

SUPREME COURT OF QUEENSLAND

CITATION: *Thompson v Cranetrans Pty Ltd* [2013] QSC 250

PARTIES: **ROSS EDWARD THOMPSON**
(plaintiff)
v
CRANETRANS PTY LTD
(defendant)

FILE NO: 11955 of 2011

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 20 September 2013

DELIVERED AT: Brisbane

HEARING DATE: 21, 22 and 23 August 2013

JUDGE: Applegarth J

ORDER: **Judgment for the plaintiff in the sum of \$552,879**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – IN GENERAL – where the plaintiff was employed by the defendant as a truck driver – where the plaintiff was injured when changing a tyre on a trailer – where wheel spanner provided did not sufficiently engage with the wheel nuts – where the plaintiff was required to use considerable force to break the tension on the nut and re-tension the nut – where defendant alleges incident did not occur as plaintiff describes – whether the equipment provided by the defendant was suitable to perform the task – whether plaintiff should have been required to change the tyre in the circumstances – whether defendant should have supplied other suitable equipment – whether defendant breached its duty of care

Czatyрко v Edith Cowan University (2005) 214 ALR 349, cited
Lusk v Sapwell [2012] 1 Qd R 507, cited
Hegarty v Queensland Ambulance Service (2007) Aust Torts Reports 81-919; [2007] QCA 366, cited
Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121, cited
Sheather v Country Energy (2007) Aust Tort Reports 81-901; [2007] NSWCA 179, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422, cited

COUNSEL: P J Goodwin for the plaintiff
W D P Campbell for the defendant

SOLICITORS: Murphy Schmidt for the plaintiff
Bruce Thomas Lawyers for the defendant

- [1] The plaintiff, Mr Thompson, sues his former employer, Cranetrans, for personal injuries he suffered on 24 June 2009. At the time, Mr Thompson was employed by Cranetrans as a truck driver, and was engaged in hauling a flat-top trailer (“the float”) with a prime mover. Near Bowen he had to change a flat tyre on the float.
- [2] The tension at which wheel nuts on the float must be maintained is high: far higher than for wheel nuts on an ordinary car wheel. At Cranetrans’ Brisbane base there was a properly-sized socket to fit tightly over the nut. It was attached to a power tool that had sufficient force to break the tension in order to remove the nut. When the nut or a replacement nut was put back, a tension wrench was used that was suited to the task and which could achieve the required tension.
- [3] Mr Thompson had no similar equipment when required to change the float’s tyre during a trip. The “rattle gun”, if connected to a source of compressed air on the truck, lacked the required power. Although it might be used to remove the nuts quickly once the tension was broken, and to replace the nuts, it was of no real use to Mr Thompson. Mr Thompson was not supplied with a tension wrench, a hand-held torque multiplier or a tyre torque wrench. To break the wheel nut’s tension, and to re-tension the nut, he had to use a wheel spanner into which a bar was inserted at a 90 degree angle. But to apply the required force to remove and later re-tension the nut, he had to use a “cheater bar” that was about a metre long and extended the length of the bar. He had to apply his full body weight onto the cheater bar so he could achieve the required force, while using his other hand to hold the wheel spanner over the nut.
- [4] Mr Thompson did not like to use the wheel spanner that Cranetrans provided. It did not slide over the nut completely. Usually Mr Thompson would take his own wheel spanner, which he considered was much better. But he did not do so on this trip, and so was required to use the equipment that was with the truck.
- [5] On 24 June 2009 he used this equipment to remove one of the float’s 32 wheels, which had become flat. He replaced the wheel. Mr Thompson explained that as he was tightening the wheel nuts he noticed that the spanner was not tight on the wheel nuts. This made him more careful, he said. However, the spanner slipped off the last wheel nut that he was tightening. At the time he had his left hand on the spanner and his right hand behind him, pushing down on the metre length bar. He was in a crouched position. As the spanner slipped from the wheel nut, Mr Thompson fell backwards on his right leg and injured it. He thought that he had twisted his ankle. But the injury was far worse. He fractured his right ankle, tore the medial meniscus in his right knee and also scarred his right knee.
- [6] His case is that he suffered these injuries because he was required to change the tyre:
 - (a) with the only equipment his employer provided to him, namely a wheel spanner of incorrect size and which was insufficient to perform the task when

coupled with a metal bar to which he had to exert great force for leverage;
and

- (b) without his employer supplying other equipment suitable for changing the tyre, namely a tension wrench, hand torque multiplier and/or a tyre torque wrench.

He adds that the wheel nuts that were on the tyre were worn down. In general terms, he says that his injuries were caused by Cranetrans' breach of implied contractual duties and its common law duty as his employer in:

- (a) having him perform the task of changing the float's tyre in the circumstances;
 - (b) failing to provide him with safe plant and equipment, namely an appropriately sized wheel spanner, a tension wrench, a hand torque multiplier and/or a tyre torque wrench; and
 - (c) failing to devise, maintain and enforce a system of work which did not expose him to the risk of injury when changing tyres.
- [7] Cranetrans pleads and persists in alleging that the incident involving the spanner slipping from the wheel nut and causing Mr Thompson to injure himself did not occur, and that he injured himself when alighting from the cabin of his truck on the roadside south of Bowen. For the reasons that follow, this defence is without merit.
- [8] Cranetrans admits that it was reasonably foreseeable that by failing to provide the correct equipment to perform the task, the wheel spanner would fail to engage properly and slip from the wheel nut whilst Mr Thompson was exerting significant force on the metal bar used for leverage, and that it was reasonably foreseeable that by failing to provide the correct equipment to perform the task he may be injured in the course of performing it.
- [9] Cranetrans denies that any injuries caused to Mr Thompson in changing the tyre were caused by a breach of its duty as employer. Cranetrans pleads, among other things, that the wheel spanner was of a correct size and was sufficient to perform the task and that there was a rattle gun in the truck for his use. It also denies that its failure to supply other equipment, particularly a tension wrench, a hand torque multiplier and/or a tyre torque wrench, was a breach of duty on the basis that the rattle gun was available to perform the task. It denies that it failed to devise, maintain and enforce a system of work that did not expose Mr Thompson to the risk of injury, and denies that it was negligent and breached its contract by requiring him to perform the task of changing the tyre in the circumstances.

Issues

- [10] The liability issues may be summarised as follows:
1. At what location was the plaintiff injured? In particular, was he injured on the roadside south of Bowen or when he was changing the float's tyre at a service station just outside of Bowen ("the place of injury issue")?
 2. How were his injuries caused? In particular, were they caused by:

- (a) being required to change the tyre with the equipment supplied by Cranetrans;
- (b) the use of equipment that was insufficient to perform the task and included a wheel spanner that was not the correct size and not tight on the wheel nut;
- (c) the fact that Cranetrans did not supply other equipment suitable for changing the tyre, namely a tension wrench, hand torque multiplier and/or a tyre torque wrench; or
- (d) the wheel nuts being worn down.

(“the cause of injury issue”)

3. Whether Mr Thompson has proved that one or more of those causes “was the product of negligence”¹ or a breach of contract on the part of Cranetrans.

(“the breach of duty issue”)

- [11] The quantum of Mr Thompson’s loss and damage is in issue. There is no real dispute about the nature and extent of his injuries, which are of a permanent nature. They include a complex regional pain syndrome and other problems which cause him great pain and threaten his future employment as a long-haul truck driver. The parties’ competing contentions about quantum appear in schedules. The main difference relates to the assessment of future economic loss.

