SUPREME COURT OF QUEENSLAND

CITATION:	*Cross v Moreton Bay Regional Council* [2013] QSC 215
PARTIES:	**PETER JOHN CROSS** (plaintiff) v **MORETON BAY REGIONAL COUNCIL (FORMERLY CABOOLTURE SHIRE COUNCIL)** (first defendant) AND **ROBERT WILLIAM PAULGER AND WENDY ANNE PAULGER** (third defendant)
FILE NO/S:	BS 10036 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	30 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 – 21 March 2013
JUDGE:	Jackson J
ORDERS:	**The judgment of the court is that:** **1. the plaintiff's claim against the third defendant is dismissed.** **2. the parties provide minutes of the judgment proposed for the plaintiff's claim against the first defendant and for orders for costs.**
CATCHWORDS:	EMPLOYMENT LAW – LIABILITY AT COMMON LAW FOR INJURY AT WORK – INJURY OCCURRING IN COURSE OF EMPLOYMENT – where the plaintiff worked for the defendant maintaining roads and adjacent areas – where the plaintiff was required to ascend and descend from the tray of a truck in the course of his employment – whether the plaintiff slipped off the step of the truck and sustained a back injury TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the plaintiff was required to ascend and descend from the tray of a truck, in the course of employment

– where the plaintiff slipped off the step of the tray and sustained a back injury – whether the employer breached its duty of care for failing to provide safe access from the tray of the truck – whether the employer provided equipment that fell below the standard of care required

TORTS – NEGLIGENCE – DANGEROUS AND INJURIOUS THINGS, ETC – BREACH OF DUTY OF CARE – where custom tray builder manufactured a tipping tray of truck to specification – where the manufacturer included a non-slip surface on the access step of the tray – where non-slip surface not maintained on the step at the time of the plaintiff's injury – whether the manufacturer breached its duty of care to the plaintiff, as a user of the truck, in failing to provide other protective access systems

Adelaide Chemical and Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514; [1940] HCA 44, cited
Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568; [2005] HCA 26, cited
AMACA Pty Ltd v Booth (2011) 246 CLR 36; [2011] HCA 53, considered
Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301 at 307; [1986] HCA 20, cited
Bennett v Minister of Community Welfare (1992) 176 CLR 408 at 416; [1992] HCA 27, cited
Betts v Whittingslowe (1945) 71 CLR 637 at 649; [1945] HCA 31, cited
Bull v Rover Mowers (Aust) Pty Ltd [1984] 2 Qd R 489, cited
Cameron v Foster [2010] QSC 372, considered
Chappel v Hart (1998) 195 CLR 232; [1998] HCA 55, cited
Coregas Pty Ltd v Penford Australia Pty Ltd [2012] NSWCA 350, cited
Craddock v Anglo Coal (Moranbah North Management) Pty Ltd [2010] QSC 133
Cross v TNT Management Pty Ltd (1987) 46 SASR 105, cited
Czatyrko v Edith Cowan University (2005) 79 ALJR 839; [2005] HCA 14, cited
Donoghue v Stevenson [1932] AC 562; [1932] UKHL 100, cited
Dovuro Pty Ltd v Wilkins, (2003) 215 CLR 317; [2003] HCA 51, cited
Duma v Mader International Pty Ltd [2013] VSCA 23, cited
Erwin v Iveco Trucks Australia Ltd (2010) 267 ALR 752; [2010] NSWCA 113, cited
Fitzgerald v Penn (1954) 91 CLR 268; [1954] HCA 74, cited
Fitzpatrick v Jobs Engineering [2007] WASCA 63, cited
Grant v Australian Knitting Mills [1936] AC 85, cited
Green v Berry [2001] Qd R 605; [2000] QCA 133, cited
Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18; [1956] HCA 42, cited

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 296 ALR 3; [2013] HCA 10, cited
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, cited
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, cited
McGhee v National Coal Board [1973] 1 WLR 1; [1972] UKHL 11, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1 at 7; [1995] HCA 5, cited
Roads and Traffic Authority v Royal (2008) 245 ALR 653; [2008] HCA 19, cited
Roche Mining Pty Ltd v Jeffs [2011] NSWCA 184, cited
S J Sanders Pty Ltd v Schmidt [2012] QCA 358, cited
Snorkel Elevating Work Platforms Pty Ltd & Anor v Borren Metal Forming Ltd [2010] ACTCA 23, cited
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; [1986] HCA 1, cited
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, cited
Suosaari v Steinhardt [1989] 2 Qd R 477, cited
Todman v Victa Ltd [1982] VR 849; [1982] VicRp 85, cited
Travel Compensation Fund v Tambree (2005) 224 CLR 627; [2005] HCA 69, cited
Williams v Mount Isa Mines Ltd [2001] QCA 101, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: M Eliadis and C Fitzpatrick for the plaintiff
WDP Campbell and F Dawson for the defendants

SOLICITORS: Mullins Lawyers for the plaintiff
Bruce Thomas Lawyers for the defendants

[1] **JACKSON J**: From a date between late June and early August 2006 the plaintiff, Mr Cross, experienced lower back pain. He was then 44 years old and was working for the Caboolture Shire Council as a ganger, level 6, in charge of a truck which he and his offsider used to carry out maintenance work for the council. He had been working for the council since January 2005.

[2] From early August 2006, he was treated for his back pain under the initial care of his general practitioner. Imaging by X-ray and a CT scan followed. They revealed a degenerative lower back. Physiotherapy, pain relief and rest were tried. The extent of Mr Cross's physical duties at work was reduced. Over a year later, he was referred to an orthopaedic surgeon. An MRI scan confirmed a moderately large L5/S1 disc herniation. By March 2008, he consulted a second orthopaedic surgeon who recommended surgery. On 20 March 2008, the surgeon performed a discectomy and explored the right S1 nerve root. Except for a short period of progress, the surgery was not successful.

[3] Mr Cross returned to work on restricted duties from May 2008 but couldn't continue. In September 2008, he ceased work. In June 2009, his employment was

formally terminated. He is an invalid pensioner. His impairment has affected most aspects of life.

[4] Before this back injury, Mr Cross's life was that of an active man both at work and at leisure. His hobbies included surfing and motor cycle riding. His employment had ranged widely over a number of physical occupations. They included prior employment by the council, and before that the Main Roads Department, for over 16 years, in a similar capacity to his employment when injured. Before that, he had operated a drilling rig and undertaken farm work for 7 years. He has truck driving and machine operating qualifications.

The event

[5] Mr Cross says that he suffered the lower back injury at work on 26 June 2006. He identifies the date in a variety of ways. First, he says that he made a contemporaneous note in his personal work diary. Secondly, he says it was during a period of school vacation and on that day he was engaged in covering a traffic sign or signs on the Bellthorpe Range Road that regulated speed in a school zone. Thirdly, he says that it was the first day back from holidays of his offsider, Mr Nipperess.

[6] As he recounted it in evidence in chief, Mr Cross and Mr Nipperess had completed covering up one of the signs. After that, Mr Cross was on the tray of the truck preparing the spray equipment for the purpose of poisoning some weeds around the sign and near the edge of the road. He pulled the cord, to start a motor to get the pump going, to pressurise the spray tank. He uncoiled some hose for the sprayer and hung the spray gun over the back of the tray of the truck.

[7] He then moved to get off the tray of the truck by using the step at the front, on the passenger side. There was a length of plastic pipe fixed vertically behind the headboard of the tray located near the passenger side. The pipe was used to store shovels or rakes or the like with their handles placed facing downwards inside the pipe. Mr Cross put his left hand on the handle of a tool located in the pipe, lifted his left foot from the floor of the tray over the side of the tray, and lowered it onto the rung of the step below. He then lifted his right foot off the floor of the tray and swung it over the side of the tray, and started to bring it around to lower it down to the ground. As he did so, he was holding onto the handle and had his left foot placed on the step. As he brought his right leg around, his left foot slipped from the step.

[8] At that point he pushed himself away from the truck, as he said, "so I didn't smash my face" and he "just landed backwards hard on my heels". He said that he "nearly went on my back but I didn't and I just went backwards further and just grazed the tree", which was "a little bit from the side of the truck." He also said that the tree "stopped me from going on to my back". The drop in level from the rung of the step to the ground surface was about 570 mm.

[9] Mr Cross says that at that point he felt "pain in the lower back and down my right leg" and that he had not felt pain like that in his lower back before.

[10] Mr Cross said that he "limped a little bit" and that Mr Nipperess "asked if I was alright". He said he replied: "Yeah, it will be alright. I'll just stop for a couple of minutes."

[11] He said that not long after this conversation, he resumed the process of getting the spray gun at the back of the tray and they completed the spraying which would have taken ten minutes at the most.

[12] Mr Cross says that in the afternoon, when he and Mr Nipperess returned to the depot, John Schiulaz and Stuart McNeil were talking in front of the office and "I just told them what had happened". He said to them: "I slipped off the truck and it will be right but…". He also says that he made a note of the incident in his diary.

[13] Contemporaneous objective evidence of Mr Cross making reference to the event on 26 June 2006 is potentially important. The relevant part of his diary entry provides that "told [name] on **that day**" (emphasis added). It is in a curious form for a contemporaneous record. On the day, one might expect a diarist to record the event without referring to the day or perhaps to write "today". Even the next day, the natural reference would be "yesterday". The reference to "that day" is an indication that it was done on a later day. Mr Cross denied that was so.

[14] The defendants' defence of Mr Cross's claim is partly based on the contention that Mr Cross's diary note of the day was made well after the event and is either a reconstruction or a fabrication. I accept that it was made later. It is not necessary to determine exactly when. I do not consider it safe to rely on it, as a contemporaneous note. The defendants rely on that fact and other matters to contend that Mr Cross's version of events for 26 June 2006 should not be accepted.

[15] Mr Schuilaz made a note on an official Construction Diary dated 26 June 2006, for the day's work for the gang which he led (which did not include Mr Cross):

> "Excavate, lay & backfill 375 RCP, gullies, headwalls
>
> Peter Cross reported an incident today in which he slipped off the side step on job truck."

[16] As to Mr Schiulaz's note, the evidence he gave was clear that the entry he made was on a copy, not the original, and well after 26 June 2006. It is clear that Mr Schiulaz was involved on 22 or 23 August 2006, in the process of Mr Cross making an "Injury and Incident Report". Mr Schiulaz did not remember when he had altered the copy of the Construction Diary for 26 June 2006. He agreed that it was possible he had done it when Mr Cross made his application for compensation in December 2007. He said that the date of 26 June 2006 was given to him by Mr Cross. It seems likely that the diary was altered in December 2007, because that was when Mr Cross forwarded the altered Construction Diary to the insurer's agent, having obtained it from Mr Schiulaz. It is possible that it was done around 22 August 2006, but Mr Schiulaz did not suggest that was so. He did not remember. He accepted that 22 or 23 August 2006 might have been when he was first informed of the event by Mr Cross.

