# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Stitz v Manpower Services & Anor* [2011] QSC 268 |
| PARTIES: | **JOHN CHARLES STITZ**<br>(plaintiff)<br>**v**<br>**MANPOWER SERVICES AUSTRALIA PTY LTD**<br>**(ACN 071 884 994)**<br>(first defendant)<br>**and**<br>**AUSTRALIAN STEEL COMPANY (OPERATIONS) PTY LTD t/a SMORGAN STEEL REINFORCING**<br>**(ACN 069 426 955)**<br>(second defendant) |
| FILE NO/S: | S658 of 2008 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Rockhampton |
| DELIVERED ON: | 9 September 2011 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 4, 5, 6 May and 17, 18 August 2011. Final submissions received 29 August 2011 |
| JUDGE: | McMeekin J |
| ORDERS: | **Judgment for the defendants** |
| CATCHWORDS | TORTS – NEGLIGENCE – CAUSATION – where unsafe system of work existed – whether system of work caused injury – whether plaintiff regularly subjected to forces likely to cause injury<br><br>TORTS – INJURY – nature of injury sustained – |

disagreement of medical experts – where both medical experts were supplied with an inaccurate history of events.

*Workers' Compensation and Rehabilitation Act* 2003 (Qld)
*Workplace Health and Safety Act* 1995 (Qld)
*Amaca Pty Ltd v Ellis* [2010] HCA 5
*Betts v Whittingslowe* [1945] HCA 31
*Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18
*Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11
*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705
*Neill v NSW Fresh Food & Ice Pty Ltd* [1963] HCA 4
*TNT Australia v Christie* (2003) 65 NSWLR 1
*Vozza v Tooth & Co Ltd* (1964) 112 CLR 316
*Waugh v Kippen* (1986) 160 CLR 156
*Wyong Shire Council v Shirt* (1980) 146 CLR 40

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| COUNSEL: | G Cross for the plaintiff |
| | RAI Myers for the first defendant |
| SOLICITORS: | Smiths Lawyers for the plaintiff |
| | Spark Helmore for the first and second defendants |

[1] **MCMEEKIN J:** Jon Charles Stitz claims damages for a back injury alleged to have been suffered on 9 April 2007 in the course of his employment with the first defendant, Manpower Services Australia Pty Ltd ("Manpower Services").

[2] Manpower Services conducts a labour hire business. At the material time the plaintiff was employed as a labourer and carried out his employment at the premises of his host employer, the second defendant, Australian Steel Company (Operations) Pty Ltd trading as Smorgon Steel Reinforcing ("Smorgans")

[3] Both liability and quantum of damages are in issue.

[4] The defendants have resolved the contribution issues between them.

[5] The plaintiff was born on 25 October 1966. He is presently aged 44 years. He was 40 years old at the time of injury.

**LIABILITY**

**The Issues**

[6] Whilst the defendants accepted that relevant duties were owed they put in issue both causation and breach. In the final analysis three issues were argued:

(a) The plaintiff was not injured on the day pleaded;

(b) If the plaintiff was injured on the day pleaded the forces to which he was exposed were not shown to be such as were likely to injure a person of normal fortitude. It followed that his injury was not caused by any aspect of the work system that was in breach of duty. As will be seen there are two subsidiary issues:

(i) when on the day was the onset of symptoms? and

(ii) to which of the identified risks involved in the work was the plaintiff exposed by the time of onset of symptoms?

(c) If the plaintiff was injured on the day pleaded and through breach of duty the injury he suffered was of no great consequence.

[7] I emphasise the day pleaded as the defendant submitted, and it was not opposed, that the plaintiff was restricted by his pleading to an injury sustained on 9 April 2007.

[8] It was no part of the defendant's case that there was any "expense, difficulty and inconvenience"[1] in taking any proposed alleviating action.

[9] Nor was it in issue that the defendants' system and place of work could have been improved. Defects in it were manifest. Rather the defendants argued, in effect, that "consideration of the magnitude of the risk and the degree of the probability of its occurrence"[2] demonstrated that no response was called for to remedy the acknowledged defects.

[10] The plaintiff's case was not straight forward. One complication is that no evidence was led of an expert nature that there were forces involved in any aspect of the work performed that day that had the capacity to injure a person of normal fortitude.[3]

[11] A further complicating feature is that the plaintiff is unable to point to any particular aspect of the work that he undertook on 9 April 2007 that caused him injury. He says that during the shift that he worked that day he became aware of symptoms of discomfort in his back, that he was exposed to work that had the potential to injure his back, and that the inference should be drawn that the work caused the injury.

**Principles**

[12] It is convenient to look at the duties owed by an employer. The duties of a host employer may be different[4] but it was not contended that any different result would follow if I drew any distinction between the defendants.

[13] Mr Stitz bases his claim on breach of the employment contract and negligence. The duty owed by an employer was explained by Windeyer J in *Vozza v Tooth & Co*

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1 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–48 per Mason J

2 *Ibid*

3 *Waugh v Kippen* (1986) 160 CLR 156 where, in reference to a duty owed under the *Factories & Shops Act* 1960, Gibbs CJ, Mason, Wilson and Dawson JJ said: "In the case of an employee who by reason of physical incapacity is more than ordinarily susceptible to the risk of injury, liability is to be adjudged in the light of what the employer knew or ought to have known of that employee's incapacity." No different principle applies here.

4 *TNT Australia v Christie* (2003) 65 NSWLR 1

*Ltd*[5] in this way: "[F]or a plaintiff to succeed it must appear that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment."

[14] In *Hamilton v Nuroof (WA) Pty Ltd*[6] it was said that the duty of an employer is "... to take reasonable care to avoid exposing [its] employees to unnecessary risks of injury".

[15] Those statements make plain, that an employer is not required to guard against all risks of injury.[7]

[16] On the question of breach Mason J's formulation in *Wyong Shire Council v Shirt*[8] explains the response expected of a reasonable man, there being a foreseeable risk of injury:

> "A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone*, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

**Was the Plaintiff Injured on 9 April?**

[17] The attack on the plaintiff's claim that he was injured on the day was based on two things – his allegedly poor character; and the version set out in contemporaneous documents.

[18] The attack on the plaintiff's character was based on his admitted attempt to deceive Centrelink in 2006. As to that deception, the plaintiff's account was that he had employment, he was staying with his estranged wife and children, an argument occurred between he and his wife and he determined to leave her house and that employment immediately. He was without funds and believed that he was not

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5 (1964) 112 CLR 316

6 (1956) 96 CLR 18 at 25

7 See *Finn v. The Roman Catholic Trust Corporation for the Diocese of Townsville* [1997] 1 Qd.R. 29 at p. 41 per Williams J

8 (1980) 146 CLR 40 at 47–48; [1980] HCA 12

entitled to Centrelink payments until a 12 week period had elapsed from leaving his employment. To avoid the delay in receiving unemployment benefits he falsely claimed to have suffered a back injury.

[19] While the deception does not reflect well on the plaintiff I do not think it results in a destruction of his credit. There are several matters of note:

(a) the deception came to light only because the plaintiff volunteered it;
(b) there were far less drastic means available of downplaying the significance of the earlier back complaint whether it had occurred or not – all that the plaintiff needed to do was say that the symptoms settled quickly. That would have been obvious to him. As it is he has now exposed himself to criminal prosecution;
(c) the plaintiff did not have the X-rays and scan suggested by the medical practitioner to whom he had complained;
(d) if the plaintiff's account of his injury at Smorgons is a fraudulent one then he has gone about it in a very odd way. He could easily have identified a particular feature of the workplace or system and attributed his injury to that cause – there seems to have been any number of obvious deficits to pick from. Yet he comes to Court without an identified source of injury;
(e) While it might be said to be equivocal, the plaintiff's behaviour after the report of the back complaint as noted by Mrs Joyce, and significantly his lack of pain behaviour such as noted by Ms Chronopolous, is not what one would expect of a fraudster deliberately faking injury.