Background

- [12] Cranetrans is in the business of transporting cranes, other large vehicles, heavy equipment and other loads that need to be transported on a flat-top trailer. Presently the business has 11 prime movers and 19 trailers, and I infer that it had a similar number in 2009. Mr Thompson would usually drive one of two prime movers. He would usually haul the same float, and between the float and the prime mover there was a dolly.
- [13] The float was built in 1995. Cranetrans purchased it in 2004 for \$295,000 plus GST. It was “notorious” for wearing out tyres. It took very heavy loads and, lacking a steering mechanism, its tyres wore rapidly and had to be rotated or replaced. This would be done at Cranetrans’ workshop in Brisbane. The aim of frequently rotating and replacing tyres at the workshop was to reduce the need to do so when the trailer was on a trip. But, it was to be expected that tyres would go flat and need to be replaced by the driver on a trip. With this in mind, the float would leave with six spare tyres. Mr Gee, a mechanic, who contracted his services to Cranetrans in 2009, gave evidence of seeing the float leave with six spare tyres and “come home with none”.
- [14] Tyres were fitted onto the float in the manner explained by Mr Thompson and Mr Gee in their evidence. The wheel nuts did not fit directly onto the wheel rim.

¹ *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 136-137 [32], [36].

Instead, there were clamps that locked the rim to what was described as “the spider”. The configuration is sketched in Exhibit 10. Mr Gee referred to a cleat device going under the wheel nut and onto the wheel rim, and for the device to be tightened to stop the wheel from spinning on the spider. The nuts had to be tightened to provide a specific tension, so that the tension was high enough, but not too great.

- [15] At the Cranetrans workshop there was a high powered tool (described by Mr Gee as a nail gun) that was used to break the wheel nut tension in order to remove a wheel. There also were proper sockets that fitted onto the wheel nut and which were powered by this tool. When a wheel was replaced or rotated a wheel nut would be placed back on the thread and tightened. Mr Gee, and also Mr Thompson who helped rotate tyres at Cranetrans’ base, would use a tension wrench to correctly tension the nuts. Mr Gee explained that it was a bar, with a socket and a ratchet. It was not complicated. It would be wound to set the correct tension and when the correct tension was reached it would click. A good tension wrench would cost \$500.
- [16] The system for a driver to remove and replace a float tyre when on a trip was quite different. The rattle gun that was with the truck could not produce anything like the force required to remove the wheel nut, which was tensioned at around 250 psi. The compressed air system on the truck was powerful enough to operate air brakes and other items. An air line to power the cheap rattle gun could be installed but it could run at only about 60 or 80 psi and did not produce enough air pressure to break the nuts or to re-tension them properly. Instead, wheel nuts were removed using a basic wheel spanner that resembled a metal tube into which a bar was inserted. The bar was extended by a “cheater bar” that was about a metre long. Someone of Mr Thompson’s size had to put all of his weight on this bar to break the tension on the nuts and to re-tension them. The wheel spanner that was supplied by Cranetrans for a driver to use had a in-built socket at one end for a nut that was one and a quarter inches in size.
- [17] Mr Thompson did not like to use that wheel spanner. As he explained, when using it on the float tyres, the nut would only go part of the way into the socket. This was because of the clamp. The spanner hit up against the clamps and a driver could not get it “far enough to get the whole complete wheel nut on”. Only about two-thirds of the wheel nut would be inserted into the spanner. Because he did not regard that kind of spanner as satisfactory, Mr Thompson used his own wheel spanner, which he kept with his other tools. Cranetrans did not know he did this. In fact, he had two wheel spanners with different sockets because trailer tyres are different to truck tyres. Mr Thompson made his own spanner with a pipe welded on the socket. There was a hole in the end of the pipe into which he would put his metal bar. He had used this tool on many occasions and it was much better than the wheel spanner supplied by Cranetrans. He explained that it was better because it was an actual socket which was thinner and smaller and therefore went on the nut better. It went on further and was tighter on the nut. The thicker spanner supplied by Cranetrans could not get in as close and cover the whole wheel nut.
- [18] The system for removing and re-tensioning wheel nuts at Cranetrans’ base with the use of a power tool to remove the nut and a tension wrench to re-tension it was far safer than requiring an employee to apply his body weight onto a metre-long bar in order to achieve enough force. Although Mr Bins, an experienced truck driver and

director of Cranetrans, referred to the fact that the wheel nuts would be getting “pounded and pounded all the time” by the rattle gun and socket, Mr Gee thought that using the socket and air gun did not affect the nut because it was a proper socket that was not worn. The position in relation to the use of the wheel spanner that was given to drivers to use was explained by Mr Gee, whose evidence I accept. He explained that the wheel nuts on the float used to wear excessively and had to be changed often. He explained that you might wear a set of wheel nuts out in two or three trips because the “bar is always worn”. This was a reference to the wheel spanner. He explained that “the bars will wear the wheel nut out quicker”. When asked to explain what wears the nuts he explained that the wheel nuts “squash up on the inside, and they taper down on the outside, so the nut ends up ... angled”. They taper towards the outside of the wheel nut and so the wheel spanner tends to twist off it. He continued, “your socket is worn and your nut is worn, and what happens when you go to tension it actually – it – it encourages the wheel brace to slip off. It’s due to wear and tear.” After two or three wheel changes “up the road” they would be worn. If the wheel nuts were worn to excess they would be taken off, but if they could be used again, they were used. Wheel nuts were used until “the life had run out of them”. They would not be routinely replaced. But the nuts, which each cost about a dollar, would be replaced when they were observed to be worn. If a wheel nut could be removed and re-tensioned at Cranetrans’ base then it was deemed to be serviceable.

- [19] A worn wheel spanner would cause wear to the outside hexagonal surface of the nut. This wear was caused by the constant doing up of nuts. Such a nut may pass the serviceability test in the workshop but a wheel brace might slide off it if the nut had flared at one end and tapered towards the outside. This posed the risk that it could not be safely removed and re-tensioned with the wheel spanner that was in the truck.
- [20] Nuts that were observed to be worn would be replaced when wheels were removed to adjust brakes or rotate wheels. But that system did not ensure that the wheel spanner that went with the truck and float could safely remove and re-tension a nut that passed such a visual test. Mr Gee tended to focus on other safety issues including maintaining brakes and other equipment. Mr Thompson (and presumably other drivers) would rotate tyres at the base.
- [21] There was a system for regular maintenance of the float and on each day of a trip the driver would make a physical inspection and complete a “tick and flick” sheet. But there was no system before a truck went on a trip for the wheel nuts to be inspected to see if they had been damaged in some way. According to Mr Bins, if something “stuck out” then it would be fixed. But no-one was appointed to check that the wheel nuts were in order, and there was no system to inspect the wheel spanners that were in the various trucks.
- [22] I accept Mr Gee’s evidence about wheel spanners on trucks becoming worn. Mr Bins said that he had never seen a wheel brace lose its hexagonal shape over the long time that he had been a driver and owned his own equipment. He started driving when he was 17 and now is aged 48. I accept the honesty of his recollection of his personal experience. But this does not persuade me to reject Mr Gee’s evidence about spanners becoming worn and the mechanism by which they became worn on this float. I accept Mr Gee’s evidence about how wheel nuts and the wheel spanners became worn on this float. He explained that the nuts wore and became

smaller. The inside of the wheel spanner would wear and become bigger. He stated: "So you have small and big, so when you do it up it twists the nut - encourages the wheel brace to twist off the nut." If the nut was flared on the inside and tapered to the outside then the wheel spanner would not go down the full length of the nut and would be encouraged to twist off.