[17] In the result, neither the note nor Mr Schiulaz's evidence constitutes support for Mr Cross's version of events for 26 June 2006.

[18] Thus, there is no contemporaneous report or note of the event made by Mr Cross or anyone else at the council at that time. The defendants' defence of Mr Cross's claim is partly based on the contention that Mr Schiulaz's note is a fabrication, made almost 18 months after the event. As I have found, that contention is correct. The defendants rely on that fact and other matters to contend that Mr Cross's version of events for 26 June 2006 should not be accepted.

[19] Mr Cross says that he told his wife on the evening of 26 June 2006 about the event. Mrs Cross gave evidence of that discussion. I will return to her evidence.

[20] Dr Ronald Bond is and was Mr Cross's family doctor from a time well before the event. It is apparent from Dr Bond's medical records that Mr Cross saw Dr Bond on a number of occasions before 26 June 2006 about an injury or condition relating to his right calf muscle. Also prior to 26 June 2006, Dr Bond had referred Mr Cross to have an ultrasound investigation of his right calf. On 14 July 2006, Mr Cross attended the ultrasound consultant.

[21] After 26 June 2006, Mr Cross first consulted Dr Bond on 4 August 2006, according to Dr Bond's records. On that day, Dr Bond referred Mr Cross to a radiologist for a CT or MRI scan of his lumbar spine. Mr Cross said that he told Dr Bond about the event at that time. However, there is no record of that in Dr Bond's notes. Still, Mr Cross must have given Dr Bond some form of history or have shown some symptomology on examination to have caused the referral for a CT or MRI scan of his lumbar spine.

[22] On 11 August 2006, a CT scan was made of Mr Cross's lumbar spine. It showed a disc protrusion at the L5/S1 level. Dr Bond referred Mr Cross to a physiotherapist.

[23] On 14 August 2006, Mr Cross consulted the physiotherapist, who noted Mr Cross's history as "Onset/incident using chain saw at work? Eight months ago. Low back pain". It was also put to Mr Cross that he had told the physiotherapist that he had: "Jumped off truck three plus months ago, started leg pain". Mr Cross denied telling the physiotherapist that he had jumped off a truck. It doesn't seem significant to me whether Mr Cross said "jumped" or "slipped while climbing down and pushed away and landed backwards hard on my heels". Nor do I think it matters that Mr Cross may have described it as "three plus months ago" as opposed to 6 weeks beforehand. The note is the first reliable documentary record of a statement by Mr Cross of the immediate cause of symptoms of the leg pain associated with his back injury.

[24] On 22 August 2006, Mr Cross completed and signed an Injury Incident Report to the council referring to the event on 26 June 2006. The form stated that the incident had been reported to the "rehab officer". At the time, Desmond Tillack was that officer. Mr Cross agreed that Mr Tillack was not informed by him about the event until 22 August 2006.

[25] The injury report form stated:

> "I was climbing down off truck and sliped (sic) off step and landed on ground (sic) my right leg hurt after a while got worse."

[26] On 20 December 2007, Mr Cross signed a statement which he submitted to Jardine Lloyd Thompson, the employer's insurer's agent. In the statement, Mr Cross referred to making an appointment to see Dr Bond on 30 June 2006 "about my leg/back area". No such appointment was recorded in Dr Bond's records and there is no other evidence that he made or attended an appointment on that day.

[27] Further, in that statement, Mr Cross said "Doctor Bond sent me to Caloundra X Ray 67 Bowman Rd ph 07 5438 2088 on the 14-7-06". The implication was that he went for an X-ray because he had seen Dr Bond about his back. That was not the case, as previously mentioned. That error was probably not a mistake. In a draft of the statement which he wrote in an exercise book, Mr Cross wrote "Doctor Bond sent me to Caloundra X Ray clinic to check ~~leg area~~ me on 14-7-06." The deletion of "leg area" suggests that Mr Cross was concerned to say that the 14 July 2006 ultrasound of his leg was about his back injury as well.

[28] When Mr Cross submitted the statement to the insurer's agent, he also sent in a copy of the altered Construction Diary, signed by Mr Schiulaz and dated 26 June 2006. He was unable to recall that he had done so or why he had done so, but accepted that he must have done so if it was received by the insurer's agent. He said that he thought he must have been asked to do so.

[29] The defendants sought to challenge Mr Cross's credibility on this and other matters. The defendants also contended that Mr Cross was in error in saying that he had been spraying poison on 26 June 2006, because there was no mention of spraying weeds in Mr Cross's personal diary for several weeks before that date. Mr Cross said that the tank and nearly empty tank of herbicide mix was on the back of the truck.

[30] The defendants suggested that the tank had been removed from the truck because the work program did not then involve significant spraying. Mr Cross said that it was not unusual for the tank to remain there after use and not to be removed for periods of time.

[31] The defendants suggested that on 26 June 2006 the Maintenance Diary showed that Mr Cross and Mr Nipperess had been mowing, which meant that the truck would have had a trailer and front deck mower attached. Mr Cross did not recall, but said that the trailer and mower would not have been attached at the time when they were covering the signs, which was when the event occurred. He had no record of any spraying being done on 26 June 2006, but said that he would not record it "when there's a little bit of spraying. You're only doing a little section."

[32] There is no doubt that by mid-August 2006 Mr Cross was saying that the pain in his leg was sourced in the event. He told the physiotherapist on 14 August 2006 that the leg pain started in getting off the truck (although he denied saying "jumping"). That was repeated in the Injury Incident Report dated 22 August 2006. Thus, at worst, the delay between when the event occurred and when the plaintiff clearly articulated to anyone other than his wife that the event had occurred was 7 weeks and he had advised the council no later than a week after that.

[33] It is not surprising that in the circumstances described above that the defendants' case was in part one of recent fabrication. Other evidence, however, was relevant to the likelihood of the event having occurred on 26 June 2006.

[34] Most importantly, Mrs Cross gave evidence that her husband told her that he had slipped off the back of a truck "when I got home from work on the day of the 26th of the 6th '06". She said that after Mr Cross came home from work that day, he "complained continuously that his back was hurting". That continued over weeks. One morning he fell while he was getting out of bed and she said to him that she thought he needed go to see the doctor. That is not inconsistent with Mr Cross going to see Dr Bond on 8 August 2006. I accept her evidence on these points. The defendants cross-examined Mrs Cross about her recollection of relevant surrounding events. Although her answers and appearance at times reflected her underlying anger, I formed the view that when she could give an answer from her recollection she did so directly. She was direct in saying it was "the 26th of the 6th '06" and was not challenged as to why she said it was that date.

[35] Secondly, although the defendants cross-examined Mr Cross on the footing that Mr Nipperess would say that the event did not happen, in the event, Mr Nipperess had no recollection one way or the other about the day in question. He did not add to the plaintiff's case but he did not contradict it either, in my view, except to the extent that it might be contended that if the event had occurred he might be expected to have remembered it. I don't draw that inference.

[36] In passing, I note that Mr Cross was cross-examined about the event and where he had slipped and stumbled by reference to two photographs, exhibits 13 and 14. I consider the markings that he made on the photographs to be inaccurate and not as an indication that the event did not occur much as he said it did. His accounts on occasions referred to a nearby tree and the edge of the hill side. I find that the markings he made on the photographs were not identified in such a way and the features of the site depicted were not identified with sufficient precision to conclude from the markings that they contradict Mr Cross's account of the event.

[37] To some extent, I have relied on Mr Cross's manner and appearance in the witness box. He was not inclined to exaggerate in his answers. At times I thought he understated what appeared to be his position. The overall impression he formed upon me was positive, but I did not consider that overrode contradicting objective evidence, where that was apparent to me.

[38] In the result, I find that the event happened, as Mr Cross said it did, notwithstanding that in December 2007 he tried to create documentary evidence and circumstances which were not genuine to bolster his account. I accept that the reason why it was not reported by him at the time was that he did not think it was likely to be particularly significant, but by mid-August 2006 his appreciation of the condition of his lower back had increased. Hence he made the Injury Incident Report on 22 August 2006. By December 2007, he was plainly anxious to improve the state of the evidence that supported his account. In the end, he has been fortunate that the account he gave to the physiotherapist in August 2006 and the report he made to his supervisors at work in that month support the fundamentals of the account of the event he gave in evidence.

Configuration of the truck and the rudimentary step

[39] The truck was a 2004 Mitsubishi Cantor 3 tonne tipping tray truck, registration number 998-HEA. It had a dual cabin. The tray was positioned behind the cabin. The tray was supplied with the truck to the council by Ray Grace Truck Centre.

The specification for the tray was determined by the council. The tray was manufactured to the specification by Paulger Engineering[1] on the order of the truck supplier. Paulger Engineering had no direct relationship in contract with the council. On delivery, the council gave the truck the plant number 2361 in its records.

[40] The tray was rectangular in shape. It was constructed of steel. There was a headboard at the front which extended to above the height of the cabin. The headboard was fabricated as a steel frame. An upright post of square section formed the side of the frame and the front corner of the tray ("the corner upright"). The corner upright extended below the level of the tray by approximately 400 mm. The tray was approximately 2.2 metres wide by 2.5 metres in length. The sides were drop sides, meaning that they were mounted on hinges, so that they could be lowered from the vertical "up" position to a vertical "down" position, which would expose the floor of the tray. The top of the sides were 360 mm above the floor of the tray.

[41] There was a circular rail (described as a rope rail) running parallel and below the level of the tray of the truck, at a height of a little less than approximately 200 mm below the level of the floor of the tray. The rope rail was welded to spacers which themselves were welded to the underside of the tray side rail at intervals along its length. The rope rail is a common fitting which can be used to tie securing ropes for items loaded on the tray of the truck. It was made of circular steel tube approximately 25 mm in diameter.

[42] The step in question was positioned below the rope rail. It too was made of circular steel tube approximately 25 mm in diameter. Hence the foot bearing surface of the step is a rung. The step was fashioned so that the front end the was welded at 90 degrees to the bottom of the corner upright, where it extended below the level of the tray. From that point, the rung ran horizontally towards the rear for about 360 mm. From that point the steel forming the rung was bent at about 45 degrees from the horizontal plane, so that its alignment converged towards the underside of the rope rail until it joined the rope rail where it was attached by a weld. It is convenient to describe it in these reasons as "the rudimentary step".