[20] Finally, while I do not pretend that the plaintiff was an easy character to assess, he did not seem to me to be dishonest in his manner of giving evidence. That is not to say that there should be an uncritical acceptance of all of his evidence. He seemed at times to be inaccurate, to overstate matters and to be vague when I would expect more precision. Where his evidence was in direct conflict with other witnesses I would need some good reason to prefer the plaintiff over them. For example he was at odds with Mrs Joyce over his post injury behaviour and I prefer the evidence of Mrs Joyce. Her demeanour was quite straight forward and she had no apparent interest in the outcome of the case. Another worrying example was his evidence as to his past work history. His vagueness about his own past was quite marked.[9]

[21] I came to the view that the plaintiff was not making up his account of the onset of his symptoms. That view was reinforced by the contemporaneous documents.

[22] As to the second basis of attack I deal with the contemporaneous documents more completely below. The plaintiff has given a consistent version in which he has attributed the onset of symptoms to a time while he was pushing and pulling on steel rods at work. That was confirmed by the person who made the records relied on.[10] To the extent that the documents suggest that he arrived at work with his symptoms already in place, and I am not sure that properly understood they do, I am satisfied that they are misleading.

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9 E.g. T1-59/40 – 1-63

10 T3-22 – Ms Chronopoulos

[23] I am satisfied then to the necessary degree that the plaintiff suffered an onset of symptoms of pain or discomfort in his lower back on 9 April 2007.

**The Work System**

[24] The plaintiff commenced working at Smorgons on about 17 January 2007. The plaintiff was required to operate a Pratt cutter – a machine used to cut steel rods (or reo bars as some called them). He worked only on the Pratt cutter. He says that his back pain came on nearly three months later during his shift on Monday, 9 April 2007. There was nothing special about the work on the day in question.

[25] The method of operation was to select and extract a steel rod from a bundle, drop it to a conveyor table which consisted of a bed of rollers, then move the rod or rods along the rollers to the machine. The leading end of a rod as it left the end of the roller bed was intended to enter into the cutting device of the machine. The evidence was clear that that leading end could drop and miss the entry into the cutting device of the machine and strike against the machine. This happened from time to time, not every time, depending principally on the flexibility of the rods, which could vary.

[26] The plaintiff's case was that, effectively, every step of this operation involved an unnecessary risk of injury. Four risks were identified:

(a) the steel rods could become entangled. If they were then it might be necessary, after selecting a rod from the bundle, to then lift and flick the rod to free it from the others. The weight taken could then be not only part of the weight of the lifted rod but also the weight of those lying on it;
(b) the force needed to move the rods along the roller bed was exacerbated by missing or stuck rollers;
(c) there could be severe jolting when the rods struck the machine if they missed the mouth of the cutter;
(d) lifting the rods into the machine when they did not enter the machine requiring significant effort.

**The Injury – When did it Occur and to What Risks was the Plaintiff Potentially Exposed?**

[27] The plaintiff's evidence in chief as to the onset of symptoms was:

> "Now, can I take you to the day of the accident, which is the 9th - or date that you first suffered symptoms, the 9th of April 2007?-- Yeah.
>
> How long had you been performing the work on that day, prior to your first-----?-- I seem to think it's two to three hours into the shift.
>
> And were you working on the Pratt cutter?-- Working on the Pratt cutter.
>
> Were you performing your normal duties? That is, flicking the rods?-- Yep.
>
> Rods onto the roller table?-- Yeah.
>
> Roller table through to the Pratt machine?-- Yeah.

> Okay. Do you remember anybody else working with you that day?-- I don't think so on that day.
>
> And been working for a couple of hours. What did you experience?-- It was the same as every day. Just the - pushing the rods into the Pratt machine and still the knocking sensation of when you - when you push them in. With my back, I just felt a sensation, it was just a - not a - it wasn't overawed or anything, it was just a discomfort sort of thing.
>
> Whereabouts in your back did you feel this discomfort?-- That was in my lower back.
>
> All right. Was it left or right or middle back?-- It was in the middle. Sort of - well, lower back, but just - you know, it wasn't - it wasn't a huge thing. I wasn't, sort of, concerned about it.
>
> Mmm-hmm. And if you don't mind standing and just indicating where in your back the pain was?-- Yep. Or where it is.
>
> Was, on the 9th of April?-- Straight around here … .
>
> Witness is indicating just above belt line. Okay. Thank you. Sit down, please.
>
> HIS HONOUR: Across the middle of the back."[11]

[28] In cross examination the plaintiff said:

> "I did feel …an uncomfortable strain, or whatever it was, and that - it's got down here it was at 3 o'clock or something like that, but I don't believe it was. I tend to think it was, like, about three hours into the shift where I did feel something. I'm not sure of what I was doing or what the time was when I was actually doing it, but it did certainly happen."[12]

[29] The plaintiff did not cease work immediately. He worked through his shift that Monday and each day until the following Friday. He said that he found that on the Thursday he could not get out of a chair after "smoko". He reported his difficulties then to his immediate supervisor and reported the injury at the start of work on Friday 13 April.

[30] The plaintiff was subsequently seen by orthopaedic surgeons. Dr Wallace has expressed the opinion that Mr Stitz has discogenic back pain.[13] Dr Boys was unable to diagnose any injury attributable to his work at Smorgons. He expressed the view that Mr Stitz experienced an episode of "degenerative low back pain."[14] Both surgeons thought that degenerative changes were present prior to the onset of the symptoms complained of.[15]

[31] The version that I have set out from the plaintiff's evidence in chief was subject to attack. The attack was based on previous versions that the plaintiff has given. Two major attacks are made. First it is said that the injury, if it occurred, did not occur

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11 T1-32/55 - 33/1-40
12 T1-79/10
13 Ex 5 at p 5
14 Ex 44 at p 5
15 See the joint report – Ex 43; T5-19/5

"two to three hours into the shift". Secondly, it is claimed that if the work caused any injury it was not caused by the knocking of rods into the Pratt machine and jolting him.

[32] The first attack is based on the early documentation brought into existence following the plaintiff's reporting of his back pain on Friday 13 April. On that date an incident report was completed and following that an application for workers' compensation was completed and signed by the plaintiff. Each document recorded the time of injury as 3pm and the date as 9 April. The plaintiff's shift started at 3pm although the plaintiff would normally arrive 10 minutes before in order to get ready for the shift.

[33] The next record in time is that of a general practitioner, Dr Xu, who saw the plaintiff on Monday 16 April 2007. Dr Xu's record reads: "Jon has back pain for 9 dayd (sic), not sure how it started, he couldn't use his back one day when he went to work".[16] The reference to nine days is puzzling. It would suggest that the injury occurred on Saturday 7 April rather than the day a week before the consultation as is the case advanced. There is no evidence that the plaintiff worked Saturdays. He has consistently asserted that the injury was sustained at work. I assume that there has been an error either in the giving or taking of the history.

[34] However, the history recorded by Dr Xu that "he couldn't use his back one day when he went to work" causes more difficulty for the plaintiff. It suggests a problem with his back towards the start of the shift rather than two to three hours into the shift. That would be consistent with the application for workers' compensation form signed by the plaintiff on Friday 13 April.

[35] That workers' compensation application form probably reflects the Incident Report form completed by Marie Chronopoulos, the first defendant's representative, which also records the time of injury at 3pm.[17] The Incident Report form is intended to reflect what the plaintiff told Ms Chronopolous. There is no other apparent source of information.[18] Ms Chronopoulos completed the form in her handwriting then put it into typed form a short time later. The handwritten version was not produced. It was made contemporaneously with the report by the plaintiff to her on Friday 13 April. There is no reason to think that the typed version does not represent what Ms Chronopolous was told on 13 April by the plaintiff. She considered the information as to time and date of injury to be important.[19] She impressed as a person liable to take her duties seriously.

