably readily foreseeable. The plaintiff has proved the matters necessary in s 312(1)(a) and (b). I have, however, concluded that there was an element of 'bravado' involved and the plaintiff ought to have reflected more before picking up the box that there was good reason to wait for two men to lift it off the truck. It was, on his evidence, not a weight with which he was familiar. I make a finding of a 30 per cent contribution to any injury sustained in this incident. The plaintiff's contribution does not fall within the circumstances elaborated in s 314(1)(a)–(f) but falls within s 312(1)(e) so that subs (4)(b) applies.

[56] The plaintiff has established breach of contract of employment and the provisions of the *Workplace Health and Safety Act* 1995, reduced, by virtue of s 312(4)(b) by 30 per cent.

The shovelling incident

[57] The Council submitted that pushing the blade of a shovel into the hilt at waist height by use of the right leg was something so straightforward as would not give rise to any obligation to train a worker in safe practices. The detailed material set out in Mr McDougall's report (exhibit 9) demonstrates that this attitude which seems to have prevailed at the Council has no support in the research literature or Code of Manual Handling. Mr McDougall referred to empirical studies which demonstrated that a person performing manual tasks close to the limits of his strength involved an increased frequency of reporting back pain, see particularly his discussion at pp 12, 13, 17 and 22. He identified a number of the aspects of this task as indicating a potential manual handling risk. They include awkward posture, large push/pulling forces, the task being performed in a confined space and the working surface cluttered and uneven.

[58] Mr Morton submitted that a jack hammer which might have been used, weighing approximately 30 kilograms, in a trench at waist height would clearly be a potentially hazardous activity. Accepting that submission, this is a case where training the plaintiff not to exert himself to his maximum was very important. The training would permit a worker to understand the risks involved and the mechanism of the spine and that it was not a good work practice to carry out such a task in the way the plaintiff approached it. Although, no doubt, not easy, there was nothing in the evidence to suggest that the labourers would not be receptive to training of this kind nor decline to give effect to it.

[59] I am satisfied that the plaintiff has proved those provisions in s 312 of the Act which apply to this incident, namely s 312(1)(a), (b), (c) and (e). As commented with respect to the raking incident, the plaintiff's approach to his work combined with an assumed knowledge by the Council of the requirements of the Code of Manual Handling meant that the actual and direct event giving rise to the plaintiff's injury was reasonably readily foreseeable. There is no basis for contribution.

[60] I find that there has been a breach of the contract of employment and of the provisions of the *Workplace Health and Safety Act* 1995.

The manhole cover incident

[61] It is clear from the evidence of Mr Johnston, apart from that of the plaintiff, that there was no training in place as to how a worker should approach removing a manhole cover be it cast-iron or cement. There was a way of doing this task which involved tapping around the top with a 14 pound sledge hammer if the cover was corroded or jammed but there was no training or practice about its safe lifting notwithstanding that some men balanced the cover on its edge across the hole once released before rolling it to one side. Mr Johnston noted that the sewerage maintenance gang 'now has access to a gatic lifter' (exhibit 26 para 51). Part of the lifter fits into a groove on either side of the manhole cover. The lifter is then turned so that it comes in underneath the slot on either side of the cover. Mr Simon Bottomley, the general manager of a company, Abstoc, which designs and manufactures manhole covers, gave evidence that a manually operating machine for lifting manhole covers had been in production at least since 1986 at a moderate cost of approximately $270. Other devices had been available for over 50 years. Gatic lifters such as are now used by the Council had been available for at least 20 years.

[62] The risk to a worker of injury lifting the covers was obvious. Labourers other than the plaintiff lifted the covers and moved them to one side. Apart from attempting to suggest that there was a safe(r) system which some workers utilized of rolling the cover off and which the plaintiff could have copied the Council did not vigorously defend its inactivity so far as this incident was concerned.