- [23] Mr Gee saw a worn tyre spanner with the float when he inspected the float at an auction not long after he had left Cranetrans. He was confident the wheel spanner that he saw at that time was not the one which was taken out of the truck by Mr Bins after a loss adjuster came to see Mr Bins and which was used for the purposes of demonstration in Court. Mr Gee's evidence raises the distinct possibility that the wheel spanner which he saw at the auction was the one which Mr Thompson used on 24 June 2009. Mr Bins accepted it was possible that there was a worn wheel spanner in the truck in June 2009, whereas the one that he took out of the truck when first interviewed by a loss adjuster was not worn. He stated that it was "very possible" that the wheel spanner brought to Court was a different one to the wheel spanner that was in the truck in June 2009.
- [24] Based on the evidence of Mr Gee and Mr Bins, I conclude that the wheel spanner brought to Court, and photographed in Exhibits 3 and 8, is not the wheel spanner that was used by Mr Thompson on 24 June 2009. Mr Gee's evidence persuades me that wheel spanners used on this float became worn. It is probable that a worn spanner of the kind seen by Mr Gee at the auction was replaced without Mr Bin's knowing about it. As Mr Bins said, such an inexpensive item would be replaced if a driver reported that it was no good and slipped all the time. Such a report would have gone to the workshop manager. In the circumstances, it is unsurprising that Mr Bins could not say whether or not the wheel spanner which was used on the float on 24 June 2009 was worn. The evidence suggests that if it was worn it may have been replaced at some stage after June 2009 without Mr Bins' knowledge, probably by the new, unworn wheel spanner that was brought to Court.
- [25] An alternative to the type of wheel spanner that was supplied by Cranetrans for use on the float in June 2009 was a wheel spanner of the kind that Mr Thompson usually used, which had a thinner socket and a tighter and more complete fit on the wheel nuts on the float.
- [26] As to suitable tools to re-tension a wheel nut on the float during a trip, evidence was given of a tool described as a torque multiplier. As Mr Gee explained, it multiplies the torque so that "if you put a little effort in you get a lot of effort out". Such a tool is cheaper than the kind of tension wrench which he used. Mr Gee said that a torque multiplier is used by "an owner driver or a company's driver." They are also used in tyre shops. A torque multiplier can cost anywhere from \$100 to \$300. A tension wrench is more expensive. A good one can cost up to \$500.
- [27] Mr Gee was contracted to repair and maintain the vehicles. If he requested equipment it would be supplied. However, he did not see it as his role to suggest to Cranetrans that they supply different tools to drivers. As he said, it was not his equipment and it was not up to him to say that they should be supplied. He used his own tools and did his job. Also, Mr Bins had been an owner driver for a long time and was older than Mr Gee. Mr Gee simply came into an established business and did not see it as his role to tell Mr Bins what to buy and what not to buy.

- [28] Mr Gee's evidence was that there was a need for a driver to be given a torque multiplier or similar equipment.
- [29] By way of overview, there was a high attrition rate on nuts that were used on this float. This is because of the frequency with which tyres had to be replaced or rotated either at Cranetrans' base or when the truck was on the road. Nuts would wear and also taper. They would be replaced if they were worn out. The wheel spanners given to drivers also were prone to wear when used on this float.
- [30] The evidence does not allow any firm conclusion to be drawn about when the wheel that became flat on 24 June 2009 was last rotated. The nuts on that wheel may have been worn but probably were not worn to excess, otherwise their loss of hexagonal shape probably would have been detected when they were last re-tensioned in the workshop. They may, however, have been tapered in the way that Mr Gee explained and been deemed serviceable because they were able to be removed at the base and re-tensioned with the equipment that was used at the base. This did not, however, make them safe to be re-tensioned with a different wheel spanner, particularly one which did not go over the wheel nut completely and which was less suitable than the sockets used at the base.
- [31] Any pre-trip visual inspection of such a nut would be unlikely to detect such a taper and a driver would have been unlikely to detect its condition.
- [32] The wheel spanner which was with the truck, and which Mr Thompson was forced to use on 24 June 2009, was not inspected prior to his departure on that trip and its state was not the subject of regular inspection. Mr Thompson had no occasion to inspect it because he usually used his own wheel spanner. Mr Thompson inadvertently left his own wheel spanner in the other truck and did not realise that he did not have it with him until he was required to change the float's tyre on 24 June 2009.

The trip

- [33] In June 2009 Cranetrans subcontracted to Russell Transport to supply a prime mover, the float and Mr Thompson's services for a job. Russell Transport had the task of transporting four large forklifts, which were capable of lifting shipping containers. The forklifts had to be transported from Brisbane to the army base at Townsville. Each of the four trucks left at about the same time. They did not travel in a convoy, as such, and were a fair distance apart. Each of those trucks had a separate pilot who was engaged by Russell Transport. The prime mover, dolly and float, together with its large load was a long and wide vehicle. The pilot had to precede it, warn oncoming traffic and do other things to ensure the safety of the following truck and other road users. For example, the pilot had to avoid the truck encountering another wide load or a truck on a narrow bridge. For this purpose the driver of the truck and the pilot needed to be in radio range, which is usually up to three kilometres. The pilot had to be a reasonable distance ahead in order to warn oncoming traffic.
- [34] The truck could only travel for a limited number of hours each day. Mr Thompson, the other truck drivers and their pilots slept in their vehicles at night. Mr Thompson knew another driver who was hauling a similar load, Mr Roach, and kept in radio contact with him.

- [35] Mr Thompson had not worked with the pilot who was engaged by Russell Transport on this occasion, Mr Chacano. Relations soured between them. Mr Chacano was driving his own V8 Jeep which had to refuel regularly. Mr Thompson's prime mover had enough fuel to not need refuelling between Brisbane and Townsville. Mr Thompson became aggravated by the fact that Mr Chacano had to stop and refuel so often, and also says he was aggravated by Mr Chacano not doing his job properly. I am not required to decide whether Mr Chacano did his job properly. The relevant point is that Mr Thompson thought that Mr Chacano was not doing his job properly and by 24 June 2009 he had "had enough" of him.
- [36] On the morning of 24 June 2009 the pilot vehicle and the truck left Mackay, intending to arrive in Townsville around lunchtime. Mr Thompson was wearing his normal work clothes and his boots. At around 10 am Mr Thompson received a message that the pilot had to "fuel up". They were then just outside of Bowen and the pilot vehicle went into the Caltex service station on the highway. Mr Chacano refuelled his vehicle and then went inside the service station for something to eat. Mr Thompson drove his truck around the back of the service station and parked on the northern side. It was at this time that he realised that he had a flat tyre on the float. He set about changing it and as he was tightening up the last wheel nut he injured himself.
- [37] At this time Mr Chacano was inside the roadhouse. When he had finished his meal he went outside. He did not speak to Mr Thompson. He may have looked to see where he was, driven his four wheel drive around to that side of the service station or called Mr Thompson on the radio. In any event, he resumed the journey and Mr Thompson followed in the truck. As they travelled north towards Ayr Mr Thompson's ankle became worse and he removed his boots. He also had to relieve himself, and so he radioed Mr Chacano and asked him to stop. This was near Ayr and they pulled over to the side of the road. Mr Thompson was limping and Mr Chacano may have asked him what happened, to which he responded to the effect that he had sprained his ankle. After this brief stop on the roadside near Ayr, they travelled on to Townsville. Mr Thompson stopped at a BP service station where Mr Roach had also parked his vehicle. Mr Chacano did not stop. His pilot duties were at an end and he and Mr Thompson separated at the BP service station without speaking to each other in person.
- [38] By this time Mr Thompson could hardly walk. He could not even refuel his vehicle on his own. Mr Roach and the other drivers helped him and they delivered his load to the army barracks.
- [39] Mr Thompson then drove south, refusing the offer of Cranetrans to fly a replacement driver to Townsville. But he had increasing difficulty with driving and could not drive through heavy traffic. So another Cranetrans employee drove the final leg of the return trip to the base in Brisbane. Mr Thompson went to a medical clinic where x-rays found that his leg was broken in two places. He then went to hospital where a plaster cast was applied to it. He could not return to work and went on workers' compensation. He attempted to return to truck driving, but with great difficulty. A Notice of Claim for Damages pursuant to s 275 of the *Workers Compensation and Rehabilitation Act* (Qld) 2003 dated 8 October 2010 was served. These proceedings commenced on 23 December 2011. Mr Chacano was not asked to recall the trip until he was interviewed by an investigator on 29 March 2011.