[36] She records the plaintiff arriving on site at 2.50 pm to "set up to use machine" and then at 3 pm "Noticed tightness in back getting worse whilst operating the machine". She records the activities that contributed to the incident as "Pushing, pulling, bending whilst moving feed steel into pratt machine".

[37] While it is fair comment that the plaintiff may not have been greatly concerned about the precise time of injury on the application for workers' compensation form, and it may simply have been transposed from the Incident Report, the fact is that Ms Chronopolous had no reason to misstate the time on her report. I have no doubt that

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16 Ex 45 at p2
17 Ex 20
18 T2-30/15
19 T3-5/45

it reflected her understanding of what the plaintiff had told her. It is difficult to accept that the plaintiff gave a history to Ms Chronopolous of suffering pain two to three hours into the shift and that was misunderstood by her to mean at the very start of the shift.

[38] Finally, it can be seen that the plaintiff's evidence about his recollection was far from certain. He said "I *seem to think* it's two to three hours into the shift" (emphasis added).[20]

[39] I did not have the impression that the plaintiff was being actively dishonest. But his own evidence carried considerable doubt as to the time of initial onset and contemporaneous records from two sources strongly suggest an onset at the start of the shift. Those doubts were exacerbated by the account given in a Notice of Claim for Damages form completed some months later and which I will deal with in a moment. The probabilities favour a finding that he experienced symptoms of pain after commencing work but at the start of his shift.

[40] This finding creates a difficulty for the plaintiff. He does not claim to have a precise memory of what he did on the day he was injured. It is one thing to assert that working over a period of some hours it is likely that the plaintiff was exposed to all aspects of the work and so to the four identified risks. But if the discomfort that he relates happened only at the start of his shift then it is unknown what work he had done by then. The problem of entanglement did not occur every time – it could vary by chance.[21] As well it is not known what size the rods were that he was required to work on and that has significance because the problems with entanglement at the start of the procedure and problems with the bars striking the machine just below the cutter and causing jarring of the operator each occurred primarily with the more flexible rods with the smaller diameter.[22]

[41] As to the second point of attack the issue is whether the plaintiff was exposed at all on the day in question, and prior to the onset of symptoms, to the jolting that he said could occur when the leading end of the rods drooped and hit into the machine. This attack is based on the plaintiff's earlier versions of what happened and is quite independent of the "time of shift" point but, I note, consistent with it. As I have said the plaintiff' memory of the events of the day was far from clear. He effectively said that he followed the normal procedures. If he worked for as long as two to three hours then he would expect, in that time, that he would be subjected to the jolting from the rods striking the cutter. However, it follows from the finding that he observed the initial symptoms at the start of the day that he may not have been exposed to this jolting so early in the shift, as it occurred, on his account, only from time to time.[23]

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20 T1-33/1; see also at T1-90/55 – 1-91/1

21 T3-87/30; 3-96/38 - Bashford

22 E.g. Bashford at 3-77/55; 3-96/20-30; 3-97/58 – 3-98/15. Mr Bosel's evidence was that it occurred more frequently (T2-92/19: "nearly every time") but he was at odds with the other witnesses and I am satisfied his recollection is flawed.

23 Dr Cross asserts in his written submission received 26 August 2011 at para 4.9 that "nine times out of ten they would not go through without a jolt". My understanding of the evidence was to the exact opposite and that was the stated premise of his cross examination of Mr Bashford: T3-96/20

[42] It should be noted that the plaintiff does not purport to know what caused the onset of symptoms of pain in his back. However he has given at least three versions[24] which make no reference to this jolting. This is in contrast to his evidence in chief where he expressly mentions the knocking effect in relation to the onset of his discomfort.[25]

[43] The first is the version that I have mentioned above as recorded by Ms Chronopolous in the Incident Report form.

[44] The second is in a Notice of Claim for Damages form completed as part of the pre litigation procedures required by the *Workers' Compensation and Rehabilitation Act* 2003. It is dated 20 November 2007. In a section headed "Completely describe details of the event resulting in the injury" the form records, after referring to "having to wheel the conveyor table to the Pratt machine": "The Claimant would have to exert great effort to transfer large sized steel rods from the conveyor table to the Pratt machine".[26]

[45] It is clear that the version in this document contains, on any view, a number of inaccuracies. For example it refers to the plaintiff working the morning shift when he had never done so. And the system of work did not require that a conveyor table be wheeled to the Pratt machine. However the gravamen of the complaint about the system of work is in the words that I have quoted. The exertion of "great effort" does not correspond with being subjected to significant jolting.[27]

[46] At the conclusion of the form the plaintiff was required to declare, and did, that "all statements made in this Notice of Claim for damages that are in my personal knowledge are true, correct and complete in every respect". Plainly the plaintiff did not convey accurately to his lawyers either the events of the day or the system of work. This is one of the unexplained inaccuracies that troubles me about the plaintiff's reliability. Nonetheless, making every allowance for the plaintiff, he could not but have realised that he was under an obligation to record those aspects of the work that he considered to be involved in his injury. He plainly did not hold the view then that this jolting had anything to do with his injury.

[47] The third is in a version to a Dr Steadman who saw the plaintiff for assessment. The plaintiff's evidence on this was:

> "Now, you saw, didn't you, in relation to this claim, a doctor by the name of Peter Steadman. Do you remember seeing Dr Steadman?-- I definitely do.
>
> Right. And you told him in relation to the accident, amongst other things, that the rollers, having explained your job, were at a different level to the guillotine and so with some momentum and twisting, the rod would be pushed along, but unfortunately it would then hit the edge of the guillotine, which was uneven?-- Mmm.
>
> And that's what you've told us about?-- Yep.

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24 Four if one counts the brief reference to versions given to a Dr Janus – see T2-23/45. Nor is there any mention of jolting in the histories provided to Drs Wallace and Boys.

25 T1-33/20

26 Ex 19 at para 38

27 The same version appears in the notice given on the same date to the second defendant under the *Personal Injures Proceedings Act 2002* – see Ex 18 at para 9

> That there were times, in fact, when the rod, after it went-----?-- Yep.
>
> -----over the last roller would droop-----?-- Yep.
>
> -----and instead of entering into the face of the Pratt machine, it would jar?-- True.
>
> And you've told Dr Steadman that you'd complained about this and then he goes on to say, **"However, ironically, this is not how he injured himself. He said that he was pushing a rod and he thinks it was about one-quarter of a tonne when his back began to get sore. He said that the rod did not jar, but his back became sore.** He kept working for another three days, however his pain became worse and worse. He said by the third day he had to stop work, because he had leg symptoms and felt that he had pressure in his low back affecting both sides."?-- Well, that's pretty right in what he says.[28] (emphasis added)

[48] I did not understand the plaintiff to deny that he had said this to the doctor. The express disclaimer to Dr Steadman that "the rod did not jar" is again against the notion that any jolting occurred, at least associated in the plaintiff's mind with the occurrence of any discomfort in his back.

[49] I am conscious that the questioning by Mr Myers in cross examination conflated the issue of the cause of injury, about which the plaintiff did not pretend to know the answer, with the question of whether there was an occurrence of jarring or jolting on the day in question.

[50] However the state of the evidence is such that I cannot find, on the balance of probabilities, that the jolting associated with the dropping of the rods as they approached the cutting machine occurred before the plaintiff suffered any apparent injury to his back.

[51] It follows that the fourth of the identified risks - the need to lift the bars up that did not enter the machine - is not shown to have occurred on the day and prior to the onset of symptoms.