[63] I am satisfied that the plaintiff has proved all the matters relevant to his claim insofar as it relates to this incident, namely s 312(1)(a), (b), (c), and (e). Mr Morton submitted that the plaintiff should bear a significant proportion of the responsibility for any damage to his back sustained in that lifting and twisting action because he knew that he had, by that stage, a vulnerable back. He submits that s 312(1)(e) (that the worker did everything reasonably possible to avoid sustaining the injury) applied. By this time the Council, too, was aware that the plaintiff had problems with his back. There was no recommendation made to him that he ought not to engage in heavy work of this kind on his own. He was very reliant upon the direction of his superiors about the work that he did and in my view cannot be held responsible or partially responsible for the consequences.

[64] Similar to the findings made with respect to the other incidents, the plaintiff has proved breach of the contract of employment and of the provisions of the *Workplace Health and Safety Act* 1995 without any reduction for contribution.

Causation

[65] The issues are whether, as the Council contends, the plaintiff's lumbar back, adopting Dr R Watson's terminology, had just "worn out" and the work related events did no more than aggravate a degenerative condition which was bound to manifest itself in the immediate future or, but for all or any of the incidents pleaded against the Council, the plaintiff would have maintained employment with the Council for a period of time. The plaintiff accepts that the degenerative condition in

his spine was such that he would have been unable to work to the accepted retirement at age 60 or 65.

[66] Radiological investigations of the plaintiff's spine and their interpretation by numbers of medical practitioners indicate a degenerative change associated with the L3/4 disc space. It is accepted that the plaintiff is unfit for any labouring work. He is probably unable to be redeployed to light, commercially viable, alternative work.

[67] The Council's position supported, Mr Morton contends, by the earliest written notes of back pain by the plaintiff is that the plaintiff experienced a gradual onset of back pain at the beginning of 1999 which had become more than passing by the time he went on holidays and, at least initially, was not attributed by him to any particular incident. I have discussed this above. It is highly relevant that the plaintiff had had no time off work due to back pain until the time of the raking incident and this was the time when Mr Johnston recalled increased complaints from him about back ache. The evidence of Drs McCombe, Winstanley and Mr McDougall make the raking incident an event which brought about injury to a vulnerable back.

[68] Dr Winstanley concluded in his report of 26 September 2003 that the primary incident which caused the plaintiff's ongoing symptomatology and resultant work incapacity was the lifting of the manhole cover on 9 April 1999. In his opinion the plaintiff would have been able to continue as a labourer for a period of 5-7 years if he had not experienced that event. He noted in his report of 4 February 2004 that had the plaintiff not returned to the heavier type of work after the initial incidents he may have been able to manage work of a lighter kind such as truck driving and his working capacity would then have been in the vicinity of 10-12 years.

[69] Initially Dr Watson thought that lifting the pipe cutter box was "the straw that broke the camel's back" and that lifting the manhole cover applied the "coup de grâce". Dr Watson revised that opinion and said

> " ... I find it extremely difficult to accurately state which of the incidents was the predominant factor in his ultimate invalidity but cannot disagree with Dr Winstanley on his decision concerning the manhole cover incident as this final insult led to his ongoing unemployability."

In a subsequent report Dr Watson opined that

> "I believe that the first three incidents caused pain which was insufficient to necessarily have put him off work and each of which in its own right would have if viewed alone probably have settled completely with the passage of time. I also believe that in any of these three if he had ceased work temporarily the ultimate prognosis would not have been any different.
>
> On the contrary however I believe that the manhole incident induced a symptomatic state sufficient to warrant cessation of work and render a vicariously [sic] placed back situation into a irremediable one likely to be constantly but variably present and preventing significant ongoing employment with the Council. Undoubtedly the pre-existing episodes would have predisposed to the severity of the

> effects of the fourth but at the same time the ergonomic circumstances of the fourth incident were sufficient in themselves de nouveau to have precipitated pain and lumbar spinal pathology or flare up sufficient to render him ongoing unemployable."