[43] The level of the rung of the rudimentary step was approximately 570 mm above the ground surface. The tray floor level was approximately 400 mm higher than the level of the rung of the rudimentary step. The top of the side of the tray was approximately 450 mm above the level of the tray.

The slip in more detail

[44] At the time of the event, the sides of the tray were up. Thus, to step down from the tray onto the rung of the step, Mr Cross began from a position standing close to the front corner of the tray on the passenger side. As he lifted his left foot over the side of the tray and lowered it onto the rudimentary step, he was holding onto an upright tool handle stored in the vertical plastic pipe that was fixed near the front of the tray on the passenger side. It provided a firm hand hold. Using his right leg and the hand hold as points of contact and support, he had to lift his left foot approximately 360 mm over the side of the tray and then lower it from its zenith of about 760 mm

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1 The third defendants carried on business under that name.

onto the rudimentary step, which he did without mishap. His left hand was still on the tool handle. His left foot was on the rung. His right foot was then approximately 400 mm above his left foot, on the floor of the tray.

[45] Using his left leg and the hand hold as support, he was then required to raise his right foot approximately 360 mm over the side of the tray and lower it towards the ground. As he did so, Mr Cross's body will have rotated clockwise. At the same time, his weight and centre of gravity moved outboard, over the side of the tray and the vertical alignment of his left foot on the rung of the rudimentary step. From the point where he started to lower his right foot, Mr Cross's centre of gravity will have been moving outboard. As he lowered his body, his left knee will have bent. Thus his torso will have moved further outboard. At the same time, the heel of his left foot will have lowered in relation to the upper surface of the rung.

[46] Mr Cross was wearing a work boot on his left foot. The point or points of contact between the surface of the sole of Mr Cross's left boot and the surface of the rung constituted the friction surface, which kept Mr Cross's left foot located on the rung while he swung his body weight over the side of the tray and down towards the ground.

[47] The outboard movement of his centre of gravity, the dropping of his heel and the rotation of the sole of Mr Cross's boot on the rung of the rudimentary step would have increased the resultant force which that friction was required to oppose to prevent any slip. Plainly, at the time of the event, the friction was not enough.

Negligence against the employer and the manufacturer

[48] The plaintiff pleaded numerous alternative allegations of negligence against the council and Paulger Engineering.

[49] The claim against the council is based on the duty of care of an employer to an employee based in contract and in the tort of negligence. The claim against Paulger Engineering is based on the duty of care of a manufacturer of a truck tray to users of the tray, in the tort of negligence. It is convenient to consider the claim against Paulger Engineering first.

Paulger Engineering

[50] The truck was supplied to the council as a result of a tender process.

[51] The council produced a specification for the supply and delivery of "plant", described as "one approximately 3 tonne diesel engined twin cabin tipper truck" to the Caboolture Shire Depot, Beerburrum Road, Caboolture. The specification required a unit "with a steel drop side tray type body". The body of the tray was to be "with steel tray with drop sides… [of] a minimum length of 2.5 m inside measurement… with heavy duty towbar...". Located between the cabin and the headboard of the tray, it was to have "a metal box… 900 mm high x 450 mm wide and full length (sic) of the cabin… mounted on the chassis…".

[52] Ray Grace Truck Centre successfully tendered for the supply of a Mitsubishi Cantor (Crew Cab) truck with a body described as a "tipping body as per council's specifications" for $54,076.00.

[53] Paulger Engineering contracted with Ray Grace Truck Centre for the supply of the tray type body and accessories for the truck. They had previously supplied trays for council trucks. They were provided with the specification. Their quote identified the body as "… dropside tipper body approx 2.5 mtrs long x 2.2 mtrs wide x 350 mm high dropsides" and stated a number of relevant features. The drop sides were to be removable and to have "slots for hungry board attachment". The tailgate was to be "450 mm high and two way top hinged automatic closure". There was to be a "7 tonne multistage under body hoist" and a "shovel holder mounted in front of headboard", an equipment box as previously described, a chassis mounted tool box, the towbar previously mentioned and other equipment. Of particular relevance, there were to be "rope rails both sides, steps both sides front." These were not particularly specified by the council. The price was $11,726.00.

[54] The truck with the tray fitted was delivered on 2 September 2004. As delivered, the step on the passenger side at the front of the tray was as previously described and was "supplied with a general grip tape which [was] placed on the step" and which "needs to be replaced on a regular basis".

[55] An experienced manager from the truck supplier described the steps quoted to be fitted to the side of the front of the body as "normal practice" and a "typical step which was provided on trucks sold by Ray Grace Trucks in 2004". He also said that in 2004 there were no criteria he was aware of or any standards, in relation to the step, and that no handrail was asked for or offered at that time.

[56] No suggestion was made that Paulger Engineering were told any particular information as to the manner of use proposed for the truck, other than by the requirements of the specification. One of the council's employees said that there was "some liaison between [council employees] and Paulger…[but] there was no liaison concerning such issues as steps and grab rails." It was not shown how that witness could give evidence of the conversations between Paulger Engineering and others.

[57] The plaintiff pleaded that Paulger Engineering knew that the council was acquiring the truck for use in its work operations. I find that Paulger Engineering knew or ought to have known that the truck was being acquired by the council for that use, but not that it had any particular awareness of how the truck was to be used. The plaintiff pleaded that Paulger Engineering knew that the council's employees would need a safe means of access to and from the tray of the truck. There is no evidence from which to draw any particular inference as to Paulger Engineering's knowledge about access to the tray. In any event, it seems to me that there is no basis to draw any inference as to the knowledge of Paulger Engineering beyond that it would have been aware that users of the truck would, from time to time, climb on to and off the tray. That much can be inferred from the provision of a step on either side of the tray and the shovel holder mounted near the headboard.

[58] The plaintiff alleged that Paulger Engineering owed a duty of care to the plaintiff "to ensure that it fabricated, manufactured and fitted a tray and body to the work truck in such a manner that it included a safe and appropriate means of mounting and dismounting from the vehicle tray". In my view, that was not Paulger Engineering's obligation, expressed either in contract to Ray Grace Truck Centre or as a duty of care in tort. The plaintiff pointed to no authority in support of that formulation of the duty of care.

[59] The formulation of a manufacturer's duty of care to a user of goods has occurred in many different contexts since *Donoghue v Stevenson*[2] and *Grant v Australian Knitting Mills*[3] were decided. It is a common error, however, for a plaintiff to formulate a relevant duty of care in negligence in terms of an obligation to "ensure" that something be done to make something "safe" as the pleaders in this case have done. Such a formulation tends to elide the separate elements of duty, breach and damage caused by any breach of duty of care in negligence in a particular case.

[60] The relationship of manufacturer and consumer is a category of relationship which creates a duty of care against damage by injury: *Dovuro Pty Ltd v Wilkins*.[4] It might be expected that there is a recognised articulation of the duty of care in such a recognised category, but recent case law has not settled on one statement.

[61] In a cognate context to the present case, the duty was expressed by Cooper J in the Full Court of this Court in *Suosaari v Steinhardt*[5] as a duty "to take care to avoid a reasonably foreseeable and real risk of injury".

[62] In *Coregas Pty Ltd v Penford Australia Pty Ltd*,[6] the Court of Appeal of New South Wales reasoned from first principles whether a duty of care to avoid injury was owed by the provider of LPG gas cylinders, storage cage and access ramp to users of the ramp. The duty was held to be to "provide cylinders in a cage that would not subject foreseeable users, including those who may be inadvertent at times, to an unreasonable risk of injury" when using the ramp.

[63] In *Roche Mining Pty Ltd v Jeffs*,[7] the Court of Appeal of New South Wales considered the duty of care to avoid injury of a supplier of a mine haul truck to a user of the truck. It was held[8] to be correct to apply the formulation of Brennan J from *Stevens v Brodribb Sawmilling Co Pty Ltd*[9] of a "duty to take reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury" and that the "content of the duty had to be determined by reference to the facts."[10]

[64] In *Erwin v Iveco Trucks Australia Ltd*,[11] the Court of Appeal of New South Wales considered the duty of care to avoid injury of a manufacturer of a semi-trailer. Although the case was decided under the *Civil Liability Act* 2002 (NSW), the discussion of the content of a duty of care included reference to the common law of negligence and the well known statement of Mason J in *Wyong Shire Council v Shirt*[12] which has come to be known as the "Shirt calculus".[13] However, that discussion is more concerned with breach than a statement of the duty of care.

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2 [1932] AC 562; [1932] UKHL 100.
3 [1936] AC 85.
4 (2003) 215 CLR 317 at [29]; [2003] HCA 51.
5 [1989] 2 Qd R 477 at 487.
6 [2012] NSWCA 350.
7 [2011] NSWCA 184.
8 At [62].
9 (1986) 160 CLR 16 at 47; [1986] HCA 1.
10 At [63].
11 (2010) 267 ALR 752; [2010] NSWCA 113.
12 (1980) 146 CLR 40 at 47-48; [1980] HCA 12.
13 See the discussion of the use of that phrase by Gummow and Hayne JJ in *New South Wales v Fahy* (2007) 81 ALJR 1021 at [57]; [2007] HCA 20.

[65] In *Fitzpatrick v Jobs Engineering*,[14] the Court of Appeal of Western Australia considered the duty of care to avoid injury of the manufacturer of a log splitting machine. It was held that:

> "A person who designs, manufactures and supplies a machine intended for commercial use owes a duty to potential users of the machine to exercise reasonable care, skill and diligence in the design and manufacturing process to produce a machine which is safe to operate."[15]

[66] In *Bull v Rover Mowers (Aust) Pty Ltd*,[16] the Full Court of this Court considered the duty of care to avoid injury owed by the manufacturer of a cylinder lawn mower. It stated the principle applicable "to the duty owed by a manufacturer to a consumer" by reference to Lord Atkin's famous speech in *Donoghue v Stevenson*, as follows:

> "… a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with not reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."[17]

[67] *Todman v Victa Ltd*[18] bears mention. It was another case concerning the duty of care to avoid injury owed by the manufacturer of a lawn mower, although on this occasion a rotary lawn mower. The Full Court of the Supreme Court of Victoria rejected the contention that a lawn mower was a dangerous chattel which attracted almost strict liability.