[52] That leaves then two of the identified risks as having been potentially experienced on the day and prior to the onset of symptoms – the untangling and flicking of the rods and the and the movement of the rods along the roller bed towards the cutter. The untangling and flicking was said to be more of a problem with the more flexible rods but I did not understand that it could not happen with the larger diameter rods. The movement of the rods along the roller bed towards the cutter was a constant feature of the work.

**Reasonably Practical Means of Obviating the Risks**

[53] As I have said it was not in issue that the work system and plant was plainly defective. In relation to the two identified risks that remain for consideration the evidence was plain that:

(a) the bars or rods were presented in a tangle to the workers which could have been avoided;[29]

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28 T1-89/25 – 90/15

29 T1-97/5

(b) the workers were left to work out for themselves how to go about the task of untangling rods;[30]

(c) there was no supervision or correction of whatever technique might be adopted by a new worker for the untangling and flicking of bars;[31]

(d) a number of the rollers that made up the roller bed and along which the rods had to be conveyed were missing or defective.[32] There was no reason why they could not have been replaced as needed. It is evident that they were not replaced in a timely way.[33]

(e) It was left to the workers to determine how best to move the rods.[34]

[54] I am satisfied that if these matters had been remedied it is probable that the forces to which the plaintiff was exposed, and hence any risk of injury, would have been reduced. That leaves for consideration the question of whether the risk of injury that the plaintiff faced on the day in question called for any response at all.

**What Were the Forces Involved?**

[55] As I have said there was no evidence led as to the level of force imposed on the spine by any of the identified risks. In my experience that is invariably proved, as indeed it needs to be, as it is fundamental to the assessment of whether a reasonable employer should respond to the risk. Virtually any activity in life is accompanied by some risk. Hard manual labour obviously carries with it the risk of manual handling injuries.[35] But it has never been the law that an employer must remove all risk of injury. And appeals to general principles such as that the standard of care expected of an employer is high[36] does not fill the evidentiary gap.

[56] As French CJ and Gummow J said in *Kuhl v Zurich Financial Services Australia Ltd*[37]

> "To satisfy the element of causation … it would be necessary to identify the action which, on the available evidence, the trial judge could conclude ought to have been taken; **that action, if failure to take it is to be accounted negligent, must be such that the foreseeable risk of injury would require it to be taken, having regard to the nature of that risk and the extent of injury should the risk mature into actuality**; **and it would be necessary that the trial judge could conclude as a matter of evidence and inference that, more probably than not, the taking of that action … would have prevented or minimised the injuries the plaintiff sustained**." [38] (my emphasis)

[57] If the forces involved were at a level not likely to injure a man of normal fortitude then the fact that those forces could have been reduced so as to be even less likely to injure such a man does not establish a need to act. A failure to take such measures does not connote negligence in an employer.

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30 T4-64/30

31 T4-64, 65

32 T1-27/45

33 T4-58/1-20; 4-79/30 – Simonds; T3-90/7 - Bashford

34 T3-94/40-50 - Bashford

35 As it happens there is evidence of this – see Dr Wallace at T5-22/1-4 - but I would have thought the point obvious.

36 Para 1.1 of the Plaintiff's submissions received 26 August 2011 referring to *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 230.

37 [2011] HCA 11 – in dissent but that is not relevant to the statement of principle

38 [2011] HCA 11 at [45]

**General Matters**

[58] There are some matters of general significance. First, the weights of the individual rods varied depending on the gauge of steel involved. The greater the diameter of steel the easier was the untangling,[39] and the fewer the number of rods or bars that were moved along the bed at any one time. The evidence was equivocal as to whether the degree of force needed to move the rods along the bed increased with the diameter of the steel.[40] The total mass to be moved could decrease and not increase with increasing gauge.

[59] Secondly, as to the dimensions of the rods. The rods that were 12 mm in diameter were nine meters in length and those 16 mm and above were 12 meters in length. The weights of the steel rods and the numbers in each bundle that were intended to be pushed at one time through the cutter were:

(a) 12mm – 12kgs - 15 at a time;
(b) 16 mm – 19 kgs – 10 at a time;
(c) 20 mm - 30 kgs – 7 at a time;
(d) 24 mm - 43 kgs – 4 at a time;
(e) 28 mm - 59 kgs – 3 at a time;
(f) 32 mm - 78 kgs – 1 at a time

[60] There was no evidence led of the diameter of steel processed at the start of the shift.[41] In the absence of evidence all that can be assumed is that the size was that which was most favourable to the defendants.

[61] Thirdly, there was no measurement of the co-efficient of friction of the steel rollers of the roller bed. Obviously the degree of force involved in the movement of a given mass depends on the resistance of the surface over which the mass is to be moved. Thus references to the mass that the plaintiff had to move does not prove the force that he needed to exert to move that mass, still less the force imposed on a man's spine in moving the mass. While it can be said that it might be more difficult to move a given mass if there were missing or seized rollers, just how much more difficult was not established.

[62] Fourthly, the unit of measurement that the plaintiff's side adopted in the trial was the force used by players pushing in a rugby scrum. Whatever that force might be, and I suspect that it varies considerably depending on the code and the level of the competition, I do know that hundreds and probably thousands of young people throughout the world exert such a force many times every week-end in their playing season and without injury to their spines.

[63] Fifthly, there was an odd aspect to the plaintiff's case. That he worked on this machine for three months without any injury to his spine does not mean that the risks of injury were not at a level that required attention. But that he worked on the machine doing his normal work for three days after the claimed injury, the claimed injury being an injured disc in his spine, does raise some question about the significance of the risk or the extent of the injury sustained, or both. I appreciate

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39 T1-24/44

40 T4-54/3-15 cf. 4-54/55 - Simonds

41 There is a reference in a report of Dr Boys to the version he received from the plaintiff. That indicates that 24mm diameter rods were being processed but the account seems to refer to the Thursday when the plaintiff struggled to get up from a chair: Ex 44 at p 2.

that the plaintiff speaks of the pain increasing over that time but the only shift that he speaks of struggling to finish is the Thursday shift after the problem getting out of the chair.

[64] The defendants' case was that the work had been performed in the same way for decades and without complaint of spinal injury. A Mr Simonds was called by the defendants. He had worked out of the subject premises for the defendant or associated companies for 35 years and had accumulated 10 years experience over that time on the Pratt cutter. He had worked 8 hour shifts on the machine for about half of that 10 years. He was a slightly built man of mature years. A Mr Bashford was also called. He was the plaintiff's leading hand and had worked on the machine many times. He was a more solidly built man.

[65] Both Mr Simonds and Mr Bashford had reason to be loyal to their employer. However, I am confident that neither was doing anything but endeavouring to be truthful in his evidence.

**The Retrieval of the Rods**

[66] The system that Mr Stitz adopted to retrieve a steel rod was explained in these terms:

> "Were the bars all separated so it was - you could just push one off, or were they - did they come in bundles, or how were they stored? They came in bundles, and I think their initial thoughts were probably to have them - to be able to lift off the stands, put straight onto here, and they would be nice and straight, so you could just roll them off. But what used to happen was, because the trucks and - used to carry them in different ways, they used to entangle. So what you'd have to do is usually pick one of these up, there'd be a rod lying on top of it, you'd flick it, and it would roll the other one off, and you'd go through that continuously. It was usually the smaller gauge the worse it was, because the smaller - they could entangle more.
>
> How would you describe that task of flicking; was that difficult? Did you find that difficult? It was, it was hard; it used to cause a lot of problems with your hands as well, cuts on hands. Yeah, there was lots of things that - yeah, it was one of those, it was just hot, hard work that - that even the - you know, the big bosses from Smorgons, they said that it was unnecessary."[42]

[67] I note that the plaintiff did not record the work as placing particular demands on his back. Another witness, Jeremy Bosel, said that this work jarred his back and shoulders.[43] Mr Bosel had worked on the Pratt cutter since the previous October and had trained the plaintiff. He himself had been trained by Mr Simonds.