[70] Dr McCombe had a somewhat different analysis of the underlying cause of the plaintiff's symptoms. Original examination by the doctors whom the plaintiff had first consulted had suggested a probable sacroiliac cause. When Dr McCombe first examined the plaintiff he could not identify any areas of tenderness over the sacroiliac joint or any pain that could be reproduced by stressing that joint. He did however consistently find tenderness at the thoracolumbar junction. Dr McCombe concluded that the plaintiff's pain which was present when he examined him was most likely referred from the thoracolumbar junction. He thought this conclusion supported because there was no significant evidence of any lumbar disc pathology on the MRI scans and the plaintiff had a good sitting tolerance. Dr McCombe's analysis did not find support from the other orthopaedic specialists who gave evidence.

[71] Dr Staunton-Smith, who saw the plaintiff for a brief 30-40 minute consultation in July 1997, concluded that the plaintiff's symptoms were due to lumbar spondylosis with an element of thoracic spondylosis. He thought that his pain was aggravated by work but not necessarily caused by his work and that he could return to all duties within 8 weeks but regarded the plaintiff's employment as the major significant factor causing his present problems. He concluded

> "It may be that at age 32, he is expecting too much of his body and will not be able to return to the very strenuous heavy duties which he was doing previously."

Dr Staunton-Smith gave evidence at the trial. He suggested that the plaintiff ought not to have returned to work after holidays on very heavy duties but should have had graduated duties and would have been able to carry out heavy work eventually. I did not find Dr Staunton-Smith's evidence of great assistance due, no doubt, to the limited contact which he had with the plaintiff.

[72] Dr P Boys, orthopaedic surgeon, examined the plaintiff in March 2000. He diagnosed him as suffering from chronic musculo-ligamentus strain in his lumbar spine with L3/4 discal degeneration. He concluded from the history that the strain was sustained in his lower back in the course of his employment in approximately February 1999 and that it was, in all probability, "potentiated" by his physique and weight. The plaintiff is 5' 10'' and weighed 120kg when he saw Dr Boys. He concluded that his management should focus upon weight reduction, improved general fitness and a program of muscle conditioning to strengthen the supporting muscles of the lower back. He believed the plaintiff was fit to take up employment performing duties which restricted repetitious low-level bending and lifting activities. He thought that he could best cope with the duties of a driver if they were available.

[73] Dr Winstanley considered the manhole cover lifting incident as very significant because the plaintiff was unable to return to his usual work activity after that incident whereas he did so after the other incidents. In his opinion all of the incidents had contributed to his present state operating on his degenerative

condition but lifting the manhole cover was a major component in his symptomatology. Had the plaintiff experienced only the raking incident Dr Winstanley thought that he would have been likely to have had trouble continuing as a manual labourer in 10-15 years from 1999.

[74] I was most assisted by the evidence of Dr Winstanley. Exhibit 27 is the letter of instructions to him from the plaintiff's solicitors dated 15 September 2003 prior to his consultation with the plaintiff. It is a long and detailed document accompanied by the statement of claim detailing the incidents, the report from Mr McDougall, an indexed and paginated bundle of all medical and other quasi-medical reports and records including hospital records and some further material facts about the nature of the plaintiff's pain as reported from time to time. This provided Dr Winstanley with a comprehensive set of facts most of which have been proved or not contested at trial.

[75] Dr Winstanley thought that but for the manhole cover incident the plaintiff would have been able to continue as a labourer with the Council for 5-7 years from the date of his first report on 26 September 2003. Had he not returned to heavy duties after the first three incidents, that is, had the manhole cover not have occurred, Dr Winstanley considered that the plaintiff may have been able to work in lighter duties, for example as a truck driver, for 10-12 further years.

[76] The raking incident triggered a pain response not previously present. The plaintiff was able to continue for what was probably about two weeks but with increasing difficulty and a couple of days on sick leave. Although the box of pipe cutters was very heavy there was no bending, twisting or stretching movement involved but the plaintiff did have significant pain the following day. After three weeks rest he was able to return to work but felt a flare up of the low back pain working in the trench. It was not until the manhole cover lift that he was finally visited with completely disabling pain. His ability to engage in even the lightest physical activities after returning from workers' compensation leave was severely compromised.