Breach of duty

[68] As to whether a manufacturer's duty of care has been breached, it is recognised that when the risk of injury is grave, what is required by way of foresight and response may well be raised.[19] But the question will still be what is required by a standard of reasonable care, because the duty is not absolute.[20] As was said by Pullin JA in *Fitzpatrick v Jobs Engineering*, referring to the "Shirt calculus":

> "…what a reasonable man would do by way of response to the risk, and the perception of the reasonable man's response calls for a consideration of the magnitude of the risk, the degree of 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…"[21]

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14 [2007] WASCA 63.
15 At [196].
16 [1984] 2 Qd R 489.
17 At 498-499.
18 [1982] VR 849; [1982] VicRp 85.
19 *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514 at 523; [1940] HCA 44.
20 *Fitzpatrick v Jobs Engineering* [2007] WASCA 63 at [39].
21 At [40]. Cf *Roche Mining Pty Ltd v Jeffs* [2011] NSWCA 184 at [62]-[63].

[69] In my view, it was reasonably foreseeable to Paulger Engineering in the present case that someone using the rudimentary step might slip when ascending or descending from the tray. To say so does not say much. It is reasonably foreseeable that someone using a step of nearly any kind might slip. Nevertheless, for the application of the framework for assessing the existence of a duty of care and whether the duty was breached, there was a reasonably foreseeable risk of injury which might be sustained by any member of the class of those who might use the rudimentary step.

[70] The present case is not one in which Paulger Engineering were free to construct the tray in any manner which they might prefer. The contractual undertaking was that the tray be configured and have the accessories or additional equipment as specified. It is one thing for Paulger Engineering to include a step, "as per normal practice" for a truck tray of this kind, on the order of Ray Grace Trucks. It would be another thing altogether to add a "means of mounting and dismounting" the tray according to the designs proposed by the plaintiff, without any specification or request to do so.

[71] However, in my view, there is no doubt that in manufacturing the tray Paulger Engineering owed a duty of care to avoid injury to users of the tray, although not inconsistently with its obligation in contract to manufacture the tray as specified. The question in the present case resolves down to whether there was a breach of the obligation to use reasonable care imposed by that duty.

[72] There are a few possibly relevant cases involving falls by users from steps while climbing onto or off a truck or heavy equipment: *Cross v TNT Management Pty Ltd*,[22] *Williams v Mount Isa Mines Ltd*,[23] *Roche Mining Pty Ltd v Jeffs*[24] and *S J Sanders Pty Ltd v Schmidt*.[25] Each case turns on its own facts to a significant degree. Some concerned the relationship of employer and employee or other relationships of control, which do not apply in the case of Paulger Engineering.

[73] Consistently with principle, in my view, it is not enough when applying the Shirt calculus to say that it was reasonably foreseeable to Paulger Engineering that persons ascending or descending from the tray using the rudimentary step might slip, fall and injure themselves.

[74] The magnitude of the risk was not explored in the plaintiff's case other than by reference to statistics contained in the expert report, which were by and large unhelpful because they were not directed to or separately referable to manufacturers, or similar vehicles, or similar steps, so far as I could tell.

[75] In my view, it is important to keep firmly in mind the actual circumstances of the slip in this case when considering the alleged duty and what might have been required of Paulger Engineering. This the plaintiff failed to do at times. The risk in this case was the risk of a user's foot slipping off the rudimentary step while descending from the tray. From the mechanism of the slip described above, the risk is of a slip of one foot from about 570 mm above the ground, while the other foot is off the ground. The gravity of this risk and any consequent fall is not to be

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22 (1987) 46 SASR 105.
23 [2001] QCA 101.
24 [2011] NSWCA 184.
25 [2012] QCA 358.

understated, but it is not the same risk as falling from a height of metres above the ground when climbing onto or off a large piece of mining machinery, for example. Although the plaintiff's expert report included discussion of the possibility of serious injuries from falls from no greater heights, in my view there was no consideration given to the likely number of occasions where someone who is a user of a vehicle with a rudimentary tray step might jump down from no more than about half a metre without injury. The analysis of the magnitude of a risk requires that there be some realistic assessment of the overall pattern of use, against which the incidence of that risk is to be assessed.

[76] There was no suggestion in the plaintiff's case that the provision of the rudimentary step for a tray on a truck tray of this kind was abnormal. That is confirmed by the evidence previously mentioned of everyday experience. The plaintiff's expert evidence was, with one exception, presented on the basis of possible alternative "improved access systems" other than the rudimentary step which it contended were safer and possible, but no evidence was adduced to say that any of those measures was usually adopted in the manufacture of a truck tray of this kind without a particular specification being required.

[77] Thus, the plaintiff did not attempt to grapple with whether the provision of the rudimentary step, on a tray of this kind, conformed to industry practice. The matter was indirectly raised in cross examination of its expert witness, who said that the illustrations of alternative improved access systems he advocated for were applied to vehicles "on a mine site or a civil construction firm, that type of environment". When he was asked whether one of the alternative configurations he advocated was a "most unusual" sort of configuration, he did not answer the question responsively, instead expressing an opinion about when these types of improved access systems were "not specifically required".

[78] Conforming to industry practice does not necessarily answer the question whether there has been a breach of a duty of care in negligence.[26] But in this context, it must have been obvious to the plaintiff that there was nothing in his case against Paulger Engineering which took the manufacture of the tray out of the category of a typical or normal application of the design and manufacture of a rudimentary step for a tray for a relatively small truck. It must follow that a conclusion that it was a failure to exercise reasonable care for Paulger Engineering to supply a tray without one of the plaintiff's expert's possible alternative improved access systems would mean that it is negligent to do so in many or all such cases, without a specification for steps other than a "normal" or "typical" rudimentary step.

[79] The plaintiff's pleaded case against the council relied on the improved access systems described in Figures 11, 12 and 13 of the report of its expert. Copies of Figures 11, 12 and 13 are annexed to these reasons. The plaintiff's pleaded case against Paulger Engineering did not rely on those improved access systems. Instead, it relied on pleaded weaknesses of the rudimentary step as "unsafe", or "not appropriate", or as defective because "3 points of contact could not be maintained" and a "dedicated hand hold was not provided". The plaintiff also alleged that the "existing step was not large enough to accommodate 2 feet", "had a radius which in itself contributed to slipping" and "did not incorporate any non-slip surfacing". In

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26 *Roche Mining* at [75]-[77]; *Erwin* at [86]-[87].

my view, the other particulars in paragraph 17 and 17A of the amended statement of claim were meaningless.

[80] Curiously, the plaintiff's counsel addressed as though the plaintiff's case was that Paulger Engineering was required to introduce the Figure 11, 12 and 13 options of its own motion in manufacturing the tray, even though that was not pleaded. I propose to deal with those matters, notwithstanding, as it seems to me, that there are significant deficiencies in the contentions that the Figure 11, 12 or 13 alternatives ought to have been included in the design and construction of the tray by Paulger Engineering, without the council and the truck supplier having specified that they were required.

[81] As previously mentioned, the rudimentary step was "normal" or "typical". The plaintiff's expert confirmed in cross-examination that there was no applicable Australian Standard. Yet he maintained that the standards relating to fixed stairways and ladders "can apply to a stationary piece of mobile equipment." I accept that some of the applicable principles will be in common. That does not seem to me to assist greatly in assessing the dictates of reasonable care, in the design of an appropriate step, in the present case. A simple example is that it does not seem to me to be appropriate to assume that the height of the first riser from the ground for a fixed set of steps in a building can have a lot to do with the appropriate height of the first step onto the tray of a truck from the ground. The truck must be able to drive over bumps and rises without engaging the lower part of the step on the ground. There was no suggestion that the tray design of this kind had proceeded generally by reference to the Australian Standards for fixed stairs or ladders.

[82] Surprisingly, the expert report appears to have ignored that the tray supplied was specified to be a tipping tray which included provision of a fitted hoist to lift the tray, a two way top hinged automatic closing tail gate, and 350 mm high drop sides with provision for a hungry board attachment. Those features are all consistent with the potential use of the tray to load loose material to be dumped by lifting the hoist. None of Figures 11, 12 or 13 shows a tray of that kind, on a truck of similar size.

[83] As well, the expert report recognises that there will be a significant cost of the Figure 11 option, which entails building a set of recessed permanent stairs into the tray with fixed permanent hand rails. The report states that "if the frequency of access cannot justify the higher capital expense of the [permanent recessed] step access system, then alternatively an improved rung-type system… could be installed". In cross examination, the plaintiff's expert conceded that he had given no consideration to the actual costs.

[84] As to the Figure 12 option, it depicts two vertical steps or rungs in place of the rudimentary step. Again this option depicted permanent hand rails, this time fixed to the floor of the tray, on either side of the steps. The illustrated application is not a tipping tray, or a tray with drop sides. It relates to a vehicle of unspecified purpose with a flat topped tray, heavily loaded with equipment of unidentified kinds. Putting that to one side, the first of the suggested advantages identified is that the steps allow for both feet to be placed on each rung. Despite my regular questions, at no point was the plaintiff able to identify why the risk of Mr Cross's fall, in this case, would have been reduced if there had been a wider step. In particular, there was no evidence that if Mr Cross had been able to or had moved his right foot onto a wider rudimentary step, in the present case, the mechanism and

likelihood of his fall would have been significantly affected, let alone why that was reasonably foreseeable to Paulger Engineering.

[85] The second of the suggested advantages of the Figure 12 option was said to be that three points of contact can be maintained with both hands on the hand rails, as one foot is lowered to the ground. Again, I was unable to elicit a satisfactory answer to the question of how that would have assisted Mr Cross in this case. What Mr Cross said was that he deliberately pushed himself away from the side of the truck, when his foot slipped, to avoid striking his face against the side. No attempt was made to explain how that would have been altered, if there were two hand holds instead of the one he had. The plaintiff did not lead evidence or submit that the slip would have been avoided had more of Mr Cross's weight been taken by his hands, through a second hand hold, at the time of the event. These points would be of relevance to a finding of causation, if a finding of negligence were made. But they also go to the question of the extent of what a reasonable man would do in response to the risk in the application of the Shirt calculus. However that may be, it seems to me that dedicated hand rails of the kind depicted in Figure 12 could interfere to some extent in the use of the specified tipping tray. I do not consider that it would have been appropriate for Paulger Engineering to have included handrails, as depicted, without the council having specified them.

[86] The Figure 13 option is again an application made to a tray which is not a tipping tray. However, it illustrates a couple of useful points for discussion. First, a swinging ladder of the kind depicted in Figure 13 would likely interfere with tipping the tray. Secondly, it also seems likely that the advantage of a swinging ladder might be that when in the "up" position, it does not interfere with the vehicle's clearance from the ground while in motion. That is also a possible problem with a fixed ladder of the kind depicted in the Figure 12 option. No other consideration was apparently given to the application of these options to the tray in question in this case, except for a suggestion that the swinging ladder option could be used on the drop sides. Even if it could be, that would increase the complexity of the means of getting on and off the tray and the permanent handrails could still interfere, to some extent, in the use of the specified tipping tray.