[68] Mr Bosel considered that most of the time the bundles were twisted together and required untangling. In this he was at odds with the other witnesses. It seems intrinsically likely that, as the plaintiff said, the more flexible the bars the greater the likelihood of entanglement.

[69] Mr Bosel's evidence was by reference to a photograph taken on 31 July 2007:

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42 T1-24/30-50

43 T2-90/3

> "Yes?-- You - you hoped that every bundle you put down on there looked like this so that it was easier to flick out, but most times as you're picking up the bundles with the chains all the steel twists up in together and - yeah, you have a difficult time trying to sort them out.
>
> If I can describe them as good days and bad days for the bundles being intertwined; is that a good day or a bad day?-- That's - that's an exceptionally great day.
>
> And if you had a not so great day, what did you have to do to release the reo?-- You had to physically lift one - untwist them all, and to get the ones that are further along because of the 12 metre length you had to pick it up and flick it down so that it sent a vibration through the steel and it flicked the - the bars off the end of it."[44]

[70] The plaintiff relied significantly on the evidence of a Workplace Health & Safety inspector Mr Russell Batley who attended at the Smorgon workshop on 31 July 2007. Mr Batley had a trade background, had obtained a Bachelor of Health, Occupational Health and Safety and a diploma in Government Workplace Inspection. He attended at the workshop because of a complaint lodged by the plaintiff. His purpose was to determine whether the second defendant was in breach of the *Workplace Health and Safety Act* 1995. The standards of that Act are not those of the common law. He determined that the second defendant had "not ensured workplace health and safety at the workplace."[45]

[71] Mr Batley was asked about the method of the initial retrieval of the rods from the stack that he observed. His evidence in chief was:

> "And can you describe what the mechanism used by that worker was? The worker was required to stand on a platform at the - the end of, I guess you could say the reinforcing table, or bed. Because the rods were intertwined, the worker was required to get hold of the ends of the rods, pick them up, and shake them, to try and
>
> The witness is indicating both hands over his right shoulder. So he was taking a fair proportion of the weight of the bar? Definitely.
>
> And was he flicking it? Yes.
>
> All right. And would that have - lifting the bar and flicking, you wouldn't be taking the whole weight of the bar? No. Probably - probably three-quarters of the weight of one - one bar, if you were lifting one bar.
>
> But you'd be also attempting to lift it from in between other bars; is that correct? That's correct.
>
> So that'd increase the force required? That's correct.
>
> Do you form any view as to whether that was a safe method? That that was an unsafe method.
>
> Why do you say that? Why?

---

44 T2-89/15-30

45 Ex 3

> Mmm? Because it was actually causing forceful exertions on - on the person doing - doing the job. It wasn't necessarily just one piece of rod being shaken at one time. Because of the bars being intertwined, a series of bars were lifted and shaken at once, therefore, placing strain on - on joints and elbows, joints, muscles, and that sort of thing.
>
> When you say to describe a fall with your hand motion of a two-handed lift over your right shoulder? Yes.
>
> And would that put strain on the back? Definitely. Taking into account the height of the bed which the - the iron bars were resting on and the position of the - the person standing on the platform actually shaking the bars.
>
> I don't understand the height comment? What's it all about? Well, there's - there's a series of steps that the worker stands on.
>
> Yes? To actually have access to the steel bars.
>
> Yes? If it wasn't adjustable, I guess you could say, the - the platform that they were standing on wasn't adjustable so it
>
> One height for all? One for all, exactly.
>
> One for all. And more appropriate would have been an adjustable height or steps? To do that particular task, I would - I would not have allowed that task to be undertaken from day one. There should have been a better system of work bringing those rods into the workplace without having to rearrange them from the bundle that they arrived in."[46]

[72] Mr Bashford described the task this way:

> "In carrying out those operations, are you able to tell his Honour of any difficulty that you experienced?-- Depending on how you've been taught, but most of us get taught the same way. You look along the sides of the steel, down the lengths of the steel to make sure they're free to flick them out."[47]

[73] And in cross-examination in a little more detail:

> "When you say sometimes a lot worse, do you mean that the bars are more intertwined and more difficult to get bars out?-- Yeah. Oh well, depends what you call difficult getting them out. If you work - you work around - around watch you twist it. 'Cause if you actually look along the bars you can find the ones that are actually loose, and they usually dig out the ones that are actually intertwined in it.
>
> But some are intertwined, are they not?-- Oh, yeah.
>
> And then you're required to flick them, flick them out, are you?-- Mmm. Mmm.
>
> What do you mean by "flick out"?-- Just use your hand like that. Like that.
>
> All right. Well, one hand?-- That's about all it takes. If you follow your lines of your bars, you'll - you can flick them out like that.

---

46 T1-96/1 – 97/5

47 T3-77/30

> One hand when they're weighing anywhere from say, 20 to 70 kilograms, you're using one hand, are you?-- Yeah, 'cause you're only picking up the end of the bar, and the bars are like a piece of rope. It's amazing to think that something that can be that round can actually flick like a piece of rope.
>
> And it'd have other bars - on occasion there would be other bars resting, or part resting on those bars, would there not?-- Yeah, so you-----
>
> You had to flick - not only lift the bar that you're operating, but also the bar that's lying on top of that?-- If you - yeah, if you do flick and there's a bar sitting on it, you try and find ones that are loose to dig them bars out. You don't just sit there and flick like crazy, it's like shaking somebody's hand for half an hour, you'll end up hurting yourself.
>
> And it's a repetitive job that flicking, is it?-- Yeah."[48]

[74] Mr Bashford said that it was not necessary to actually lift the bars.[49] He rejected the suggestion that it was heavy work.[50] He thought that in any one processing of steel bars about four to five minutes would be spent flicking bars out and three minutes pushing the steel through the machine.[51]

[75] Mr Simonds added little to the picture. He said "it's just basically you flick the bar out, it rolls down onto the rollers".[52] After agreeing that the rods could be delivered intertwined he indicated that you would use one hand to extract them. When challenged he said:

> "…but you'd - you'd look at the bars and you take the one that looked the most free before you'd start. You - you wouldn't just - just grab a bar and try and flick it without-----
>
> You'd try to make life easy for yourself?-- Yes.
>
> But there'd be occasions where you'd have to flick it to get other bars off, or disentangle it, wouldn't you?—Yes"[53]

[76] An orthopaedic surgeon, Dr Boys, whilst disclaiming any particular expertise, said that the forces involved were not necessarily commensurate with the weight being manoeuvred.[54]

**The Movement Along the Roller Bed - The Defendants' Case**

[77] Mr Simonds' evidence concerning the effort required to move rods along the roller bed was:

> "Now, will you explain to his Honour what force is needed to have these - how do you handle it? We've heard a description of something like packing a rugby scrum, going perhaps-----?-- Well, if-----

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48 T3-87/38 – 3-88/20
49 T3-84/40
50 T3-89/1
51 T3-103/20
52 T4-64/1
53 T4-67/52 -4-68/5
54 T5-33/20-40

> -----over the top and pushing them?-- -----you had to pack a rugby scrum with it, you know, there's - there'd be something wrong because it's - it's not like you can put your hand on them and roll them like that.[55] You'd - you know, you'd just put your hand on the top. Just put the palm of your hands on and push them like that … . The thicker - the bigger the steel it is you might have to put a bit more effort, but it wouldn't be like how they pack it like a rugby - the term, "packing a rugby scrum", it wouldn't be to that effort involved.
>
> ….
>
> And in your 35 years, in your 10 years of operating the roller, have you ever had any problem, experienced pain or suffering or anything going beyond a muscular lesion in doing that sort of thing? No, I've never, like - once you - you operate that machine constantly you get to know what works for you and like, what's the easiest way for you to do things with it."[56]

[78] Mr Bashford gave similar evidence concerning the method of moving the bars along the roller bed:

> "And then you put your hands around it?-- Yeah.
>
> What, two hands?-- Yeah, well, as much as you can 'cause if you push the steel in together it will drag through with it. It mightn't come out level but that's why you got the stoppers for when you make your measurement. It brings them up and brings them up flush so you can cut that - that length.
>
> All right. So you put your hands around it, that's your initial - to break the - or at least to establish-----?-- And measure.
>
> -----the momentum?-- Mmm.
>
> Is that right?-- Yeah.
>
> And then you feed it over the next roller?-- Yeah.
>
> All right. And as you move along, you describe the movement as - once you've commenced the momentum, you move along, what, with only one hand on top, or two?-- Oh, usually you put two on there just to make sure it does move evenly.
>
> Right. And then if you're using 12 gauge and it's the one in 10 that's going to impact with the mouth of the cutter, what happens?-- Well, normally, 'cause you got your hands on top, it'll just slide. Your hands will slide and you say okay, pull it back. Either push your hands on the back of it to bring the bars up so they do go over or put your hand underneath. 'Cause you got gloves on, it shouldn't - it won't penetrate your hands or anything." [57]

[79] Mr Bashford described the force needed to move the rollers in these terms:

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55 The sense of his evidence was the exact opposite of that recorded. I suspect that a significant pause does not appear in the transcript. As the next sentence shows Mr Simonds asserted that one could "put your hand on them and roll them like that" and he indicated with a waving motion of his hand.

56 T4-54/3-15; 40-48. Mr Simonds was unimpressed with the rugby scrum analogy and said so in strong terms: T4-77/25

57 T3-104/10-40

> "…Then you just roll them onto the actual rollers. The only initial force you've got to actually use is to get the actual steel moving. Once it's moving you're right, it's like just the initial inertia.
>
> Right. And what sort of force are you talking about to overcome that initial inertia?-- Oh, how do you describe that? Probably the same sort of inertia you sort of use to push a go-kart, I suppose, or something like that."[58]

[80] Mr Simonds thought that even the go-kart analogy was going too far.[59] While I am not critical of Mr Bashford, so imprecise a description is not particularly helpful, as it can mean different things to different people. What is plain enough is that Mr Bashford thought that the force involved was quite modest.

[81] Mr Simonds performed the "pre start up" on the machine of the day in question. That indicates that he worked on the machine on 9 April on the morning or day shift. Mr Simonds felt that the positioning of the defective or missing rollers was of significance. The further from the entry to the cutter the less relevance they had.[60] His practise was to adjust the rollers accordingly. He plainly thought that the extent of the missing or defective rollers had little impact on the functioning of the bed because of the relatively few affected.[61]

[82] Mr Bashford's experience was that there was no appreciable increase in the force needed to move the rods when the rollers malfunctioned in the roller bed.[62] He did not accept the rugby scrum analogy.[63]

**The Movement Along the Roller Bed - The Plaintiff's Case**

[83] The plaintiff asserted that the bed was "pretty shabby" with rollers missing or seized, by which he meant that they didn't work at all and he said in relation to the difficulties this presented:

> "Did it make any difference that rollers were missing and rollers were seized, to how you did your work or how hard your work was?-- Well, I'm not really sure because I'd never - like, I wasn't sort of - if they weren't fixed, they - it wasn't as though when I started that they were all great, and they were all shiny and new. What I - when I started, this is the way it was, so I wouldn't know. There was no - but what I - I know that it did - it was, it was hot, hard work and it did take a hell of a lot of effort to put those rods into the - into the Pratt machine."[64]

[84] Later he said of the degree of force needed in pushing rods into the cutter:

> "...if there was two on, which a lot of the time there was.[65] It either used to be Jeremy or I. He would have to stand near the Pratt machine and I would get in the middle, so around the six metre mark on the rods, and get - it was virtually getting a run up, because they were that heavy. It was like - you - because **it was a standing start.** It's all right when things start to roll, so - but you had to get a -

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58 T3-77/40-50
59 T4-77/32
60 T4-53/45
61 T4-57/45
62 T3-79/10
63 T3-94/30
64 T1-28/1-10
65 I note that on the day in question the plaintiff worked alone

exert a lot of pressure into getting it going. And that's what the issue was."[66] (my emphasis)

.

[85] And later again the plaintiff said:

"When you say "a run up" go to photograph D, how far did you have to run up to get them going?-- It was virtually - well, I - I always refer to it, it was like being in a scrum. **It was a standing start** and you just used your legs and - and tilt your - tilt your body over to give you that initial push"[67] (my emphasis)

[86] Mr Bosel described the work of pushing the bars as "heavy". His evidence was:

"All right. With the condition of the roller bed, as you found it in October 2006, how would you describe the task of moving along the reo bars on the roller bed?-- Heavy.

Okay. Could you describe the manner you did that?-- You had to put both hands on the steel to hold it together, and you had to get in and use your legs and just push, and once you got it moving it was all right, but then that had trouble going through the actual cutter.

All right. Before we get to the cutter, you indicated you put both hands on the steel, hold it together?-- Yeah.

Bend your knees and push?-- Yeah, and get down and push.

Did you ever play football in your younger days?-- Yes.

Rugby or rugby league?-- Yes.

Rugby league?-- Yes.

It is similar to that type of exercise, pushing in a scrum?-- Yeah, pushing in a scrum, but trying to hold onto the steel at the same time.

All right. And the bar - some of the roller bars were seized and some were missing; is that correct?-- Yes, that's correct.

Do you know how many were missing?-- I couldn't tell you, no. There was probably a good half a dozen, and the amount that were - wouldn't roll properly, I haven't got a figure. There was too many.

More than six?-- Oh, a dozen or more."[68]

[87] I have concerns that Mr Bosel was apt to overstate the case. I do not suggest that he was not honest in his evidence but on at least two matters where there was some means of checking his evidence, his recollections did not accord with that of other witnesses. I refer to the extent of the entanglement problem and the extent that rods would run into the machine and cause jolting.

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66 T1-29/40-48

67 T1-30/20

68 T2-90/58 – 91/35

[88] Mr Batley, the Occupational Health and Safety officer, said of the roller bed he saw in July:

> "It was in very poor condition in - in the way that there were bearings seized in some of the rollers and also some of the rollers were missing."[69]

[89] This was of significance Mr Batley said because the state of the bed "would make that quite difficult … to push the pieces of steel into that machine".[70] In re-examination he said that the roller bed was "unsafe" due to lack of maintenance.[71]

[90] Evidence from Mr Simonds, as I have said a long term employee of the second defendant, was to the effect that the bed would have been in much the same condition in April 2007 as it was in July at the time of Mr Batley's visit.[72]

[91] It was difficult to get any impression of the number of rollers that were said to be missing or defective – either in April or in July. There were about 80 rollers in the bed. Mr Batley checked about a dozen he thought. He found three types of defects – some rollers were missing, some had not been properly maintained so that they did not run freely, and some had lost their bearings and had dropped and so were effectively missing. At one point he referred to the roller bed as "dilapidated". His evidence under cross examination was:

> "…you say there were some seized - but the majority of the rollers were, in fact, rolling very freely?-- No, that's not right. That's not correct.
>
> Right. How many did you test?-- I can't give you an exact figure, but I looked over the whole distance of the roller bed and inspected all of the rollers, just like a quick inspection, and gave them a bit of a flick as I went along.
>
> All of them?-- Wouldn't say every single one of them, but like I said, over all of the roller bed, I would've probably checked probably about a dozen.
>
> And of that dozen, you'd admit that most of them were rolling; most of them were moving freely?-- In a fashion.
>
> In a fashion?-- In a fashion, yes.
>
> All right?-- They weren't moving as freely as what a roller bed or a roller that has been continuously maintained - in a maintained fashion.
>
> …
>
> Now, are you suggesting that there were rollers that just didn't move at all as opposed to the others that you say weren't moving as freely as you would've liked them to be moving?-- There were rollers that weren't moving as freely as what they should have.
>
> Yes?-- Because of lack of maintenance.