[77] I accept Dr Winstanley's evidence, supported by Dr Watson, that it was the final incident, that is lifting and throwing the manhole cover which precipitated this state of affairs. It is always difficult to predict how long a person with a susceptible condition might have continued in employment but for the intervention of the compensable event. It is even more difficult when there are four incidents, each more probably than not contributing to the ultimate condition. It is more likely than not that the plaintiff would not have been able to continue in his heavy labouring duties for more than six years from September 1999 even though the plaintiff was a very hard worker with a positive attitude to his employment. Had the plaintiff had available to him lighter duties thereafter I conclude that Dr Winstanley's figure of 10 years must be further modified. Truck driving for the Council involved other tasks such as assisting to load and unload and checking the security of the load. Other light tasks such as gardening which the plaintiff tried all involved lifting, leaning and twisting. Other light work in the community may not have been readily available. I would assess a further five years from the six years as the limit of the plaintiff's employability. Thereafter the natural consequences of the degeneration would have taken over completely.

Quantum

[78] In an effort to return to work the plaintiff engaged in an extensive regime of rehabilitation activity. He underwent Bowen therapy, physiotherapy and hydrotherapy, chinese natural therapy, the assistance of a chiropractor and the use of a TENS machine and a back brace. He was an inpatient at the Belmont Rehabilitation Clinic in December 1999. The pain was and is severe and disabling. If he attempted or attempts to do household chores which he used to do previously he suffers severe pain the following day in his low back and into his groin and legs. He particularly needs to avoid activities involving heavy lifting or repetitive forward bending, reaching or twisting.

[79] He was assessed by Mr Steven Hoey, an occupational therapist, for medico-legal assessment in early September this year. The plaintiff told Mr Hoey that sitting for any time caused low back pain and he is restricted to sitting for about 1 hour; he is limited by his pain with respect to the time he can stand; he can walk short distances; ascending stairs or slopes aggravates his low back pain; he can climb a ladder; long periods of crouching occasionally aggravate his low back pain; push/pull activities occasionally aggravate his low back pain; he can put the wheelie bin out but avoids doing so; he can push a shopping trolley at the shopping mall but the twisting motion at the end of the aisle aggravates his symptoms; he can push a lawnmower but avoids doing so; forward bending occasionally aggravates his low back pain; static forward bending aggravates his low back pain. He can lift light items from the floor and light to medium items at waist height. His sleep patterns have been disturbed by pain and discomfort. He does not take medication for his pain. He told the court that his sexual life with his wife had suffered which she corroborated. He is unable to interact and play with his young children. He is acutely conscious that he is unable to set an example to them of working industriously at a gainful occupation which causes him great distress.

[80] The plaintiff previously enjoyed outdoor recreations such as fishing and golf which, although he has attempted, he cannot do. He enjoyed feeling fit and strong, something which he no longer experiences.

[81] Mr Hoey concluded as a result of his testing that the plaintiff is now physically capable of occupations in the sedentary to light range only. The plaintiff tried on a volunteer basis two periods of work. The first was as a console operator at a service station and the second as a kiosk operator in a youth centre. Neither led to any further work. CRS Australia has been involved in the plaintiff's rehabilitation but there was no evidence that he had engaged in a work trial. In Mr Hoey's opinion such work could include a courier driver, a car park attendant, a mail sorter, a security guard, a gate keeper or a motor vehicle spare parts interpreter. He concluded, however,

> "... a hypothetical physical capacity for work does not necessarily translate to commercial employments. Although only 37 years of age, Mr Appleyard has only worked in low-skilled, physically demanding occupations, from which he is now precluded. He has no experience in the above detailed occupations and no training or experience in more sedentary clerical, sales or service occupations. And having interviewed him today, I must say (respectfully) that he will never be employable in such occupations. He has ongoing occupational restrictions that limit his ability for long periods of sitting or standing, and, resultant of the injury he has

> 1. Been out of the commercial workforce for over four years; and
>
> 2. He now has a history of a compensation claim."(exhibit 8 p 11)

[82] Having seen the plaintiff in the witness box, Mr Hoey's conclusion about his unemployability, with which the Council does not seriously argue, is accepted.