The place of injury issue

- [40] Mr Thompson's case is that he injured himself when changing the tyre at the service station on the highway close to Bowen. He denies that he and the pilot vehicle pulled over on the roadside south of Bowen and before the pilot had to stop for fuel at the service station. The only encounter with Mr Chacano beside the road happened north of Bowen and near Ayr.
- [41] On the basis of a handwritten statement given by Mr Chacano on 29 March 2011 Cranetrans disputed the sequence of events, and positively denied that the alleged incident happened. Mr Chacano's recollection in March 2011 was that he and Mr Thompson pulled off the highway south of Bowen, that he stayed in his vehicle for a few minutes and saw in his side view mirror that Mr Thompson was limping badly. They then continued to the Caltex service station on the Bruce Highway just south of Bowen. Mr Chacano had breakfast there and noticed that Mr Thompson was in the process of getting tools out to change a tyre. By the time Mr Chacano had finished his breakfast the tyre had been changed. According to Mr Chacano's recollection of 29 March 2011, they then continued the trip to Townsville.
- [42] In his oral evidence before me, Mr Chacano readily conceded the possibility that his statement of 29 March 2011 was wrong about the sequence of events. He accepted that it could well be that they pulled off the road near Ayr, and this was the place at which he noticed that Mr Thompson was limping, favouring one leg and said that he had twisted his ankle.
- [43] I am persuaded that Mr Chacano's written witness statement is wrong in its recollection of the sequence of events, and find the sequence of events was as Mr Thompson explained.
- [44] I found Mr Thompson to be an honest and reliable witness.
- [45] Mr Chacano was an honest witness, but his recollection of the sequence of events and details of events was poor, as he readily conceded. That his recollection was poor is understandable. He had no occasion to recall this trip until nearly two years after it occurred. The place at which he and Mr Thompson pulled over to the side of the road at which time he noticed that Mr Thompson had hurt his ankle had no significance to him at the time. He acknowledged in his evidence-in-chief that his memory was "a bit murky" and he could only vaguely remember the incident. Under cross-examination, after accepting that it could well be that they pulled over to the roadside near Ayr, he added that it was a long time ago, that his memory of the events was not "a hundred per cent" and that he had been trying to tell people this. He also said that after he gave the statement on 29 March 2011 he thought more about it and wondered whether his recollection of events was as it had happened. Given Mr Chacano's acknowledged poor recollection, I conclude that his written statement about the place at which he and Mr Thompson pulled over to the roadside and precisely what was said when they did should be accorded little weight. It was an honest, but unreliable, reconstruction of an event and a conversation which had no significance to him at the time.
- [46] Mr Chacano's witness statement and his evidence-in-chief about the location where he and Mr Thompson pulled over beside the road is inconsistent with Mr Thompson's evidence, which I accept. It is also inconsistent with Mr Roach's evidence. Mr Roach recalls speaking to Mr Thompson by radio after he had passed

through Bowen. He recalled having gone past Bowen, seeing Mr Thompson's truck and having rung him. He could remember Mr Thompson telling him that he had hurt his ankle when changing a tyre. Mr Roach's evidence suggests that he saw Mr Thompson's truck north of Bowen, not beside the road south of Bowen or at the Caltex petrol station which is south of Bowen.

- [47] In addition, Cranetran's case, based upon Mr Chacano's written statement dated 29 March 2011 (but not his sworn evidence in its entirety which conceded that the sequence of events could have been different) seems improbable. If Mr Thompson had already badly sprained his ankle and was only able to hop on one leg. Mr Chacano probably would have noticed Mr Thompson limping as he got the tools out of the truck at the service station and probably would have offered some kind of assistance to Mr Thompson to change the wheel. It seems improbable that Mr Thompson, despite his unfriendly relationship with Mr Chacano, would not have sought some assistance if his leg was as bad as Mr Chacano saw it to be when they were beside the road.
- [48] It is far more probable that the one occasion when they were beside the road and Mr Chacano noticed that Mr Thompson was hopping on one leg, was told that he had injured his ankle and saw that it was swollen occurred north of Bowen. By the time they pulled off the road north of Bowen Mr Thompson had removed his boots and may have been in thongs. It was only then that Mr Chacano noticed him outside the truck limping around. He may have inferred at the time, without being told, that Mr Thompson had twisted his ankle getting out of the truck. Mr Chacano was probably told by Mr Thompson that he had twisted his ankle, but I do not accept that he was told by Mr Thompson that he had twisted his ankle getting out of the truck.
- [49] I find that the occasion when Mr Chacano noticed Mr Thompson limping, saw his ankle was swollen and was told by Mr Thompson that he had hurt his ankle occurred north of Bowen, and near Ayr, as Mr Thompson recalled. Mr Thompson would be likely to recall the location, being in great pain and having to relieve himself beside the road at that place.
- [50] I conclude that the injuries Mr Thompson sustained to his leg happened at the location he said, namely the Caltex service station just south of Bowen and they occurred when he was required to change a flat tyre on the float.

How were the injuries caused?

- [51] I accept Mr Thompson's evidence about how the injuries were caused. He was required to change the tyre and the equipment provided by his employer meant he had to exert significant force on the metal pipe used for leverage, both when breaking the tension of each nut to remove it, and also when re-tensioning each nut. He suffered the injuries described by him when he was seeking to apply great force to the final nut. I accept his evidence that he noticed that the spanner was not tight on the wheel nuts and he took care to try to keep the socket on the nut. However in applying the significant force that was required to tension the final nut, the wheel spanner slipped from the wheel nut and resulted in his injuries.
- [52] The wheel spanner slipped because there was insufficient engagement between it and the nut for the reasons that were explained by Mr Thompson and by Mr Gee. Their evidence in this regard was not contradicted by other evidence about the use

of the type of wheel spanner that was left in the truck and the arrangement of the nut, spider and wheel rim on this float.

- [53] The type of socket that was provided by Cranetrans and kept in the truck did not sufficiently engage with the final nut which Mr Thompson had to tighten, or, indeed the other nuts which he had to tighten that day. It was unlike the socket used by Cranetrans at its workshop in Brisbane and also was less effective to provide the required contact with nuts than the socket Mr Thompson used and which he usually took with him.
- [54] The wheel spanner that was provided by Cranetrans, and which Mr Thompson used on 24 June 2009 was not tight and did not fit firmly on the wheel nuts.
- [55] The type of wheel spanner that was provided to Mr Thompson, even if not worn, was less suited to perform the task on the type of wheel that was on the float than a socket that better fitted over the nut and had a tighter fit.
- [56] The evidence that this type of spanner did not fit tightly on this float's wheel nuts leads me to conclude that it was insufficient to perform the task in circumstances in which Mr Thompson's full body weight had to be applied to the bar so as to achieve the required tension. The use of this equipment posed an unnecessary risk of slipping from the wheel nut when significant force was used on the metal bar.
- [57] It is quite possible that the spanner did not fit firmly on the wheel nuts and was therefore insufficient to perform the task not simply because of the type of wheel spanner used and the way the nuts were attached to the wheels of this float. The spanner may also have been insufficient to perform the task because it was worn and therefore not the correct size to perform the task.
- [58] Mr Gee gave evidence that one reason that wheel nuts wore excessively and had to be changed often, sometimes after only a few trips, was that the "bar is always worn". His evidence about sockets on this kind of wheel spanner being worn makes it distinctly possible that the wheel spanner used by Mr Thompson on this occasion was worn, and even less adequate for the task than an unworn spanner of that type.
- [59] A worn spanner was not detected by any visual inspection by Mr Thompson at the time. But this does not mean it was not worn since there was no visual inspection. Mr Thompson was placed in the position where he had to do the best he could with the only spanner available to him. He did not inspect the socket to see if it was worn before using it. Mr Thompson noticed that it did not fit properly and he did the best he could to take care. After the incident he had more immediate things to attend to than inspect the state of the spanner. He had to get back on the road and his pilot had already left. By the time they pulled off beside the road near Ayr he was in great pain and it is understandable that he did not inspect the spanner (which by then had been packed up) in order to see if it was worn. He struggled on over the next few days. When he returned to Brisbane he did not report it being worn.
- [60] Mr Thompson gave the impression of being a man of few words, and it seems that he simply reported to his employer that he had suffered the injuries he did when trying to change a tyre. The Notice of Claim served by him did not assert that the spanner was worn. He did not give evidence of having observed it to be worn. Still, the evidence of Mr Gee (whose evidence I accept) is that the spanners became worn. Worn spanners were only replaced if someone reported that they were worn.

