DISTRICT COURT OF QUEENSLAND

CITATION:	*Peters v Wilkins Trust* [2020] QDC 125
PARTIES:	**JOHN ARTHUR PETERS** (plaintiff) v **ROBERT RONALD WILKINS AND KAREN WILKINS ATF RR & KL WILKINS TRUST** (defendant)
FILE NO/S:	194 of 2017
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	Cairns
DELIVERED ON:	10 June 2020
DELIVERED AT:	Cairns
HEARING DATE:	3, 4, 5 & 6 June 2019, 23 August 2019
JUDGE:	Morzone QC DCJ
ORDER:	**1. I will give judgment to the plaintiff against the defendant for $191,383.70.** **2. Unless either party applies for a different costs order within 14 days of this judgment, I will also order that the defendant will pay the plaintiff's costs of the proceeding (including reserved costs) to be assessed on the standard basis.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS AND CAUSATION – MEASURE OF DAMAGES – whether the defendant breached its duty of care – where pipes protruding on a residual building slab in vicinity of work area present tripping hazard – where the risk was foreseeable – where the risk was not insignificant – where not unduly burdensome to take precautions to avoid risk of injury – where timely inspection of tripping hazards would reduce probability of serious injury – where marking or barricading protruding pipes would reduce probability of serious injury – where warning and reminding of risk in a timely way would reduce risk to the plaintiff – whether defendant's breach was a necessary condition of the occurrence of injury – where risk not an obvious risk to plaintiff – where no finding of

contributory negligence – where defendant is liable for breaching its duty to take precautions against a relevant risk and thereby caused the plaintiff's injuries – assessment of damages

Legislation
Workers Compensation and Rehabilitation Act 2003 (Qld) ss 305D, 305E, 305F, 305G, 305H, 305I & 305J
Workers' Compensation and Rehabilitation Regulation 2014 (Qld) part 2 schedule 8, 9

Cases
Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420
Allianz Australia Insurance Ltd v McCarthy [2012] QCA 312
Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649
Bankstown Foundary Pty Ltd v Braistina (1986) 160 CLR 301
Coca-Cola Amatil (NSW) Pty Ltd v Pareeze [2006] NSWCA 45
Corbin v State of Queensland [2019] QSC 110
Deans v Maryborough Christian Education Foundation Ltd [2019] QCA 75
Heywood v Commercial Electrical Pty Ltd [2013] QSC 52
Inghams Enterprises Pty Ltd v Tat [2018] QCA 182
Marshall v Queensland Rehabilitation Services Pty Ltd [2012] QSC 168
McLean's Roylen Cruises Pty Ltd v McEwan (1984) 54 ALR 3
Morgan v Costello [2004] WASCA 260
Osbourne v Downer EDI Mining Pty Ltd [2010] QSC 470
Raimondo v State of South Australia (1979) 23 ALR 513
Rosenberg v Percival (2001) 205 CLR 434
State Government Insurance Commission v Oakley (1990) ATR 81
State of Queensland v Kelly [2015] 1 Qd R 577
Swain v Waverley Municipal Council (2005) 220 CLR 517
Tame v New South Wales (2002) 211 CLR 317
Test v Forgacs Engineering Pty Ltd [2012] QDC 318
Turner v South Australia (1982) 56 ALJR 839
Vairy v Wyong Shire Council (2005) 223 CLR 422
Woolworths v Perrins [2015] QCA 207
Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL: D G Turnbull for the plaintiff

T A Nielsen for the defendant

SOLICITORS: Adams McWilliam Solicitors for the plaintiff

BT Lawyers for the defendant

[1] The plaintiff was an experienced block and brick layer of about 40 years when he suffered a lower back injury after tripping on pipes protruding from a house slab, and he now sues his defendant employer for consequential loss and damage.

[2] The defendant disputes the claim on the basis that the plaintiff was well aware of the obvious risk and his injuries resulted, in whole or part, because of his own negligence.

SUMMARY

[3] On 3 August 2015 the plaintiff was working in his capacity as a bricklayer in the employ of the defendant on a new house construction site. He was almost 58 years old having been born on 19 July 1957.

[4] The defendant is a small bricklaying family business working on a residential site under the control of Mr and Mrs Wilkins. Mr Wilkins was the defendant's representative on the job site who was responsible for all issues relating to job safety assessment, safe work procedures and job safety training of the defendant's employees, and generally discharging the obligations of the defendant with respect to workplace health and safety.

[5] At one point the plaintiff was working with a string line to lay blocks to build a straight section of wall on the perimeter of the house slab. After he repositioned the line block secured at one corner of the wall, the plaintiff moved to look along the line to check it was running free and level, and manoeuvred such that he lost balance when the heel of his left work boot caught on pipes protruding from the slab. He fell backwards onto a stack of blocks by initially striking his right chest area then severely twisting and jerking his lower back. He landed partly on the block stack and partly on the slab.