[87] No evidence was called by the plaintiff to suggest that there is any other manufacturer of truck tray bodies, such as that supplied by Paulger Engineering, who installs any of the alternative systems advocated by the plaintiff's expert report, without specific order or a specific application which might call up those systems.

[88] Similarly, the plaintiff did not prove that the radius of the rung of the rudimentary step, itself, was not a reasonable measure or that it contributed to him slipping. Perhaps the plaintiff was moved to plead that allegation by the circumstance that the council caused alterations to be made to the configuration of the rudimentary step after May 2008, as depicted in Figure 2 to the plaintiff's expert report. The rung was replaced with a square or rectangular section piece, so that the foot bearing surface was flat. However, the assumption that this represented a material improvement was discounted by the plaintiff's expert report. It did not suggest that the rung should have been replaced by a flat surfaced section, even though that alteration was shown in Figure 2. In cross examination, the plaintiff's expert said of such a surface: "…if that is a square object with very little grip on it then it doesn't… make a significant amount of difference…". In my view, that evidence tended to disprove the allegation that the radius of the rung adopted by Paulger

Engineering was a breach of duty and there was no evidence to the contrary, except for the fact that the council chose to modify the step in question.

[89] A feature of the pleaded case against Paulger Engineering is the allegation that the rudimentary step did not incorporate any non-slip surfacing. The plaintiff's expert report proceeded on that assumption too. That report opined that "at the very minimum, any step-type or rung-type access system should have an aggressive, high grip contact surface…".

[90] However, the experienced manager from the truck supplier said that the rudimentary step had a "general grip tape which is placed on the step" when the truck was supplied. Thus, the allegation that there was no non-slip surfacing of the rudimentary step of the tray, as supplied, was positively disproved.

[91] No attempt was made by the plaintiff to prove that was not a reasonable measure, except to the extent that the plaintiff's case predicated that the alternative "improved access systems" would have been better. Although the plaintiff also relied upon the modifications to the configuration of the rudimentary step, that were made by the council in 2008, he did not attempt in evidence to prove that configuration would have been reasonable, whereas general grip tape applied to the rudimentary step was not reasonable.

[92] In the resolution of the question whether there was a breach of the duty of care owed by Paulger Engineering, it is critical that there is absolutely nothing in the circumstances of the case proved by the plaintiff against Paulger Engineering which would distinguish the present case from any other order by a customer of a typical tipping tray and hoist with drop sides of the same dimensions.

[93] In my view, the plaintiff failed to prove any breach of the duty of care owed by Paulger Engineering.

The council

[94] It is not necessary to pronounce at any length upon the council's duty of care, as employer, to the plaintiff, as employee. Dixon CJ and Kitto J stated the duty in these terms in *Hamilton v Nuroof (WA) Pty Ltd*: "[the duty] is that of a reasonably prudent employer and it is a duty to take reasonble care to avoid exposing the employees to unnecessary risks of injury."[27] Fullagar J, who joined them in the majority said: "The employer's duty may be perhaps stated as a duty to ensure that all reasonable steps are taken to provide a safe system of working."[28]

[95] A more recent statement to the same effect, made in the context of an unloading system for a truck, is the statement of principle in *Czatyrko v Edith Cowan University*.[29] There the court said:

> "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks

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27 (1956) 96 CLR 18 at 25; [1956] HCA 42, restated in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307; [1986] HCA 20, where the plurality also said at 307: "The law has not changed."

28 (1956) 96 CLR 18 at 34; [1956] HCA 42.

29 (2005) 79 ALJR 839 at [12]; [2005] HCA 14 at [12].

> of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work."

[96] Ultimately, in my view, the case against the council resolved into two live questions. First, should the tray of the truck have been designed or modified to have a set of stairs or steps with hand rails, which would reduce the risk of slipping? Secondly, should the rung of the rudimentary step provided have been designed or modified to have a different height, profile or surface?

[97] The provision of a dedicated stair or steps with two side handrails, in accordance with the alternative improved access systems depicted in Figure 11 of the plaintiff's expert report, would have reduced the risk of someone slipping in comparison to the rudimentary step provided.

[98] Consideration of the possibility of alteration of the design or condition of the rudimentary step, to an improved access system with handrails, as depicted in Figure 12 or Figure 13 of the plaintiff's expert report, raises questions as to whether it was a failure to take reasonable care to adopt either of those configurations. There are potential difficulties in the path of that conclusion for some of the reasons raised in the discussion of the liability of Paulger Engineering.

[99] However, there are differences between the requirements of the duty of care of Paulger Engineering, as a manufacturer of the tray, and the duty of care of the council, as an employer, in relation to safe methods of work. Those differences are informed by the relationship of employer and employee and the employer's control of the method of work. As well, the reasonable foresight required of the council, in relation to the risk of injury of the kind that occurred in the present case, is based on knowledge of the responsibilities and methods of work for the plaintiff to carry out his duties as employee possessed by relevant council employees to whom the plaintiff reported.

[100] Nevertheless, it might have been expected that the plaintiff's evidence against the council about the application of any of the alternative access systems propounded in Figure 11, 12 or 13 as an alternative to the rudimentary step would be based on more than examples confined to the context of mine site or civil construction firm site vehicles. The plaintiff's expert gave evidence to say that the photos were examples of good practice "to demonstrate our concepts" and that "[t]he concept of building these access systems into the decks of trucks and small light vehicles like this has been around predating… 2001." He also said that "from a risk management perspective a decision needs to be made on what is the primary use of the vehicle. If it is deemed that access to the back of the truck is needed very frequently, then an appropriate access system, a well designed access system like this, could be installed."

[101] Again, the potential impact of the cost of improved access systems of these kinds and the practicability of using them in an application like the present case were matters not covered at all or in any detail in the evidence.

[102] The plaintiff also relied as against the council on the design for access steps shown in five technical specifications produced by the council between 2009 and 2012 as follows:

(a) the first was specification 28.09. It was for an 8 tonne truck. Clause 2.8.7 required retractable steps for access to a tool box. Clause 2.8.14 required "suitable access is to be provided including a ladder", "access… structures to allow users to maintain 3 points of contact" and that "[s]tepping plates must be flat with non-slip treads…"'

(b) the second was specification no 20.10. It was for a 7.5 tonne truck. The requirements were the same in substance as for specification 28.09. However, appendix 9 depicted a rudimentary step of the kind in question in the present case;

(c) the third was specification 33.11. It was for a 7.5 tonne truck. The requirements were in substance the same as for specification 20.10. Appendix 13 depicted a rudimentary step with the addition of a handle placed above it on the corner upright of the tray or headboard;

(d) the fourth was specification 29.12. It was for a 7.5 tonne truck. The requirements were in substance the same as for specification 20.10. Appendices 4, 5 and 14 depicted a retractable step, in place of the rudimentary step depicted in prior designs, with hand holds constructed into the top of the side of the tray, as well as the hand hold shown on the corner upright;

(e) the fifth was specification 44.12. It was for an 8 tonne truck. The requirements were in substance the same as for specification 29.12.

[103] No evidence was given about the efficacy of the retractable step alternative in comparison to the rudimentary step, although presumably it was adopted as an improvement.

[104] However, each of the trucks was significantly larger than the truck in question in this case. The trays were 3.5 metres long approximately. The sides of the trays were 600 mm high. The height of the trays from ground level may have been higher than in the present case, although they were not stated. On the other hand, the design for the tray and accessories of the trucks depicted seems to have been adapted to a similar purpose as the smaller truck in this case.

[105] However, I have concluded that it is unnecessary to analyse the alternative improved access systems or the retractable step option in greater detail to resolve the question of the council's liability.

[106] That is because, on the undisputed facts of this case, there was something that the council failed to do which it might easily have done without great cost or modification of the rudimentary step. As the plaintiff's expert said: "at the very minimum, any step-type or rung-type access system should have an aggressive, high grip contact surface."

[107] As appears from the analysis of the case against Paulger Engineering, "general grip tape which is placed on the step" was on the rudimentary step when the truck was delivered on 2 September 2004. It was not there when the event occurred on 26 June 2006. The inevitable inference is that the council failed to maintain the rung of the rudimentary step with a non-slip surface. In my view, the failure of the council to maintain an "aggressive, high grip contact surface", that is a non-slip surface, on

the rung of the rudimentary step was a failure to exercise reasonable care as employer to the plaintiff, as its employee.

[108] A non-slip surface on the rung of the rudimentary step would have provided greater frictional resistance and decreased the risk of the plaintiff's foot slipping off the rudimentary step, as he got off the tray at the time of the event causing him injury. The plaintiff has proved that the council failed to take reasonable care to avoid that risk of injury.

Causation

[109] Once it is accepted that it was a breach of duty for the council to fail to maintain a non-slip surface on the rung of the rudimentary step, the next question is whether that breach of duty caused Mr Cross to slip and then to jump down from the step to the ground, causing him injury.

[110] There was no direct evidence that a non-slip surface would have prevented the slip. The plaintiff's counsel submitted that it was a matter of "common sense". In my view, the answer to the question of causation in fact in this case is not just a matter of common sense. It is a question of fact depending on the evidence and an inference as to what would have happened if the rung had a non-slip surface.

[111] It is true that cases of the highest authority stand for the proposition that causation in law is a matter of "common sense". In the context of the directions that should be made to a jury, as the tribunal of fact, the discussion of that proposition in *Fitzgerald v Penn*[30] is perhaps a sound starting point. In that case, the question was how to resolve, as between competing causes, whether the negligent act or omission caused the damage. In that context, and in particular in discussion of the limits of the use of the "but for" test as the measure of causation in law, the utility of a "common sense" approach has been emphasised time and again, including in the leading cases of *March v Stramare (E & MH) Pty Ltd*[31] and *Medlin v State Government Insurance Commission*.[32] However, in other relevant cases, doubt has been cast on the notion of "common sense" as a "useful, still less universal, legal norm".[33] And that reservation has been extended to tort liability for negligence, where medical or scientific evidence is involved.[34]

[112] The problem of causation in fact, in the present case, is not of the kind discussed in *Fitzgerald*. The precise problem here is that there is no evidence which specifically proves that on the balance of probabilities it is more likely than not that a non-slip surface on the rung would have prevented the slip or that the absence of a non-slip surface materially contributed to the slip.

[113] This problem is by no means novel, or to be answered without the benefit of relevant authority. Sixty-eight years ago in *Betts v Whittingslowe*,[35] Dixon J said:

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30 (1954) 91 CLR 268 at 277-278; [1954] HCA 74.

31 (1991) 171 CLR 506 at 515 and 522-523; [1991] HCA 12.