---

69 T1-93/55
70 T1-94/53
71 T2-18/22
72 T4-60,61

> Yes?-- There were rollers there that had bearings that were actually missing completely, probably because of, you know, certain forces being put on them.
>
> Yes?-- And they'd collapsed and not been replaced.
>
> And were those rollers - notwithstanding the absence of the bearings - still rolling?-- They were rolling, but they - when the bearing goes missing out of the end of the roller, they actually sit lower than the rest.
>
> Right?-- So in actual fact, they aren't coming into play at all.
>
> Right. It's as though they're not there. It's as though they're missing?-- That's it. That's right.
>
> And did you do a count on how many of the rollers in the bed were at a lower height so they weren't, in fact, bearing-----?-- I did not.
>
> You didn't?-- No. But there were quite a few of them.
>
> Well, when you say "quite a few", what are we - is it right to say that there are 80-odd rollers in this whole bed?-- I didn't take a count of them, so I can't answer that.
>
> All right. Well, just assuming that it is a significant number of that sort, are you suggesting any more than one or two were absent the bearings?-- I - there were definitely more than two.
>
> Right. Any more than three?-- I - once again, I can't tell you because it's that long ago."[73]

[92] Mr Batley was asked about the plaintiff's description of the force required and he said:

> "The description given as to the task is that - by Mr Stitz, was that because of the state of the roller bed and the number of bars he was using, he almost had to, as a - like, a rugby scrum - take a run-up to get it moving? To push them through.
>
> Is that your observation? Yes, that's correct."[74]

[93] That observation was amended a short time later:

> "Mr Stitz indicates that it was a bit like a rugby scrum, I think he may have indicated, where you run up, pushing as if you're going - if you're a rugby person going into a mall (sic)? Mmm.
>
> Is that how you observed the worker that day? Well, you'd have to grab the bundle and - and force them along, if that's what he calls as being a rugby-type grip, I guess you can say."[75]

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73 T2-9 – 2/10 (incorrectly numbered as day 1)

74 T1-97/15-20 – this in fact misstates the plaintiff's evidence – as I have pointed out above he said on more than one occasion that it was a standing start. I think that Dr Cross was misled by a reference by the plaintiff to "virtually getting a run up" which he quickly corrected to "standing start": see T1-29/45

75 T1-98/37-45

[94] Thus Mr Batley's interpretation of what he was being asked related to the grip on the bundle, not the force being used. To say, as Dr Cross did in his submissions,[76] that the plaintiff's method of pushing the rods along the roller bed was consistent with Mr Batley's observations is to considerably overstate the degree of accepted coincidence.

[95] Mr Batley concluded that "workers were at risk of musculoskeletal injury" by performing tasks in the manner that he observed.[77] He gave that evidence in response to a question that covered the jolting force when the rods missed the entry to the cutter as well as the two risks that are now relevant.

[96] Under cross examination Mr Batley appeared to accept that his concerns were restricted to two matters – the untangling of the rods and the jarring caused when the rods struck the machine.[78] He accepted that he caused an Improvement Notice to be issued which referred only to those two matters.[79] However in re-examination he asserted that his concerns, and the Improvement Notice, related to all four of the risks that the plaintiff identified with the work, risks that he said exposed workers to musculo-skeletal injury.[80] His evidence in re-examination seemed to me to reflect the tenor of his evidence as a whole and better reflect his intended meaning.

**Conclusion as to Whether Any Injury Suffered Was Caused by Breach of the Duties Owed**

[97] What then is the end result of this evidence?

[98] It is not known what gauge steel rods were processed by the plaintiff at the start of the shift on the relevant day. The smaller the gauge the more likely the degree of entanglement and conversely. The amount of weight taken was estimated by Mr Batley at three-quarters of the weight of a bar plus the weight of any rods that may have been resting on the rod selected. Obviously a worker would endeavour to pick a rod from the top of the pile or the least entangled. Whether the plaintiff was confronted with the problem of entanglement on the day in question and prior to the onset of his symptoms is unknown. Whether the worker Mr Batley observed on 31 July was performing the work in the fashion that the plaintiff did on 9 April and on bars of the same dimensions is unknown. Mr Batley's description of a two handed lift above the right shoulder does not match the plaintiff's account of his method.

[99] The mass of the bars that were required to be pushed along the roller bed could be in the vicinity of 210kgs or as low as about 78 kgs. The pushing along the roller bed required an unidentified force to be exerted on the spine. The coefficient of friction of steel on steel in this situation is not proved. It would plainly reduce and, I suspect, considerably reduce the effort required to move the mass. So much would be consistent with the evidence of Simonds and Bashford. What mass the plaintiff pushed before the onset of his symptoms is unknown.

[100] There were an unidentified number of rollers that were defective or missing. Mr Simond's point that the location of these missing or defective rollers was of

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76 Para 4.12 of submissions received 26 August 2011
77 T1-100/35
78 T2-4/15-55
79 Ex 3
80 T2-21/40-2-22/20

significance was not shown to be wrong. The location of the dozen rollers checked by Mr Batley is not established. Mr Simonds had great experience with the roller bed. He had checked the machine on the morning of the day the plaintiff was injured. He presumably complied with his own criteria of relocating missing or defective rollers so as to minimise their effect.

[101] Whatever the exertion involved it was required of the plaintiff on an unknown number of occasions before the onset of symptoms.

[102] The lay witnesses were in conflict as to the degree of force involved in the work. Both the plaintiff and Mr Bosel were inclined to over state the case.

[103] Mr Batley was concerned with enforcement of the provisions of *Workplace Health & Safety Act*. The test that he had to consider was whether the employer had ensured workplace health and safety.[81] That is not the common law test. Unsurprisingly he found the workplace to be unsatisfactory. He determined that there was a risk of musculo-skeletal injury. That opinion does not seem to me to take matters very far. Any manual handling task involves a risk of musculo-skeletal injury. The question here is the extent and likelihood of injury. What he had in mind is unexplained.

[104] I am satisfied that there were measures available to the employer, reasonably open to it in all the circumstances, that would have reduced the risk of injury. Those measures would not have unduly impeded the performance of the work. What I do not know is whether the adoption of such measures would probably have protected the plaintiff from the risk of injury.[82]

[105] While it is reasonable for the plaintiff to argue that he was exposed to work that had the potential to injure his back, and that the inference should be drawn that the work caused his injury, whatever be its character, it does not necessarily follow that work in breach of duty caused his injury.

[106] In *Neill v NSW Fresh Food & Ice Pty Ltd*[83] Taylor and Owen JJ said:

> "in many cases no more than common knowledge, or perhaps common sense, is necessary to enable one to perceive the existence of a real risk of injury and to permit one to say what reasonable and appropriate precautions might appropriately be taken to avoid it."

[107] While Mr Simond's evidence of long use of the machine without injury does not result in a finding that there was necessarily no relevant risk of injury, it does in my view prevent any perception of the existence of "a real risk of injury" by the application of common sense and precludes a necessary finding, without more, that some action ought to have been taken.

[108] In *Betts v Whittingslowe*[84] Dixon J said:

> "Breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the

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81 Section 28(1) of the *Workplace Health & Safety Act* 1995

82 See *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 per Windeyer J at p319

83 (1963) 108 CLR 362 at 368; [1963] HCA 4

84 (1945) 71 CLR 637 at 649; [1945] HCA 31

> contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty."