[6] The plaintiff claims that the defendant breached its duty of care to protect him against the risk of tripping on pipe work and suffering injuries on a house construction site. He says that the defendant's breach caused him to trip and suffer a severe back injury, and now claims a little over $300,000 for loss and damage for those personal injuries.

[7] The defendant disputes the claim on several fronts:

1. It says that the protruding pipes were plastic, not copper;
2. It does not accept the mechanism of injury in the way the plaintiff says he fell;
3. It asserts that having worked on the site for two days, the plaintiff was well aware of the position of the protruding pipes, and the risk of tripping on a pipe was an obvious risk;
4. It was therefore unnecessary for it to warn of the risk of falling over the pipe;
5. The risk of tripping on the pipes was insignificant;
6. Marking the pipe in some way would not have reduced the risk of injury;
7. Barricading off the plastic pipe would have created an alternative tripping hazard and would have unduly restricted the plaintiff's work area;
8. The defendant did not have the power, authority or any right to remove the pipe;
9. If there is a breach of duty then it did not cause or contribute to the fall, and /or the plaintiff was contributorily negligent;

10. A later event on 28 February 2017 was an intervening event which subsumed the effect of the accident;
11. The plaintiff's had a significant pre-existing degeneration in the lumbar spine;
12. The plaintiff failed to return to work despite capacity;
13. The plaintiff's capacity for work would be affected by other medical conditions including chronic obstructive airway disease due to smoking; gastro oesophageal reflux disease and a Barrett's oesophagus; schizophrenia, depression and anxiety.

Issues

[8] The determinative issues in the proceeding are:

1. Did the defendant breach its duty of care to take precautions against a foreseeable and not insignificant risk of injury to the plaintiff?
2. If there has been any breach of duty, was the relevant breach of duty a necessary condition of the occurrence of the injury (or did it make the injury more severe) and is it appropriate for the scope of liability of the person in breach to extend to the injury so caused?
3. Was the plaintiff himself negligent because he undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account an obvious risk, or alternatively failing to keep a look out as he moved?
4. If the defendant is liable, what is the assessment of damages?

[9] I have concluded that the defendant did breach its duty of care to take reasonable precautions against a foreseeable and not insignificant risk of injury to the plaintiff of tripping on protruding pipework. A reasonable person in the position of the defendant would have taken the precautions to: inspect the slab, assess and identify the pipes as tripping hazards, then clearly marked them with bollards or witches' hats; barricaded them with palleted block stacks immediately adjacent to the pipes; and warned the plaintiff of the risk. In the circumstances of this case, the pipes did not present an 'obvious risk' and the plaintiff was not negligent. The defendant's breach of duty was a necessary condition of, and caused, the occurrence of the plaintiff's back injury, and thereby sounds in the defendant's liability.

[10] Therefore, I give judgment to the plaintiff and assess damages accordingly.

LIABILITY

[11] The defendant accepts that in all the circumstances, a duty of care was owed by the defendant to the plaintiff but says that duty was not breached.

[12] The legal framework for the case is found in the law of negligence, as reframed by Chapter 5, Part 8 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("WCRA"), and the relevant considerations for breach of duty and causation are governed by those legislative provisions.[1]

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[1] Cf. *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [11], and *Inghams Enterprises Pty Ltd v Tat* [2018] QCA 182 at [28].

Did the defendant breach its duty of care to the plaintiff?

[13] Section 305B(1) provides that a person does not breach a duty to take precautions against a risk of injury to a worker unless:

1. the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
2. the risk was not insignificant; and
3. in the circumstances, a reasonable person in the position of the person would have taken the precautions.

[14] Sections 305B(2) and 305C provide for related considered for deciding liability for a breach of duty. The statutory regime operates against the background of the common law principles but modifies them to an extent.[2] The considerations of breach of duty must be considered and assessed prospectively and realistically and not through the prism of hindsight by reference to what actually occurred.[3]

[15] As Gleeson CJ in *Rosenberg v Percival*,[4] explained:

> "There is an aspect of such a question which may form an important part of the context in which a trial judge considers the issue of causation. In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed. Recent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated…"

[16] In *Vairy v Wyong Shire Council*,[5] Hayne J explained the prospective nature of the inquiry into breach of duty in contrast to matters of causation as follows:

> "[124] Again, because the inquiry is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions

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2 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CL 420 at [11], [15], [27], [39] and [41]. Cf. *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at 47 – 48 per Mason J; *Test v Forgacs Engineering Pty Ltd* [2012] QDC 318; *Heywood v Commercial Electrical Pty Ltd* [2013] QSC 52; *Marshall v Queensland Rehabilitation Services Pty Ltd* [2012] QSC 168; *Woolworths v Perrins*, [2015] QCA 207 at [173] per McMeekin J.

3 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [124]-[128]. Compare *Rosenberg v Percival* (2001) 205 CLR 434 at 441 – 442, *Tame v New South Wales; Annetts & Anor v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [101].

4 *Rosenberg v Percival* (2001) 205 CLR 434 at 441 – 442.

5 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [124]-[128].