32 (1995) 182 CLR 1 at 7; [1995] HCA 5 at [7].

33 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642-643; [2005] HCA 69 at [45]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-597; [2005] HCA 26 at [96]–[97].

34 *AMACA Pty Ltd v Booth* (2011) 246 CLR 36 at 61–62; [2011] HCA 53 at [67]–[69].

35 (1945) 71 CLR 637 at 649; [1945] HCA 31.

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

[114] The context there was a claim by an injured employee, who was a boy, against his employer for breach of a regulation requiring fencing of a dangerous part of a machine. The employee's hand had been injured by the dangerous part. It may be said that it was not difficult in that case to draw the inference that the ineffectiveness of the fence caused the employee's hand to be in the path of the dangerous part when he was injured.

[115] A similar general approach has been advocated in other cases of high authority. Another well known statement was made in *McGhee v National Coal Board*[36] where Lord Wilberforce said:

> "[T]he question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that his increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate class of case there is an appearance of logic in the view that the pursuer, on whom the onus lies should fail – a logic which dictated the judgments below… In my opinion… it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within that area of risk, the loss should be borne by him unless he shows that it had some other cause…"

[116] This statement has proved controversial in England, but it was described as "compelling" by Kirby J in *Chappel v Hart*,[37] and a similar approach was at least partly reflected in the reasoning of Gaudron J in that case, who also referred to *Betts*.[38]

[117] However, the approach in *Betts* has been distinguished on more recent consideration in the High Court. Thus, in *Roads and Traffic Authority v Royal*[39] Kiefel J said:

> "[Dixon J's] reasons [in *Betts*] do not suggest any presumption to operate or any alteration to the requirement of proof of causation. They have not been understood to suggest any lessening of it. As Dixon CJ later confirmed in his judgment in *Jones v Dunkel*, the facts proved must form a reasonable basis for a definite conclusion, affirmatively drawn.
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> The statement of Dixon J in *Betts* does not provide support for a conclusion of liability to be drawn from a failure to address, or reduce, a risk." (citations omitted)

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36 [1973] 1 WLR 1 at 6; [1972] UKHL 11.

37 (1998) 195 CLR 232 at 273; [1998] HCA 55 and see *Green v Berry* [2001] Qd R 605 at [81]; [2000] QCA 133.

38 (1998) 195 CLR 232 at 239; [1998] HCA 55.

39 (2008) 245 ALR 653 at [139]-[140]; [2008] HCA 19. See also [141]-[143].

[118] Kiefel J's approach has been followed at intermediate appellate court level in Australia, in *Duma v Mader International Pty Ltd*[40] and *Snorkel Elevating Work Platforms Pty Ltd & Anor v Borren Metal Forming Ltd*.[41]

[119] Two recent decisions of the High Court on the subject of causation are *Kuhl v Zurich Financial Services Australia Ltd*[42] and *AMACA Pty Ltd v Booth*.[43]

[120] In *Kuhl*, the causation question as viewed by the majority did not raise any matter of principle.[44] The dissenting minority referred with approval to Kiefel J's reasons in *Roads and Traffic Authority*.[45]

[121] *AMACA* dealt with the subject of causation of the disease of mesothelioma and was principally concerned with difficulties created by the limits of medical science, including the science of epidemiology, in that context. It does not detract from Kiefel J's reasoning set out above. More than that, the plurality reasons included:

> "In such cases what may be unclear is the extent to which one of these conjunctive causal factors contributed to that state of affairs. These situations have been addressed by the proposition… that it is sufficient that the plaintiff prove that the negligence of the defendant 'caused or materially contributed to the injury'."[46] (citations omitted)

[122] Thus, if there are alternative causes it must be shown that it is more probable than not that the negligent causal factor made a material contribution.

[123] On the other hand, *Strong v Woolworths Ltd*[47] may leave the question of principle for the finding of causation unresolved. That was a slipping case. The *Civil Liability Act* 2002 (NSW) applied to the injuries.[48] However, the discussion of causation proceeded by reference to the background of common law principles of causation. In the reasons of the majority, it was said that:

> "Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court."[49]

[124] Reference may also be made on that point to *Bennett v Minister of Community Welfare*[50] and to the further statement made by Kiefel J in *Roads and Traffic Authority* that:

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40 [2013] VSCA 23 at [63]-[65].
41 [2010] ACTCA 23 at [39]. And see generally [33]-[50].
42 (2011) 243 CLR 361; [2011] HCA 11.
43 (2011) 246 CLR 36; [2011] HCA 53.
44 See [99]-[104].
45 At [59]-[61].
46 At [70].
47 (2012) 246 CLR 182; [2012] HCA 5.
48 In the present case, s 5(1)(b) of the *Civil Liability Act* 2003 (Qld) repels the application of the equivalent provisions from the Queensland Act.
49 At [26].
50 (1992) 176 CLR 408 at 416; [1992] HCA 27.

> "…the question whether a failure to take steps which would reduce a risk amounts to a material contribution to the injury, ha[s] been discussed elsewhere in connection to a possible shift in the onus of proof. No decision of this Court holds that there is that equivalence or some lessening of the requirement of proof."[51] (citations omitted)

[125] In my view, her Honour's reasoning is to be preferred to an approach which would suggest any reversal or dilution of the onus of proof. Cases of difficulty may require an inference based on less than perfect proofs. As a matter of principle, that does not mean that a plaintiff does not bear the onus of proof on the balance of probabilities throughout.

[126] Another point on which *Strong* deserves mention is as to the role that the concept of a "material contribution" to the plaintiff's damage plays in satisfying the required causal element. As the majority reasons explain,[52] "material contribution" may connote different things in the context of causation in tort. In the present case, the sense which is relevant is that of a causal factor which can be identified as contributing in the sense that it is a factor which would have operated as part of the causal conditions to bring about the damage, but the separable causal operation of which is unclear.

[127] In an even more recent case, *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,[53] the High Court said that:

> "Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss."

[128] It was further said in *Strong*, although about the operation of the section of the *Civil Liability Act* in question there, that:

> "Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles, be accepted as establishing factual causation…"[54]

[129] It follows, in my view, that the question whether a non-slip surface would have prevented the slip or its absence was a material contributing cause of the slip is a matter on which the onus of proof lies on the plaintiff. The mechanism of the slip has been previously described. Mr Cross was an experienced employee at the time of the slip.

[130] Perhaps it might have been possible to calculate the potential effect of a non-slip surface given appropriate assumptions. They would include Mr Cross's mass, the length of relevant "levers" represented by his limbs and body and their rotation as he swung his body weight over the side of the truck and towards the ground. The location of his centre of gravity as he did so will have been important.

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51 (2008) 245 ALR 653 at 689; [2008] HCA 19 at [143].
52 At [20]-[25].
53 (2013) 296 ALR 3 at [45]; [2013] HCA 10 at [45].
54 At [26].

[131] It might be necessary to know where his foot was placed on the rung of the step, as it is likely to affect how low his heel might have reached before the point of slip. There is no reason on the evidence to think that on this occasion he did not show the same care that he would usually have employed and did not place his foot squarely on the rung. The flexibility of his ankle joint might also matter.

[132] The calculation of the coefficient of friction may have been complex also, or required that relevant assumptions be made and proved on the balance of probabilities. It would be necessary to know something of the condition of the sole of Mr Cross's shoe, as well as the non-slip surface of the rung. Was either surface wet? Was there any contaminating material on either surface?

[133] None of these questions is answered by the evidence. Perhaps one cannot reasonably expect that in the circumstances of this case. I am prepared to infer that there is a necessary area of uncertainty.

[134] Perhaps also the nature of a non-slip surface would be such that it might be expected to materially increase friction notwithstanding that the shoe which engages the rung is wet. In any event, there was no evidence to suggest that Mr Cross's shoe was in fact wet. So that reason could not be assumed as a basis for a possible finding that the slip would have happened in any event.

[135] In the result, it seems to me that it is appropriate on the facts of this case to draw the inference that the absence of a non-slip surface on the rung did materially contribute to the slip. The plaintiff has proved that the council's negligence caused the event and his injuries.

Contributory Negligence

[136] The council alleged that "by not using his right hand to secure a third point of contact the plaintiff failed to take reasonable care for his own safety."

[137] Mr Cross said that he put his right hand on the side of the tray as he slipped. It is a reasonable inference that before then his right hand was not holding on to the side of the tray. But was that a failure to take reasonable care for his own safety? Perhaps it was a simple precaution. Even so, I gratefully adopt the language of the High Court in *Czatyrko* as apt to the analysis of this allegation of contributory negligence, although the facts of the two cases are different:

> "But in acting as he did, the [plaintiff] did not disobey any direction or warning from the [employer]. No directions or warnings of any kind were given by the [employer] in relation to the use of the platform… The work was repetitive. In all of these circumstances it presented a fertile field for inadvertence. The onus of proving contributory negligence lay upon the [employer]. This it failed to do in this case."[55]

[138] Even if I had found contributory negligence, for the same reasons as I have analysed in relation to Paulger Engineering, it is not clear to me that the event and the plaintiff's injuries were caused by Mr Cross's failure to hold the top of the side of the tray with his right hand before his foot slipped.

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55 (2005) 79 ALJR 839 at [18]; [2005] HCA 14 at [18].

[139] I find that the council has not proved that the plaintiff was guilty of contributory negligence or that his injuries were caused by the alleged contributory negligence.

Quantum

[140] Summarising, against the council (and Paulger Engineering) the heads of damage claimed, the respective positions of the parties and the differences are as follows:

Head of damage	Plaintiff	Defendants	Difference
General Damages	$80,000.00	$60,000.00	$20,000.00
GD Interest	$5,400.00	$4,050.00	$1350.00
Past earnings	$205,328.14	$154,417.65	$50,910.49
Interest on past earnings	$63,729.68	$17,200.00 $ @ 5% less 16,499.45	$46,529.68
Past superannuation	$16,994.60	$4,500.00	$12,494.60
PS Interest	$0	$0	$0
Future earnings	$418,705.87	$133,380.00	$285,325.87
Future superannuation	$37,685.53	$12,004.20	$25,681.33
Future treatment and medication	$56,014.40	$32,329.60	$23,684.80
Special damages	$36,490.63	$36,490.63	$0
SD Interest	$597.81	$597.81	$0
Totals	**$920,946.66**	**$454,969.89**	**$465,976.77**

[141] Against only Paulger Engineering the further heads of damage claimed, the respective positions of the parties and the differences are as follows:

Head of damage	Plaintiff	Defendant	Difference
Past gratuitous care	$344,794.60	$23,150.00	$321,644.60
Interest on past gratuitous care	$116,368.17	$7,813.30	$108,554.87
Future gratuitous care	$1,268,067.30	$34,440.00	$1,233,627.30
Totals	**$1,729,230.07**	**$65,403.00**	**$1,663,827.07**

[142] Because I have found that the plaintiff has not established that Paulger Engineering breached a duty of care in negligence to the plaintiff, it is unnecessary to deal further with the gratuitous care claims, except against the possibility of appeal. I do so briefly.