There was no routine inspection of the spanners to see if they were worn. The spanner that was provided by Cranetrans with the truck was likely to be worn if used a lot on nuts that themselves were worn. Mr Gee explained the nuts wear when put on a spider wheel of the kind used on the float, that the nuts “squash up on the inside, and they taper down on the outside”.

- [61] The spanner used by Mr Thompson when changing the tyre on 24 June 2009 was not produced at the trial or photographed. Mr Thompson accepted that the type of wheel spanner which was brought into Court by Cranetrans for him to demonstrate with (photographs of which became Exhibits 3 and 8) was the type of spanner that came from the truck that he was driving that day and was the type of spanner that was used in trucks he had driven. He did not identify that particular spanner as being the one he used on 24 June 2009. Mr Bins, who gave evidence on behalf of Cranetrans, could not say that it was. There was no system whereby he or any other Cranetrans employee or contractor inspected the wheel spanners from time to time.
- [62] Mr Gee’s evidence about wheel spanners used on this float becoming worn and having seen such a worn spanner with this float some time after the incident leads me to conclude that it is probable that the wheel spanner that Mr Thompson used on 24 June 2009 was worn.
- [63] In any event, I find that even if it was not worn it did not fit tightly and was insufficient to safely perform the required task. Unlike the socket used in the workshop and the socket usually used by Mr Thompson, it would not fit tightly over the whole nut. I accept Mr Thompson’s evidence about the extent of its engagement due to the size of the socket and the mechanism by which nuts were fitted on to this float’s wheels.
- [64] The only equipment Cranetrans provided to Mr Thompson to change the tyre was a wheel spanner that was insufficient to perform the task. It did not correctly fit on the nuts that he was required to tighten
- [65] Mr Thompson used the wheel spanner that was provided to him and a metal bar for leverage, and was required to exert significant force on the metal pipe in order to remove nuts and to re-tension them. The need to exert such significant force on the metal bar was a contributing cause of the incident.
- [66] Another cause of the incident, and the consequential injuries suffered by Mr Thompson, is that Cranetrans did not supply to him other equipment suitable for changing the tyre, namely a tension wrench, hand torque multiplier and/or a tyre torque wrench. If such equipment or a properly sized spanner that was adequate for the task had been supplied it would have been used by Mr Thompson on the trip to change the tyre and to re-tension the nut to its required tension. The incident would have been avoided.
- [67] The evidence leaves open the possibility that the wheel nuts Mr Thompson had to re-tension were worn down. This is a distinct possibility even though Mr Thompson did not report them as being in such a condition and there is no reference to worn nuts in his Notice of Claim or his statement of claim in its original form. The allegation that the wheel nuts were worn down was the subject of an amendment to the statement of claim on 29 November 2012. The nuts may have been in the angled condition that Mr Gee described in his evidence whereby they

taper down on the outside and are squashed up on the inside without that being readily-observable.

- [68] Mr Thompson had replaced worn nuts on the float a few days earlier after his previous trip. The ones he replaced may not have been all of the nuts that were worn. But he was a fastidious worker, and would have done his best to replace worn nuts that he observed. A few days later on 24 June 2009 he did not observe the nuts on the wheel to be worn when he removed them in the course of changing the tyre. He was not prompted to replace them with what were described as the “best of the worst” which were kept as replacement nuts with the vehicle.
- [69] The evidence does not permit me to conclude that it is more probable than not that the particular wheel nut which the spanner slipped off was worn down. It is possible that all or most of the nuts were worn to some extent and were in that state because of the substantial forces that had to be applied to them with a wheel spanner that did not fit the nuts properly. Still, I am not satisfied that all or most of the nuts were in such a worn condition.
- [70] It is quite possible that the particular nut the wheel spanner slipped off was itself worn. But its worn state has not been proven. The lack of fit of the wheel spanner on all of the nuts that Mr Thompson had to tighten is more likely to have been because the spanner was inadequate in the circumstances than that all of the nuts were worn.
- [71] I conclude that the main reason the wheel spanner did not fit properly is that:
- (a) the type of spanner that was supplied with the truck was a poor fit, and that whilst this type of spanner may have fitted reasonably well over nuts used on other wheels, it did not fit well over the nuts that were used on this float; and
 - (b) the particular wheel spanner that was used by Mr Thompson on 24 June 2009 did not fit tightly or firmly on the wheel nuts that had to be re-tensioned on to the replacement wheel.

On either basis it was insufficient to perform the task. As to (b), one reason the particular spanner did not tightly fit over the nut is that, like other spanners of that type seen by Mr Gee, it was worn, and therefore not the correct size.

Conclusion on cause of incident

- [72] The injuries Mr Thompson sustained were caused because, in terms of sub-paragraphs 4(a), (b) and (c) of the amended statement of claim:
- (a) Mr Thompson was required to change the wheel on the float;
 - (b) the only equipment that was provided to him by his employer to change the tyre was a wheel spanner of incorrect size and insufficient to perform the task;
 - (c) he used the tyre spanner and a metal bar for leverage and was required to exert significant force on the metal bar; and

- (d) his employer did not supply him with other equipment suitable for changing the tyre, namely a tension wrench, hand torque multiplier and/or a tyre torque wrench.

In the course of being required to change the wheel Mr Thompson used a spanner that did not tightly fit the nut it was required to tension, and he was required to use significant force in order to achieve the required tension on the nut. He had to use a “cheater bar” to achieve that high tension.

- [73] The incident and the consequential injuries would have been avoided if any of the following had occurred:
- (a) if Mr Thompson had not been required to change the wheel using the only equipment supplied by his employer, for example, if another party had been asked to change it, such as a service-provider who had suitable equipment;
 - (b) if Mr Thompson had been supplied with suitable equipment, namely a tension wrench, hand torque multiplier and/or a tyre torque wrench; or
 - (c) if a correctly-sized spanner that was sufficient to perform the task of safely removing the nuts and (in the absence of a tension wrench or other equipment) safely re-tensioning them.

Duty of care

- [74] An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in the 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.²
- [75] The parties were content to accept the following basic principles, which were stated in a case that involved the provision by an employer to an employee of equipment:

“...it is the duty of an employer at common law to take reasonable care to avoid exposing an employee to unnecessary risk of injury. That duty includes the provision of a safe system of work; a safe place of work; and proper plant, equipment and appliances. The duty is not delegable. It is personal to the employer. It extends to taking reasonable steps in accident prevention and not waiting for accidents to happen before safeguarding the health and safety of employees.”³

- [76] In the same case it was stated:

“An employer does not warrant that equipment which it supplies to employees will not in any circumstances fail, causing harm. But the employer does owe a duty of care to procure suitable equipment and then to ensure that it is inspected from time to time against reasonably detectable risks of failure or deterioration. ... [A]

² *Czatyрко v Edith Cowan University* (2005) 214 ALR 349 at 353 [12].