[83] Although I have concluded that the plaintiff must bear 30 per cent responsibility for any further aggravation to his spine resulting from carrying the pipe cutter box, in view of Dr Winstanley's and Dr Watson's opinions that it was the manhole cover lifting incident which has brought him to his present condition I propose to do no more than reduce the overall figure by a nominal sum of $5,000.

Pain, suffering and loss of amenities of life past and future

[84] The pain which the plaintiff has experienced since February 1999 to present has been constant. He has had relief from time to time by a course of injections, by the use of a TENS machine, by various courses of physiotherapy and by techniques which he has been shown. His pain affects every part of his quality of life. More important is the psychological loss of his ability to earn money by the exploitation of his labouring skills to support his family. This has been significant. He has also lost the ability to engage in the normal pursuits of family life with young children and engage in recreational activities such as fishing and golf which he enjoyed previously. Mr Amerena has proposed $45,000 for this head of damage and Mr Morton $35,000. I would allow $38,000.

Past economic loss

[85] Counsel agreed on the figure of $127,563.99 as being the amount of earnings that the plaintiff would have recovered had he remained in the employment of the Council to the date of trial. The weekly rate is $578 net. From then to the date of judgment is a further 12 weeks, $6,936, making a total of $134,499.99. Mr Morton submits that the figure for past economic loss should be reduced by 25 per cent to take account of contingencies. Work was available for a labourer and the plaintiff would have remained in employment with the Council. There is no need to discount the past economic loss.

[86] The plaintiff is entitled to lost superannuation contributions for that period. The rate has been agreed at 10.5 per cent and amounts to $14,122.50.

[87] Interest on damages is governed by s 318 of the Act. The Council concedes that the court may order interest and there are no matters raised by s 318(4) which would affect the discretion to do so. The rate of interest is 5 per cent per annum pursuant to s 318(5) which takes the rate prescribed under the *Supreme Court Act* 1995, s 48(1). The amount of workers' compensation and the Centrelink benefits must be deducted before calculating interest. The plaintiff was paid $4,619.84 as workers' compensation. He was paid $28,664.75 by Centrelink to 30 June 2004. Assuming payment by Centrelink at the same rate of $189.54 per week there are 22 weeks to judgment from the last Centrelink calculation (30 June 2004) being an amount of $4,170. The total payment is $32,834.63. Accordingly, the total deductions are

$37,454.47 leaving a net figure of $111,168.02 on which interest at 5 per cent is to be awarded. The period should be over four and a quarter years being from the date the plaintiff ceased employment in August 2000 with the Council to judgment. This amounts to $23,623.20.

Special damages

[88] Schedule 1 to exhibit 13 sets out the special damages claimed by the plaintiff less $217.95 (by agreement) from the Health Commission Certificate. They include medical expenses, rehabilitation expenses paid by the Local Government Work Care Scheme, other medical and therapy expenses not so paid, travelling to medical treatment, the CRS refund and pharmaceutical expenses and expenses for mowing. The Council challenges only the pharmaceutical expenses for Arapax and Zoloft since they relate to mental health matters which have not been pleaded as being attributable to injuries sustained at work and the mowing expense of $38.50. From the notations in the Maryborough Base Hospital Mental Health Unit records it seems that the plaintiff was feeling agitated about the health of his father prior to his work related injuries but his inability to look after him adequately was greatly exacerbated by the pain in his back. It was after 9 April that it appears that anti-depressant medication was prescribed. The amount claimed for all medication is a modest $731. The anti-depressant medication is a minor component. I do not propose a reduction to take account of the modest amounts of anti-depressants which in some part may not have been attributable to the subject injuries.

[89] A claim for $38.50 is made for mowing expenses. The evidence suggests that the plaintiff's solicitor suggested to either the plaintiff or his wife that they should get a quote for the cost of mowing, no doubt with a *Karanfilov* claim in mind. Mrs Appleyard, until the time of trial, had done the mowing but did not wish to continue to do so. The invoice from Jim's Mowing (exhibit 19) was most likely a quotation. It is not allowed. I would allow special damages in the amount of $19,996.76 as per schedule 1 exhibit 13.