[143] Some of the evidence as to the assistance provided to Mr Cross by his wife, as a result of his injuries, is summarised further below. As well, the plaintiff relied on the report of an occupational therapist. The report strayed beyond the field of expertise of an occupational therapist. As well, some matters seemed not to be focussed on the functional impairments Mr Cross has and what needs to be done to compensate for his loss, in those areas. Thus, the report allows for his wife's concern as to his mental health and the risk of suicide. Similarly, it allows for her need to perform "family" tasks which the plaintiff use to perform, for the benefit of her and her son, as well as meeting a need of the plaintiff. Thus, there is no sufficient separation between what is a need of the plaintiff and what is a need of the family, in the provision of relevant services. Further, I was concerned that the assessment of some of the plaintiff's needs, such as assistance in toileting and personal care appeared to be overstated in the report. Another obvious example is the description that he needs help in making chair or bed transfers. The plaintiff is not wheel chair bound. The transfers in question were not otherwise identified in the evidence. As well, it seems to me that the plaintiff's wife has decreased her hours of work for other reasons than the need to care for the plaintiff, so a calculation based on that event is flawed. I also viewed the claimed rate of $41 per hour for most of the claim to be appropriate for personal health care, which is not where I consider the plaintiff's needs principally lie. The aggregate assessment of his needs was said to be between 38 and 39 hours per week, plus two hours per week for driving. In my view, this was a gross exaggeration of the plaintiff's needs for gratuitous care, past or future.

[144] Nevertheless, I do not consider that the defendant's submissions as to the appropriate assessment of future gratuitous care are sufficient.

[145] For past gratuitous care, in my view, it is appropriate to assess three weeks at 15 hours per week at $41 per week for the plaintiff's post-operative period and 5 hours per week at the rate of $30 per hour from September 2008 onwards to the date of

trial. For future gratuitous care, in my view, it is appropriate to assess 5 hours per week at the rate of $30, namely $7,800 per annum, for the balance of the plaintiff's life expectancy. In relation to general damages, I deal further below with the possibility that the plaintiff might have experienced pain and suffering from a similar injury to his degenerative lower back in any event as a contingency. In my view, notwithstanding that possibility, it is not appropriate to discount the assessed amount for future gratuitous care further.

[146] It is unnecessary to extend the calculations or to calculate interest on the amount of past gratuitous care as those amounts will not form part of any judgment.

Agreed amounts

[147] Special damages and interest are agreed.

General damages – non-pecuniary loss and interest

[148] The dispute about general damages is in narrow compass. There is no significant dispute as to the extent of the plaintiff's injuries or disabilities.

[149] The primary injury comprised a right L5/S1 disc herniation with right S1 radiculopathy. That resulted in a right L5/S1 discectomy and right S1 nerve exploration on 20 March 2008.

[150] Dr Gillett's and Dr Williams' opinions were accepted by both sides. Dr Gillett says that the plaintiff's lumbar injury has left him with a whole person impairment of 13%. Dr Williams, who was the plaintiff's surgeon, says a 10% whole person impairment. The parties did not explore the range represented by those points of view.

[151] The primary injury resulted in an adjustment disorder with depressed mood.

[152] Dr Cantor's and Dr Lawrence's opinions were accepted by both sides. Dr Cantor says the plaintiff is severely depressed and unlikely to improve significantly. Using AMA 2, he assesses 25% whole person impairment. Dr Lawrence says the diagnosis is an adjustment disorder with depressed mood and a chronic pain disorder due to psychological factors. Using PIRS (which does not have to be applied because the *Civil Liability Act* 2003 (Qld) does not apply) she assesses 13% whole person impairment. Again, the parties did not explore the range represented by those points of view.

[153] Neither of the parties sought any specific findings of fact as to the plaintiff's non-pecuniary loss.

[154] The extent of the plaintiff's pain and suffering is evidenced by observation of him in the witness box, the things he and his wife said in evidence and the account of the development of his symptoms and their treatment as discussed in the various medical reports.

[155] The plaintiff entered court using a walking stick and walked with a pronounced limp. He showed physical discomfort in sitting which prevented him from relaxing in his seat and caused him to shift on his seat often, to move his weight onto a different point. These observations are consistent with the medical reports,

including a description of the plaintiff walking and sitting by Dr Gillett in one of his reports.

[156] He said that he experienced pain after the event. The pain was in his back and leg. In August 2006 he went to see Dr Bond for the pain. He had some physiotherapy. The pain got worse. It was worse some times more than others. He started doing other jobs that didn't have an irritating effect, such as driving a roller. He took Panadeine Forte or other painkillers. He continued not to do any heavy work.

[157] The progression of his condition led to further specialist medical review in the later half of 2007, physiotherapy, surgery in March 2008, and a following rehabilitation process. He returned to work, but unsuccessfully. On leaving work in October 2008 he became a disability pensioner. Under the continuing care of his general practitioner, he has been reviewed for forensic purposes by a number of the medical and other health practitioners whose reports are in evidence.

[158] The outcome is a lumbar spine disability assessed as a 13% whole person function impairment attended with consequences according to Dr Gillett as follows: "He will require ongoing assistance in daily life and he is permanently affected in relation to employment, recreation and daily life pursuits. Chronic pain will persist in the long term."

[159] One of Dr Cantor's reports expanded on the plaintiff's daily experiences of pain and suffering as follows: "He described the quality of the pain as like a bad toothache and in addition he may experience 'light' or 'hard' pains. On a pain scale score of 0 to 10 with 0 equalling no pain and 10 equalling unbearable pain he rated a typical day's pain as 7/10, a bad day as 9/10 and a good day 5/10. This pain makes him tired and irritable." This is a subjective assessment, but to an extent pain is subjective. That said, the heavy medication that the plaintiff has taken and takes for his pain is not subjective. Nor is the interruption of his sleep due to discomfort and pain.

[160] The consequences of the plaintiff's pain and associated functional impairment can also be seen objectively. Surfing, weight training, riding his motor cycle, home maintenance, furniture restoring and going to work are no longer possible. All this is consistent with Dr Gillett's succinct description: "His current situation would be best described as a failed surgical back…"

[161] It is accepted that the plaintiff has an adjustment disorder with depressed mood, as well as the underlying physical impairment associated with his back injury. Viewed from the physiological perspective of Dr Gillett as set out above, or from the psychiatric perspective of Dr Cantor – "I consider it highly unlikely that there will be any significant improvement given the persistence of his problems to date" – the prognosis for the plaintiff's pain and suffering is not optimistic. Whether the depressive condition be described as a major depressive disorder as Dr Cantor opines, or a chronic adjustment disorder with depressed mood, there is little difference of substance in the reports, in my view. Dr Lawrence has a slightly more optimistic outlook of the potential benefits of future treatment by way of an active pain management program such as that provided by the Wesley Hospital and more active and vigorous psychiatric management including attention to counselling and rehabilitation, but "would be cautious about the degree of improvement that can be

fully achieved, since there is an underlying medical condition which will continue and has to be adjusted to."

[162] Mr Cross gave some detailed evidence as to his current capacities and state of health and mind. After he left work he felt useless. He doesn't sleep much because of his back. He is lucky to get four hours sleep per night and sleeps on a divan because he can't sleep in his bed. He cries at times, brought on by insignificant things. He has at times thought he would be better off dead. He no longer visits friends much.

[163] He tried to ride his motorcycle wearing a brace but it didn't work. He can vacuum a bit but not mop the floor. He does a little bit of washing and puts it out. He washes the dishes. He is not a cook but in any event can't lift heavy pans. He has tried to drive the ride on mower but it didn't work. He has tried washing the car a couple of times "but you pay for it in the end", meaning his back swells and his leg hurts. He can no longer do the external home maintenance and renovation he previously enjoyed.

[164] Now and again he will go to the shops with his wife and walk with her, depending on how he feels. He isn't able to carry boxes or the like. Similarly, he walks the dog to varying degrees.

[165] He attends to these things "like a job, so it spreads out."

[166] Mrs Cross's evidence supported a number of these points and others, including the loss of their sexual relationship. She manages his medications. She assists him with showering, dressing and undressing. She drives him to the GP.

[167] Both sides sought to support their contentions as to the appropriate award of non-pecuniary loss by reference to *Cameron v Foster*,[56] as a comparable case. The plaintiff submitted that he was entitled to a higher award than the $80,000 awarded for general damages in that case because of the degree of his physical whole person impairment and the length of the period of pain and suffering were greater in this case. The defendants referred to other cases as well, and submitted that the amount ought be $60,000 because awards of $80,000 are merited in cases of "continuous and severe pain due to significant neck or back injuries and with associated psychiatric compensation" compared to this case "noting the fall was a minor incident". I recognise authority which dictates that it is an error to seek to create a scale or direct comparison between different cases.

[168] I fail to understand how whether the precipitating cause was a major or minor incident is particularly relevant on this question, unless it is an indirect contention that there is a possibility that future pain and suffering and loss of amenity of life would have been incurred in any event and the award of non-pecuniary loss should be discounted for that reason. That was not a matter expressly raised by the defendants pleading or in argument. My questions to Dr Gillett and the defendants' cross examination about the minor circumstances in which such an injury, as the disc protrusion suffered by the plaintiff, might occur can be said to have indirectly foreshadowed the point.

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56 [2010] QSC 372.

[169] In principle, it seems correct to me that in assessing the plaintiff's non-pecuniary loss on the possibilities any pain and suffering and loss of amenities of life the plaintiff might have experienced in any event because of the plaintiff's underlying susceptibility to an injury of the kind actually suffered are relevant.

[170] The possibilities here are not the same as the assessment of the possibilities that the plaintiff will suffer future economic loss. That the plaintiff might have experienced a similar injury to his degenerative lower back, in any event, is one possibility. Another possibility is whether such an injury might have caused similar physical pain and loss of function. Yet another is the possibility that a similar illness to the adjustment disorder with depressed mood might have affected the plaintiff. If there is a percentage prospect of each of those hypothetical contingencies, any overall assessment on the possibilities would be discounted by the product of those chances, as explained by the High Court in *Malec v JC Hutton Pty Ltd.*[57]

[171] In the absence of any evidence exploring these possibilities, I do not consider that anything other than a very broad brush recognition of the possibilities could be attempted. However, since the defendants failed to plead the point, or to raise it expressly in evidence or argument, I decline to discount the assessment of the plaintiff's non-pecuniary losses on this account.