[109] However for reasoning of that kind to apply the facts proved need to be compelling. As Dixon J said of the evidence in *Betts* "the facts warrant no other inference inconsistent with liability on the part of the defendant".[85]

[110] In my view the facts do not warrant that inference being drawn here. Here the plaintiff was engaged in manual work. Such work has a capacity to injure – particularly if one has a degenerate back, as did the plaintiff.[86] That would be irrelevant if it were shown that the work that the plaintiff performed exposed him at the material time to forces that were at a level likely to injure a man of normal fortitude. But that is not shown.

[111] The approach to take to causation in negligence suits was recently discussed by French CJ and Gummow J in *Kuhl v Zurich Financial Services Australia Ltd*.[87] Of present relevance their Honours mentioned *Hamilton v Nuroof (WA) Pty Ltd* in these terms:

> "That case concerned the duty of an employer to adopt a safe system of work. The decision has been said[88] to indicate that it may be unnecessary for a plaintiff to show exactly how the injury occurred if there be a defect in the system of work and it is clear that the injury arose out of the defective system."

[112] Here it is shown that the injury occurred against a background of a defective system of work but it is not "clear that the injury arose out of the defective system" in the sense of being caused by it.

[113] The plaintiff submitted that the decision of the High Court in *Amaca Pty Ltd v Ellis*[89] supported his assertion that an inference should be drawn that the injury sustained was caused by the negligence of the defendants. There the question was whether the plaintiff had demonstrated, where scientific certainty was impossible, that the negligence of the defendant had caused lung cancer through exposure to asbestos. The relevant point however is that the plaintiff there disavowed:

> "any argument in these appeals that demonstrating only that the exposure to asbestos increased the risk of contracting lung cancer was sufficient to establish causation."[90]

[114] Here the plaintiff has shown that there may have been an increased risk of injury given the way the defendant conducted its works but that does not necessarily demonstrate that its actions in breach of duty did in fact cause the injury.

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85 (1945) 71 CLR 637 at 649. See also the comment of Kiefel J in *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at 897 [139]; 245 ALR 653 at 688; [2008] HCA 19

86 E.g. see Dr Wallace at T5-20/35; 5-21/42; Dr Boys – T5-28/20 the degeneration being described by him as "mild to moderate… probably moderate" and at two levels: T5-33/5 - 5-34/3

87 [2011] HCA 11 – in dissent but that is not relevant to the statement of principle

88 Citing Glass and McHugh, *The Liability of Employers in Damages for Personal Injury*, (1966) at 43–44.

89 (2010) 240 CLR 111; (2010) 263 ALR 576; (2010) 84 ALJR 226; [2010] HCA 5

90 At [12]

[115] In my view the plaintiff has not established that any breach of the common law duties owed has caused any injury.

**Nature of Injury**

[116] As I have mentioned the nature of any injury suffered is in issue. Dr Wallace and Boys disagreed on whether any injury was sustained in the relevant work.

[117] Again the issue is bedevilled by the plaintiff's apparent inability to give a consistent history. Both of the surgeons received a history which suggested that the onset of significant pain occurred on the day that the plaintiff suffered the first signs of discomfort. Dr Wallace recorded, after referring to the work of cutting reo bars:

> "He states that he developed low back pain whilst doing this bending and pushing. This was initially not severe but after his smoko break he had severe stiffness and pain in the lumbar spine. He worked on with pain."[91]

[118] Dr Boys recorded a similar history.[92]

[119] Dr Boys' view was that the plaintiff's ongoing symptoms were "activity related and postural low back symptoms as a consequence of degenerative changes within the lower lumbar spine."[93] He did not accept that there was any evidence of an injury being sustained at work. Radiographic images show a bulging disc at L5/S1 consistent with degeneration but no focal prolapse.

[120] Dr Wallace held the view that the plaintiff did sustain an injury at work. When cross examined as to why he held that view he replied:

> "And what leads you to a different conclusion to Dr Boys conclusion?-- That was based on the history given to me by Mr Stitz, in which he - in which when I interviewed him on the 6th of December 2007, he gave a history of a specific work related injury to his lower back. And that was when he was - he told me that he was cutting reo in a guillotine."[94]

[121] And later Dr Wallace again stressed that his view was formed because "the history given to me was that he injured his back whilst cutting - guillotining reo."[95] He formed that view because "an event which occurred has been a significant contributing factor to his current disability."[96]

[122] That last comment tends to beg the question.

[123] It has been said that "a prime duty of experts in giving opinion evidence: [is] to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions"[97] The criterion that Dr Wallace relies on, to the extent that it is revealed at all, is flawed. The plaintiff does not give a history of "a specific work related injury to his lower back" as Dr Wallace assumed. A history of discomfort

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91 Ex 5 at p 2. No different history is considered in his subsequent reports. Interestingly this history matches the version given in the Notice of Claim for Damages (Ex 19).

92 Ex 44 at p 2

93 Ex 44 at p 4

94 T5-18/26-31

95 T5-19/31

96 T5-20/40

97 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59] per Heydon JA

one day but with an ability to do hard manual labour for the next three days before the onset of severe symptoms at around smoko on the fourth day is not the same as the history that Dr Wallace has assumed.

[124] Whether adoption of the history that the plaintiff gave in evidence and now says is accurate would permit Dr Wallace to maintain the same opinion or cause him to alter his views was simply not explored. If anything Dr Wallace seems to be drawing comfort from the temporal proximity of the onset of significant symptoms to the work injury he assumes. That temporal proximity is more tenuous than he supposed. Whether the discomfort that the plaintiff spoke of as initially occurring and the continuing ability to carry out hard manual work of the type that the plaintiff did for the next few days is consistent with the injury that Dr Wallace assumes occurred on 9 April is far from clear.

[125] The difficulty that this presents is that Dr Wallace's opinion does not have a "rational relationship with the facts proved" as it is not based on a sufficiently accurate assumption of fact. In *Makita (Australia) Pty Ltd v Sprowles* Heydon JA said:

> "The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material: see generally *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510; *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved."[98]

[126] In my view the history that Dr Wallace has assumed and that forms the basis of his views is not "sufficiently like" the history that the plaintiff now gives to justify acting on Dr Wallace's evidence.

[127] That being so all that can be found is that the plaintiff has experienced a modest temporary aggravation of a degenerate back condition as a result of the work performed on 9 April.

[128] I am conscious of the plaintiff's account of the pain increasing from Monday through to Thursday and then the problem getting out of the chair at around 6 pm on Thursday when he had "excruciating pain" and that he struggled to finish the Thursday shift.[99] There are many cases in which histories of this type have been analysed by expert medical witnesses and hypotheses in favour of causation of a significant back injury drawn.[100] But there are two problems here. First, there is no medical evidence on which to base a finding of a causal relationship between a discal injury of some sort and the work on the Monday and in my view that is

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98 (2001) 52 NSWLR 705 at [64]

99 T1-33/50 – 1/34/25

100 That I cannot draw any direct conclusion from evidence in other cases on disputed issues in this case is of course fundamental: *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 277 ALR 611 at [44]

essential.[101] And secondly, that would require an uncritical acceptance of the plaintiff's account of his symptoms over those few days. I do not feel able to do that. Quite apart from his presentation in the witness box, which did not inspire confidence in the reliability of his recollection, he has the significant difficulty that he has given a number of out of court versions that do not contain this history. Added to that is the improbability of the plaintiff working in this work, which on any view was reasonably significant manual labour, for three days with a discal injury without complaint and, so far as the evidence shows, without any other worker noticing.

**DAMAGES**

[129] As neither doctor had an accurate history it is not possible to be remotely precise about the extent or duration of the modest temporary aggravation that I have found.

[130] Doing the best I can I assess damages at $2,000.

**Orders**

[131] There will be judgment for the defendants.

[132] I will hear from counsel as to costs.

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[101] I am conscious of Dr Boy's answer at T5-34/35 which comes closest to providing a causal link to a permanent aggravation of a degenerative condition but he required evidence of "a specific incident which gave rise to injury" and there remain problems with the reliability of the history.