[90] Interest is permitted by s 318 of the Act on items of special damage a claimant has actually paid. Those are items (iii) medical and natural therapy expenses, (iv) the pharmaceutical and allied items and (v) travelling to medical treatment. Those items total $5,081.52 on which interest will be paid at 5 per cent per annum for four and a quarter years being an amount $1,079.82.

Loss of future earning capacity

[91] The plaintiff's loss of future earning capacity must be divided into two periods – from judgment to the time assessed by Dr Winstanley that the plaintiff could have continued as a labourer with the Council but for the manhole cover incident and the period thereafter when, because of the natural progression of degenerative change in his spine, he could have worked as a truck driver or at similar lighter work. Mr Amerena has proposed a figure of approximately $209,000 ($148,000 + $61,000) for these periods including discounting for contingencies. Mr Morton has submitted a figure of $100,000 as a global amount heavily discounted for contingencies including the plaintiff not obtaining reliable lighter work and also factoring actual employment in the future.

[92] I propose to accept the average of Dr Winstanley's assessment that but for the manhole cover incident the plaintiff could have continued as a labourer with the Council for approximately six years from the end of September 2003 (the date of Dr Winstanley's first report). From the date of judgment I select a period of five years. The present wage for a labourer is $578 net per week. Using the 5 per cent tables (multiplier 231.5) gives a figure of $133,807. I reduce that figure by 15 per cent for contingencies (the selection of five years has already involved some factoring for contingencies) which gives a figure of $113,735.95 for the first period. To that must be added the loss of future superannuation contributions at the agreed rate of 10.5 per cent which amounts to $11,942.27 giving a total figure of $125,678.22.

[93] I have concluded, generally accepting Dr Winstanley's opinion, that the plaintiff might have been able to engage in lighter duties but for the manhole cover incident for a further five years after he had ceased being able to engage in heavy labouring duties. This may have been as a truck driver or in some other capacity. Counsel have proceeded on the basis of a truck driver's present wage of $425 net per week. Using the 5 per cent tables (multiplier 412.9 – 231.5 = 181.4) gives a figure of $77,095. This figure should be discounted by 25 per cent to take account of the unavailability of lighter work from time to time and other vicissitudes not encompassed in the figure of five years. This gives an amount of $57,821.25. To that figure should be added an amount to represent the loss of future superannuation contributions at the agreed rate of 10.5 per cent. This amounts to $6,071.23. For this period the amount is $63,892.48.

[94] In view of Mr Hoey's evidence it is unlikely that the plaintiff will engage in commercially remunerative employment of the kind which would allow any actual assessment to be made. He may from time to time do a little work but will be largely voluntary in nature.

[95] The total amount for loss of future earning capacity is $189,570.70.

Future pharmaceuticals

[96] The plaintiff makes a claim of $4 per week for 11 years. Since I have concluded that 10 years is the period after which the natural effects of his generative disease would have taken effect I will allow 10 years. Using the 5 per cent tables (multiplier 412.9) gives a figure of $1,651.60 which I allow.

Future assistance

[97] I was not persuaded that the plaintiff would retain the services of a handyman to do the mowing and therefore do not allow any amount for this, *Karanfilov v Inghams Enterprises Pty Ltd* (2004) 2 Qd R 139 at 141 and 150.

[98] In summary the plaintiff may recover the following amounts

Description	$
General damages for pain, suffering and loss of the amenities of life, past and for the future	38,000.00
Past economic loss (including Fox v Wood and superannuation)	148,622.49
Interest on past economic loss	23,623.20
Special damages	19,996.76
Interest on special damages	1,079.82
Loss of future earning capacity	189,570.70
Future pharmaceuticals	1,651.60
TOTAL:	**$422,544.57**

[99] From that sum should be deducted $5,000 for contribution and $17,217.00 paid by the Local Government Work Care Fund.

[100] Judgment is given for the plaintiff against the defendant in the sum of $400,327.57.