[172] In the result, I assess the plaintiff's non-pecuniary loss in the sum of $75,000.

[173] The plaintiff submits that interest should be calculated on 50% of that amount at 2% over 6.75 years. The defendants' submission as to interest on past non-pecuniary loss is in effect the same. I assess interest on past non-pecuniary loss as $4,095.

Past earnings, interest and superannuation

[174] The parties are agreed that the relevant period is either 226 or 227 weeks to trial. The defendants calculate upon a net weekly loss of $717.95 for 226 weeks to arrive at $162,256.70 before discounting for the usual contingencies at 15%. The plaintiff calculates the net amount from gross earnings and calculated the tax over the period. Without setting out the full calculation he arrived at $188,828.69 without discounting for the usual contingencies.

[175] Despite my best efforts, I am unable to follow the plaintiff's calculation. The amount arrived at was said to be "the total amount of gross income less 18% for tax." But the total hypothetical gross income was said to be $214,578.02. Eighty-two percent (less 18%) of that amount is $175.953.98, not $188,828.69. That would be the amount to be compared to the defendants' amount of $162,256.70 over the period to trial.

[176] There is a basis identified in the evidence for the differences in the calculation of those amounts. The defendants appear to have adopted an annual gross salary as at 1 July 2009 in the sum of $45,266.20, or near to it, as their base rate for calculation and allowed for tax at a rate between 17% and 18%. The plaintiff has taken the gross rates per week over the relevant periods from November 2008 to the trial, and allowed for tax at 18%. The plaintiff's exercise more closely approximates the movement in net weekly earnings over the relevant period.

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57 (1990) 169 CLR 638 at 645; [1990] HCA 20.

[177] Adopting the plaintiff's gross weekly losses, and tax at 18% as an approximation, I assess the loss of past earnings in the sum of $175,953.98

[178] Each of the parties recognises that there was $16,499.45 of weekly payments of compensation. Each of them added that sum in their calculations of loss of past earnings. But it was a sum actually received. It has to be repaid, but I do not understand why that increases the loss and do not add it.

[179] The discounting of past earnings upon the possibilities for contingencies is something I have considered. In my view, it is not required on the evidence. I have considered the possibilities in relation to the plaintiff's claim for future economic loss bearing this in mind.

[180] The parties agree that interest should be calculated on loss of past earnings at 5%. The plaintiff submits that the period is 6.75 years. That calculates the loss from the date of the event. The loss of income occurred over the period from November 2008 to March 2013, namely 227 weeks. The period should be 4.37 years.

[181] The repayment of $16,499.45 of weekly payments of compensation is excluded from the multiplicand, resulting in $159,454.53.

[182] The amount of interest is calculated as $159,454.53 at 5% for 4.37 years, namely $34,840.61.

[183] The parties agree that the loss of past superannuation benefits should be calculated at the rate of 9% of past earnings. That amount is 9% of $175,953.98, namely $15,835.86.

Future earnings and superannuation

[184] The plaintiff calculates a loss of future earning capacity by adopting a multiplicand of $838.25 net weekly loss over 15 years, less a discount of 10% for the usual contingencies. The defendant adopts $780.00 net weekly loss to age 55 (4 years and 5 months at the date of trial) less a discount of 10% for contingencies. I prefer the plaintiff's multiplicand, which corresponds to the approximate net weekly earnings at the time of the trial. The plaintiff's calculation assumes that apart from the "usual" contingencies, no discount is to be made on assessment of future loss on the possibilities. The defendants' calculation assumes that by age 55 the plaintiff would have been unable to work and thereafter suffers no loss.

[185] I consider that both approaches are flawed for analogous reasons to those I set out in *Rodger v Johnson*.[58] In my view, the correct approach requires a global assessment on the possibilities that the plaintiff would have suffered the loss measured by reference to the difference between the hypothetical earnings he would have made if he had not been injured on 26 June 2006 and the hypothetical earnings he will make having suffered that injury.

[186] The possibility that he will not earn income from now until what would have been the end of his working life is an overwhelming probability. However, what would have happened had he not been injured by the event on 26 June 2006 is problematical.

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[58] [2013] QSC 117 at [7] – [17].

[187] In my view, the minor nature of the precipitating injury in the present case coupled with the pre-existing degenerative condition of the plaintiff's lower back suggest that there must have been a reasonable likelihood of that happening while he followed a physical labouring occupation and active lifestyle. He intended to work for the council in the same occupation until retirement. I asked Dr Gillett as to his opinion on this point, who said that "what possibly can happen is that he would get back pain as he aged, and then the back pain would then impact upon him in relation to the manual-handling tasks… I would have thought as an estimate it would probably be in his mid to late 50s." The plaintiff's counsel re-examined Dr Gillett to say that was "speculation on [his] part". Nevertheless, in my view it is not satisfactory to conclude that this relatively minor incident caused such a catastrophic outcome upon the plaintiff's ability to carry out his manual labouring employment but that if it had not occurred the plaintiff would have continued uninterrupted in carrying out such work until retirement age.

[188] As well, there are the "usual" contingencies for which a discount of an otherwise healthy plaintiff's claim is allowed. Both parties contended for a discount of 10% for future economic loss. Neither side developed submissions in support of their contention, although the defendants' further contention was that a discount of 15% should also be allowed for past economic loss expressed to include "the possibility of the plaintiff having been likewise injured in an equally minor incident". As to future economic loss, the defendants' submission was made against the background of a factual assumption that future economic loss should only be allowed to age 55. Neither side explored differences of judicial opinion as to the range of the "usual" contingencies discount.[59]

[189] In my view, it is appropriate to discount the calculation of the plaintiff's future economic loss as the difference between his pre-event level of earnings taken as at the date of trial and the absence of earnings on the basis that he will never work again by 45%. Taking the plaintiff's calculation otherwise, the amount is $253,317.05.

[190] At the agreed rate of 9%, the amount of the loss of future superannuation entitlements is $22,798.53.

Future treatment and medication

[191] The plaintiff claims compensation for the expenses of future monthly consultations with his GP for an indefinite period for his mental health. At a monthly amount of $36.46 over the plaintiff's life expectancy the present value of that future cash flow is $31,750.70. The defendant allows two sums: first $6,767 for future GP consultations, in general, based on past attendances; secondly, $10,000 for compensation for the possibility of future additional mental health consultations. The total is $16,767. The defendants rely on the fact that the plaintiff is not presently making monthly mental health consultations and may not do so in the future.

[192] I accept the defendants' allowance in the absence of evidence from the plaintiff that he considers he would attend monthly mental health consultations with his GP.

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[59] See, for example, *Craddock v Anglo Coal (Moranbah North Management) Pty Ltd* [2010] QSC 133 at [72]-[76].

[193] The plaintiff claims a further amount of $10,000 for future medical expenses for further treatment in the form of pain management strategies and attendances at pain management clinics. There was no evidence specifically as to the costs for this treatment, or that it is presently considered an appropriate strategy or treatment plan, although Dr Lawrence appears to favour it. In my view, it should have been the subject of evidence and I do not allow it against the general possibility of further treatment at a pain clinic or clinics.

[194] The plaintiff claims a further amount of $20,000 for the possibility that if he and his wife acquire a home in the future there may be a need for modifications, as opined by Ms White. I consider this to be speculative and do not allow it.

[195] The plaintiff claims future expenses on medication at the rate of $8.19 per week valued over the plaintiff's life expectancy of 34.5 years on a multiplier of 870.8 in the amount of $7,131.85. The defendant calculates at the rate of $6.35 over 35 years on a multiplier of 876 the amount of $5,562.60. I accept the plaintiff's weekly amount by reference to exhibit 7 and the calculation of $7,131.85.

Conclusion

[196] The result of the assessment of damages against the council is as follows:

Head of damage	Plaintiff	Defendants	Assessment
General Damages	$80,000.00	$60,000.00	**$75,000.00**
GD Interest	$5,400.00	$4,050.00	**$4,095.00**
Past earnings	$205,328.14	$154,417.65	**$175,953.98**
Interest on past earnings	$63,729.68	$17,200.00 $ @ 5% less 16,499.45	**$34,840.61**
Past superannuation	$16,994.60	$4,500.00	**$15,835.86**
PS Interest	$0	$0	**$0**
Future earnings	$418,705.87	$133,380.00	**$253,317.05**
Future superannuation	$37,685.53	$12,004.20	**$22,798.53**
Future treatment and medication	$56,014.40	$32,329.60	**$23,898.85**
Special damages	$36,490.63	$36,490.63	**$36,490.63**
SD Interest	$597.81	$597.81	**$597.81**
Totals	$920,946.66	$454,969.89	**$642,828.32**

[197] It follows, in my view, that the plaintiff is entitled to judgment that he recover from the council the sum of $642,828.32, as damages for negligence, including interest, up to the date of the trial. That amount has not been adjusted to bring the calculation forward to the date of judgment. I have done that so the determinations I have made can be analysed against the amounts and calculations which were presented to me in the submissions.

[198] It also follows that Paulger Engineering is entitled to judgment that the plaintiff's claim against Paulger Engineering is dismissed.

[199] I will hear the parties on the final amount of the judgment to be given on the plaintiff's claim against the first defendant and as to costs.

ANNEXURE

Figure 11 – Stairway built into tray area of vehicle.

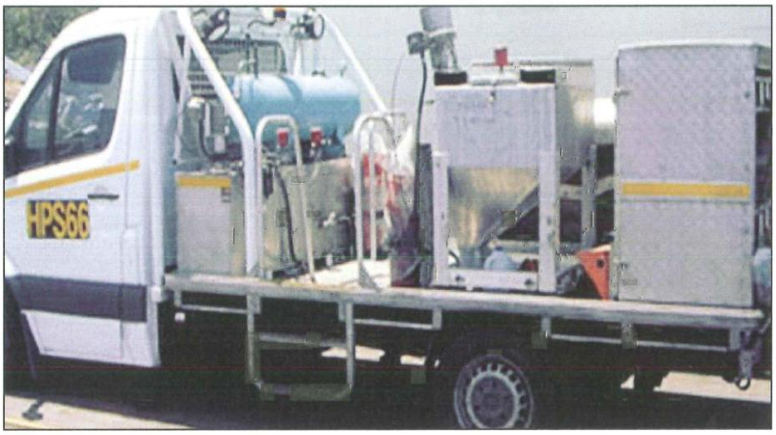

Figure 12 – Improved fixed step with hand rails.

Figure 13 – Drop down tray side with integrated step.