³ *Schellenberg v Tunnel Holdings Pty Ltd* (supra) at 159-160 [101] (footnotes omitted).

continuous duty, demanding vigilance and attention to the needs of accident prevention, is now imposed by the common law upon employers, enforceable in the case of breach causing damage by an action framed in negligence.”⁴

[77] There is no dispute in this case that Cranetrans owed Mr Thompson a duty of care of this kind. The parties’ dispute focuses on whether or not Cranetrans’ duty of care was breached.

[78] As Hodgson JA observed in *Sheather v Country Energy*,⁵ cases of negligence generally raise three broad issues, the second of which tends to be bracketed with the first or third:

1. existence of a duty of care;
2. content of the duty; and
3. breach of the duty.

Often issues 2 and 3 are bracketed together, as making up the totality of the question of whether a duty of care is breached. Hodgson JA remarked that in some discussions issue 2 appears to be bracketed with issue 1 rather than issue 3, but this does not appear to make any material difference to the reasoning or the result. His Honour’s insights serve to emphasise the importance of determining the content of the duty of care in a particular context. If a duty of care, such as the ordinary duty of an employer to an employee to exercise reasonable care not to expose the employee to avoidable risks of injury, is formulated in general terms, then the content of that duty falls to be considered in conjunction with the issue of breach. This was the approach of the parties in this proceeding.

Breach of duty issue

[79] The parties’ contentions about breach of duty arise against the background of Cranetrans’ admission that it was reasonably foreseeable that by failing to provide the correct equipment to perform the task, the wheel spanner would fail to engage properly and slip from the wheel nut whilst Mr Thompson was exerting significant force on the metal bar used for leverage and that he may be injured. The breach of duty issue arises in the context of what performance of Cranetrans’ duty of care required in the case of this float, not by reference to trucks and tyre wheels in general. The focus is upon the type of equipment that was required to safely change a tyre on the float, not the type of equipment required for a car or a truck wheel where wheel nuts are fitted in a different fashion onto a wheel rim. The adequacy of the equipment provided falls to be decided where the driver changing the float tyre was required to exert very significant force on the bar, at far greater force than would be required on an ordinary wheel spanner. This significant force had to be applied to re-tension the nut because of the absence of any equipment such as a torque multiplier that would remove the need to use the “cheater bar” in conjunction with the wheel spanner.

⁴ Ibid at 160-161 [102].

⁵ (2007) Aust Tort Reports 81-901; [2007] NSWCA 179 at [20].

- [80] The circumstances also include the fact that the driver was not provided with a power tool with adequate force to break the nut. Mr Thompson does not particularise the absence of such a power tool as an aspect of breach of duty. Instead, the absence of such a power tool is one of the facts that explains why he was required to use a metal bar for leverage to attempt to change the tyre, both in breaking the tension on the nut and in re-tensioning any nut. The adequacy of the wheel spanner to safely perform the required task must be assessed in that context, namely the need to exert significant force on the metal pipe whilst the driver was crouching.
- [81] The absence of such tools serves to contrast the safe system that existed at the float's base in Brisbane, where suitable sockets were used, with the system that was devised and maintained to change the float's wheels when it was on the road.
- [82] Even if the wheel spanner Mr Thompson used was not worn (as I have found it was) the risk of it not providing a tight fit and injury resulting existed for a number of reasons. The contact between the spanner and the nuts was inadequate for the reasons explained by Mr Thompson, which were not challenged effectively in cross-examination, and which I accept. Also, as Mr Gee explained, the nuts used on this kind of tyre tended to taper on the outside and flare on the inside, preventing a spanner from achieving sufficient contact over the length of the nut. The condition of such a nut was not easily detectable on visual examination, unlike a nut that was simply burred. Also, inadvertence by the person changing the wheel, even of a momentary kind, might mean the spanner was not properly fitted onto the nut and injury would result to someone applying significant force in a crouched position. Although Mr Thompson was not inadvertent on this occasion, the safety of the system devised for changing tyres with the equipment that was provided needed to take account of employee inadvertence, and the risk that in the course of applying great force to the bar with one hand whilst crouched, the other hand might not maintain a tight fit of the socket on the wheel nut.
- [83] The risk of injury from using the type of spanner that was supplied when used in conjunction with the metal bar was reasonably foreseeable.
- [84] Because the wheel spanner supplied by the employer was prone to become worn from being used on the float, the risk of the spanner slipping off the nut was even higher, assuming the nut was not worn. If both the wheel spanner and the nut were worn then the risk of the spanner slipping off the nut was even higher.
- [85] The risk of injury was significant, even if the spanner was of the correct size and not worn and the driver was careful because of:
- (a) the force required to break the nut and to re-tension it;
 - (b) the limited contact between the spanner and the nut compared to the type of socket that was used in the workshop and the spanner that Mr Thompson usually used; and
 - (c) the prevalence of nuts that were worn or tapered.
- [86] Mr Thompson's submissions point to inexpensive alternatives which in all likelihood would have avoided injury to him. These include:

- (a) an unworn spanner being applied to an unworn nut;
- (b) a socket of the kind that Mr Thompson owned;
- (c) a tension wrench as used in the workshop; or
- (d) a torque multiplier.

These alternatives were relatively inexpensive.

- [87] In 2009 and prior to his injury Mr Thompson worked for Cranetrans for about four to five months. He recalled he had to change a float tyre once while he was on the road. This does not indicate that this was a statistical average and he gave other evidence of having to change tyres a number of times. The evidence about tyre wear on this float, including the number of spare tyres that were kept with it, indicates that there was a reasonable prospect that a driver would have to regularly change a tyre on the float during the course of a trip.
- [88] The need to change a tyre was hardly unexpected. Given the distances to be travelled, and Mr Thompson averaged thousands of kilometres each week, his employer must have anticipated that he would be routinely required to change the float's tyres on the road. Over the years he had lost count of the number of times that he had to change a truck tyre. It would have been in the hundreds. The chance of having to change one of the float's tyres on the road and injuring himself in doing so was not so small that it was reasonable to take no steps at all to eliminate the risk. There was a risk of injury, perhaps not always as serious in its aftermath as the consequences suffered by Mr Thompson, but there was a risk of orthopaedic and other injury if the spanner came off the wheel nut whilst the driver was applying significant force in a crouched position. The risk of injury was fairly obvious.
- [89] The cost of avoiding such harm was not substantial. The costs of alternative equipment contended for by Mr Thompson's counsel was small compared to the capital costs of the vehicle and its maintenance. A new float would cost approximately half a million dollars. This float was old, having been built in 1995. Still, it was worth about \$200,000 in 2009. The operation of the float involved substantial recurrent costs in maintaining it, including in replacing and rotating tyres. Cranetrans did not seek to justify not supplying the suggested equipment by reference to its cost. This is not a case of a large expense to avoid a very small risk.
- [90] In the context of Cranetrans' obligation to provide a safe work environment and to procure suitable equipment so as to avoid exposing an employee to unnecessary risk of injury, the precaution of supplying a torque multiplier or another tool to safely re-tension nuts was a simple and relatively inexpensive precaution. The provision of such equipment was consistent with performance of an employer's duty of care and was reasonable.
- [91] An inquiry into breach must attempt to identify the reasonable person's response to foresight of the risk of occurrence of injury. That inquiry must attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred. Although that judgment must be made after the event, it

must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury.⁶

- [92] The essential issue is what, in all of the circumstances, would be a reasonable response to the foreseeable risk. Here, there was a foreseeable risk of possibly serious injury. The risk was not small. The risk was to an employee to whom a duty was owed to take reasonable care to avoid exposing the employee to unnecessary injury. The cost of avoiding the harm was reasonably small and would not have imposed any significant financial hardship upon the employer. There were no adverse consequences to the employer's business from implementing a safer system.
- [93] I conclude that, in all the circumstances, it was unreasonable to require Mr Thompson to perform the task with the tools which were provided to him. This establishes the particulars of negligence in paragraph 6(a) of the amended statement of claim.
- [94] It also was unreasonable in the circumstance to fail to provide Mr Thompson with safe plant and equipment, namely an appropriately-sized wheel spanner, and a tool that would enable him to safely re-tension any nut, such as a tension wrench or torque multiplier.
- [95] These conclusions are reinforced by the fact that wheel spanners associated with the float were prone to become worn.
- [96] There is no evidence that it was industry practice to supply truck drivers with torque multipliers, a tension wrench or a tyre torque wrench. The type of wheel spanner that was supplied with this truck was common in the trucking industry.
- [97] Mr Thompson does not seek to prove that it was common practice in the trucking industry to supply drivers with torque multipliers or similar tensioning tools. But he does not need to in order to establish a breach of duty. Industry practice, if one exists, is relevant, but not decisive. The ultimate question is not whether the defendant's conduct accords with practices that are common in the industry, but whether it conforms to the standard of reasonable care demanded by the law.
- [98] The evidence of industry practice was limited and not very illuminating. Wheel spanners of the kind supplied by Cranetrans, which cost about \$20, may have been suitable for use on other wheels, and perhaps on many kinds of truck wheels. This kind of wheel spanner was not suitable for use on this float, which was notorious for its high wear on tyres and wheel nuts, because of the risk of insufficient contact between the spanner and the nut, as explained by Mr Thompson and Mr Gee. Such a basic wheel spanner which provided inadequate contact, particularly when nuts were prone to wear, exposed an employee, such as Mr Thompson, to an unnecessary risk of injury.
- [99] I conclude that it was unreasonable to not supply a spanner with a socket that correctly fitted over the wheel nuts (even one as simple as the one usually used by Mr Thompson and which he provided at his own expense). It also was

⁶ *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461 [126]; *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports 81-919; [2007] QCA 366 at [49]; *Lusk v Sapwell* [2012] 1 Qd R 507 at 512 [17] – [18].

unreasonable to not supply a tool that was suited to re-tensioning any nut that had to be re-tensioned by a driver when changing a tyre on the road. Accordingly, Cranetrans breached its duty of care to provide suitable equipment, as particularised in paragraphs 6(d) of the amended statement of claim.

[100] Paragraph 6(e) of the amended statement of claim alleges that Cranetrans failed to devise, maintain and enforce a system of work which did not expose Mr Thompson to the risk of injury when changing tyres. As noted, an employer's general law duty of care demands attention to the needs of accident prevention, rather than waiting for accidents to happen before safeguarding against their repetition. Cranetrans did not carry out a risk assessment in relation to the task of changing tyres.

[101] A number of the matters that I have already addressed in connection with breach of duty are subsumed within subparagraph 6(e) of the amended statement of claim. The system which Cranetrans devised and maintained supplied a driver in charge of this float with a wheel spanner that was insufficient to perform the task because:

- (a) there was inadequate contact between the spanner and the wheel nuts on the float;
- (b) the spanner and the nuts were prone to wear;
- (c) significant force on the bar was required to break the tension of nuts and to re-tension them;
- (d) there was a foreseeable risk of injury from the spanner slipping off the wheel nuts when significant force was applied to the bar; and
- (e) Cranetrans did not supply spanners that provided a better fit or tools that were suitable to safely re-tension wheel nuts on the float.

[102] If Cranetrans had taken reasonable steps in accident prevention then the risk of unnecessary injury would have been assessed and preventative action taken.

[103] Performance of Cranetrans' duty of care to devise and maintain a system of work which did not expose truck drivers to unnecessary risk of injury when changing tyres during trips required a system whereby:

- (a) drivers were not required to change the tyre on the float with the equipment that was provided by Cranetrans, and, instead, the tyre was changed by someone else with suitable tools; or
- (b) the provision of at least a different and better wheel spanner that was sufficient to perform the task, along with tools that enabled the wheel nuts to be safely tensioned to their correct tension.

[104] If Cranetrans did not wish to supply drivers with a better wheel spanner and other tools that were suitable to safely change tyres on the float, then a reasonable response to the risk of injury was to not require drivers in Mr Thompson's position to change tyres. Instead, a reasonable response was to instruct drivers to not change float tyres during trips. The cost of having a tyre mechanic or someone else with proper tyre-changing tools change a tyre was not significant. Mr Bins gave

evidence that Cranetrans has engaged tyre repairers in such a situation and that presently they charge \$95 an hour. He could not say what the rates were in 2009. There would be a tyre repairer in Bowen and the Caltex service station was only about ten minutes outside Bowen. Cranetrans does not contend that it would be unreasonable to instruct drivers to request such a tyre repairer to undertake the task of changing a float tyre if the need arose. Given the relatively small expense of engaging a tyre repairer, and the fact that Cranetrans has done it before, I conclude that it was a breach of Cranetrans' duty of care to require Mr Thompson to perform the task of changing the tyre on the float in the circumstances. This finding is relevant to both sub-paragraphs 6(a) and 6(d) of the amended statement of claim.

[105] I have concluded that Mr Thompson has established that Cranetrans breached its duties as an employer, in particular in the respects particularised in subparagraphs 6(a), (d) and (e) of the amended statement of claim.

[106] In summary, a reasonable response to a risk of the kind which materialised on 24 June 2009 did not necessarily require Cranetrans to purchase expensive sockets or the kind of equipment which was used at its workshop to safely change tyres. Any reasonable response, however, required Cranetrans to take account of the risks associated with:

- (a) the use of a wheel spanner that was ill-suited to the task of changing wheel nuts on this float;
- (b) a wheel spanner which may have been suited to changing nuts on other kinds of tyres but was prone to wear when used to change nuts on the float;
- (c) wheel nuts on the float which were prone to burr or taper and limit the amount of contact between spanner and nut;
- (d) a system which required the force of a driver's body to be applied to a metal bar whilst crouched; and
- (e) the foreseeable risk of injury if the spanner slipped off the nut when such force was being applied.

In requiring Mr Thompson to change the tyre on the float using such equipment under such a system, and in failing to supply him with suitable equipment for safely changing the tyre, Cranetrans breached its duty of care.

[107] In addition, it breached its duty of care because the wheel spanner which was supplied was worn and this was not detected by any system of inspection that required such a tool to be inspected from time to time against signs of wear or deterioration. As a result, Cranetrans failed to devise, maintain and enforce a system which did not expose Mr Thompson to the risk of injury when changing tyres on the float.

[108] If Cranetrans had not breached its duty of care in these various respects then the injury would have been avoided.

[109] If the system had not required drivers in Mr Thompson's situation to change a float tyre in the circumstances in which he did, but instead had a tyre repairer or other

mechanic perform the tyre change with suitable equipment then the incident would have been avoided. In circumstances in which Mr Thompson did not have his own spanner on the trip and he considered that the spanner supplied by his employer was inadequate for the task, he probably would have followed a requirement to call a tyre repairer.

- [110] If, instead of implementing such a system for someone else to be called to repair the tyre, Cranetrans had supplied Mr Thompson with equipment suitable for changing a float, then he would have used this equipment. There is no sound reason to suppose that he would not have done so. I infer that he would have.⁷
- [111] In conclusion on the breach of duty issue, Cranetrans breached its duty of care, and Mr Thompson suffered injury as a result.

Conclusion on liability

- [112] Three separate particulars of breach have been established, although each is inter-related. Essentially, this is a case about requiring a diligent and hard-working truck driver to undertake a task that presented a real risk of injury without supplying suitable equipment to perform the task safely. If the employer in this case was not prepared to supply Mr Thompson and other drivers who hauled this float with suitable equipment, namely an appropriately sized wheel spanner that was sufficient to perform the task and/or a tool which allowed him to safely re-tension the wheel nuts to their required high tension, then it should not have required him to undertake the task. Instead, a tyre specialist or mechanic with suitable equipment should have been called to replace the tyre.
- [113] If Mr Thompson was required to change the float's tyre during a trip then he should have been provided with suitable equipment. Cranetrans did not warrant that any equipment which it supplied to its employees would not fail, causing harm. However, its duty of care required it to procure suitable equipment and then to ensure that it inspected the equipment from time to time to see if it remained in a condition to safely perform the task. Cranetrans was obliged to devise, maintain and enforce a system of work which did not expose Mr Thompson and other drivers to an unnecessary risk of injury when changing tyres on the float.
- [114] Cranetrans breached its duty of care. Mr Thompson has established a breach of duty on more than one ground. If Cranetrans had not breached its duty then the incident would have been avoided and Mr Thompson would not have been injured.

Quantum

- [115] Mr Thompson was 43 at the time of the incident and is now 47. He was educated to Grade 10. After leaving school he was employed in meatworks, and then began driving trucks in his mid 20s. Since then Mr Thompson has worked for several trucking companies. He ran his own trucking business for eight years. Following the breakdown of his first marriage, his wife retained that business. Mr Thompson began working for Cranetrans in 2009 hauling floats. Following the incident he returned to truck driving in mid 2010, and currently works for NQ Group as a long-haul truck driver.

⁷ *Lusk v Sapwell* (supra) at 523-524 [78] – [79].

- [116] At Cranetrans Mr Thompson was a highly regarded employee. Mr Gee described Mr Thompson as fastidious in his approach to work. Mr Thompson is a man with a strong work ethic who enjoys working.
- [117] As a result of the incident Mr Thompson suffered several injuries, namely:
- (a) a fractured right ankle;
 - (b) tearing of the medial meniscus in the right knee;
 - (c) a fracture to the great toe on the right foot;
 - (d) scarring to the right knee; and
 - (e) complex regional pain syndrome.
- [118] As a consequence of the injuries Mr Thompson struggles to cope with his present work. Mr Thompson needs to break about every three hours which is twice as often as he previously required. He experiences pain when walking on carpet and grass and has trouble walking. He described a hot burning sensation in his foot and ankle particularly if he is wearing his boots for long periods. Mr Thompson walks with an obvious limp. Mr Thompson does not require ongoing treatment though he does require continuing use of pain killers and orthotics.
- [119] The evidence from Dr Morgan, Dr Tadros and Dr Saines about the state of Mr Thompson's injury was uncontested. In such circumstances I adopt Dr Morgan's most recent 2013 report. This report indicates Mr Thompson's condition is unlikely to improve. Dr Morgan opined that the "repetitive and prolonged use of his right lower limb whilst driving a heavy haulage vehicle is not sustainable." Dr Morgan reports that Mr Thompson is likely to notice a reduction in his ability to engage in certain recreational activity and will most likely require help in the domestic setting with heavier tasks such as lawn mowing and gardening. Dr Morgan assessed Mr Thompson's whole body impairment to be 10 per cent.
- [120] Dr Tadros described Mr Thompson as a stoic and hardworking man, however he advised and warned that despite this stoicism the pain may become too much requiring Mr Thompson to retire from long-haul driving. I accept that over time it is unlikely that Mr Thompson will be able to continue to work as a long-haul driver and will suffer economic loss.
- [121] Mr Thompson's evidence indicated that short distance driving around the suburbs inflames his condition as he is required to load and unload the truck to make deliveries. Mr Thompson also gave evidence that when driving in suburban areas he has trouble putting the right amount of pressure on the brake pedal. Given Mr Thompson's experience, education and physical disability, if he is forced to give up long-haul driving he is not suited to other work. Even if Mr Thompson were to retrain his future earning capacity would be significantly reduced because of his age, education and physical disability. These factors would place him at a significant disadvantage on the open job market. I assess his residual earning capacity at 25 per cent of what he would have earned as a long-haul driver with his present or a similar employer.

- [122] I accept Mr Thompson's evidence that had the incident not occurred he would have stayed with Cranetrans or some other company involved in long-haul driving and he would have continued working until 67 years or older. This is supported by Mr Thompson's strong work ethic, enjoyment of his work, family history of late retirement and the fact that his divorce from his first wife meant he needed to keep working.
- [123] I assess general damages in the amount of \$70,000. Approximately 4.25 years have elapsed since the incident. I will award interest on general damages at the rate of two per cent for 4.25 years on one half of the general damages award, that is an amount of \$2,975.
- [124] Prior to the incident Mr Thompson was earning an amount of \$1,289 net per week. After the incident Mr Thompson was unable to work for 45 weeks. I assess the sum of \$101,583 for past economic loss. I will discount this amount by 10 per cent to reflect the normal contingencies. I award interest on the amount of \$46,215 (\$91,425 less Workers' Compensation payments of \$45,210) at the rate of five per cent for three and a half years, namely \$8,088.
- [125] Mr Thompson was entitled to superannuation at the rate of nine per cent. This equates to a sum of \$8,228. Interest on this amount will be \$576 ($\$8,228 \times .02 \times 3.5$).
- [126] As to future economic loss, Mr Thompson's present wage is \$1,268 net per week. He may be forced to finish work as a long-haul truck driver in a few years, but I will assess his loss of earning capacity on the basis that there is a reasonable prospect that he may work with his present employer or another employer as a long-haul truck driver for another five years. He will then be 52 and not be able to work as a long-haul truck driver for the further 15 years that he would have until reaching the age of 67. On the five per cent tables a loss of his present wage from age 52 to 67 is \$551,732. That sum should be reduced to take account of his limited residual earning capacity of 25 per cent, arriving at a figure of \$413,799.
- [127] There should be a discount for the contingencies of life that might have affected Mr Thompson's ability to work as a truck driver in any event, such as a supervening injury or unemployment. The contingency should reflect his stoicism, his work ethic and his qualities as a driver, which reduce the risk of lengthy periods of unemployment and recognise his preparedness to continue to work notwithstanding injury. Still, he may have suffered injuries that he could not cope with or the misfortune of a serious road crash. Those and other contingencies should be recognised by a further discount of 10 per cent. In the result, I assess future economic loss at \$372,419. Future loss of superannuation amounts to nine per cent of this sum or \$33,517.
- [128] Past expenses are largely agreed and I award an amount of \$24,145. I allow interest on past expenses paid by the plaintiff of \$4,011 at five per cent for 4.25 years being an amount of \$852. The *Fox v Wood* component is \$13,294.
- [129] As to future medical care, Mr Thompson consumes painkillers such as Nurofen Plus, and will need to continue to do so. He claims an amount of \$9.50 per week. In addition, he is likely to require orthotics in the future. I consider a reasonable assessment of his future expenses in relation to painkillers and orthotics is \$6,000.

[130] I assess quantum as follows:

General Damages	\$70,000
Interest on 50 per cent at two per cent for 4.25 years	\$2,975
Past Economic Loss	\$91,425
Interest on Past Economic Loss	\$8,088
Past Loss of Superannuation Benefits	\$8,228
Interest on Past Loss of Superannuation Benefits	\$576
Future Economic Loss	\$372,419
Future Loss of Superannuation Benefits	\$33,517
Past Expenses	\$24,145
Interest on Past Expenses	\$852
Future Medical Expenses	\$6,000
<i>Fox v Wood</i>	\$13,294
Sub Total	\$631,519
Less Refund to Workcover	\$78,640
Total	\$552,879

[131] There will be judgment for the plaintiff in the sum of \$552,879. I will hear the parties on costs.