> that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be 'nothing'.
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> …
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> [126] When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. 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.
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> …
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> [128] If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was — diffuse in the sense that its occurrence was improbable or, as in *Romeo*, diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds."

[17] Further, the court must act in a realistic paradigm as McHugh J observed in *Tame v New South Wales; Annetts & Anor v Australian Stations Pty Ltd*:[6]

> "I think that the time has come when this court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall — perhaps it already has fallen — into public disrepute if it produces results that ordinary members of the public regard as unreasonable."

[18] In *Coca-Cola Amatil (NSW) Pty Ltd v Pareezer*,[7] Mason P observed:

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6 *Tame v New South Wales; Annetts & Anor v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [101].

7 *Coca-Cola Amatil (NSW) Pty Ltd v Pareeze* [2006] NSWCA 45 at [3].

> "In a case of breach by omission the plaintiff must clearly identify what should have been done and proved that it was unreasonable in the circumstances not to do it (cf *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319). A breach inquiry is not satisfied merely by positing, with the benefit of hindsight, that something more might have been done."

What is the relevant risk of injury contended by the plaintiff?

[19] The plaintiff contends that protruding pipes on a residual building slab in the vicinity of a bricklayer's work area presents a tripping hazard in that location and a risk of injury. I agree that this is the relevant risk here.

Was the risk foreseeable; one that the defendant knew or ought to have known?

[20] The plaintiff contends that a builder employer ought to have appreciated that the work duties of a bricklayer do not involve a constant lookout of footing and proximate trip hazards.

[21] The defendant acknowledges that the risk of tripping on a building site generally is foreseeable. This is contemplated in the defendant's generic safe work method statement which identifies "*slips, trips and falls*" as possible hazards.

[22] I think the risk was foreseeable.

[23] Unlike a supermarket, or even a bare slab, a residential building at the wall construction stage is a very different environment. By the time it becomes a building site with a busy and crowded building slab with plant, equipment and materials to be used in the block laying work. Stacks of blocks on pallets are typically placed adjacent to the block-work areas for ready access, starter bars of steel rods protrude about 800mm above the slab along wall alignments ready to be encased by the blocks, and plumbing pipes penetrate and protrude above the slab where required. Ready appreciation of protruding pipes is often obscured by surrounding things as a brick layer might walk to, and manoeuvre around, their work area. A bricklayer would be expected to regularly move in the vicinity of adjacent protruding pipes as they properly carry out the exacting tasks of laying a good quality straight block wall, including adjusting the string line to ensure level alignment. A bricklayer may well inadvertently not notice protruding pipes as they move around competently doing their task.

[24] The defendant knew or ought to have known of the risk of a bricklayer injuring himself by tripping on protruding pipes as he moved in the ordinary course of his work.

Was the risk not insignificant?

[25] The plaintiff asserts that the risk was not insignificant.

[26] However, the defendant argues that the pipes were not in any walkway that the plaintiff was required to traverse regularly for the purposes of laying bricks, because the pipes were beyond or at the end of the area where the blocks were being laid. They argue that the risk of tripping on the particular pipes in question does not pass the "not insignificant" test. I disagree.

[27] Gotterson JA in *Deans v Maryborough Christian Education Foundation Ltd*[8] referred to *Meandarra Aerial Spraying Pty* Ltd v *GEJ & MA Geldard Pty Ltd*,[9] about the test for "not insignificant". In *Meandarra*, Fraser JA contrasted the use of "not insignificant" in s 9(1)(b) *Civil Liability Act* 2003 (Qld), an analogue of s 305B(1)(b), with the common law formulation of "*not far fetched or fanciful*" saying:[10]

> "… Nevertheless, the provision was designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable. I think that it did produce some slight increase in the necessary degree of probability. A far-fetched or fanciful risk is necessarily so glaringly improbable as to be insignificant, but the obverse proposition may not necessarily be true. The generality of these descriptions makes it difficult to be dogmatic about this, but the statutory language does seem to convey a different shade of meaning. The difference is a subtle one. The increase in the necessary degree of probability is not quantifiable and it might be so minor as to make no difference to the result in most cases. Nevertheless, in deciding claims to which the Act applies the "not insignificant" test must be applied instead of the somewhat less demanding test of ― not far-fetched or fanciful‖."

[28] I have already remarked about the nature, height and location of the pipes protruding from the slab, and in relation to surrounding items especially the relevant wall and the usual placement of stacks of blocks proximate to the bricklayer's work area. In my reckoning a bricklayer was likely to traverse the area to carry out his work, which included checking the stringline, wall alignment, and level brick placement.

[29] Dr Kahler, consulting engineer, highlighted the significant number of falls in the construction industry in Australia each year, their frequently and serious consequential injuries. He reported that the "*second most common single mechanism of injury was 'fall on the same level'*". He also cited a report by Master Builders Australia entitled "OHS Performance in the Construction Industry, which "*…contains a description of serious claims in the construction industry between 2003-2004 and 2009-2010 (Figure 4), indicating that falls remain a major mechanism of serious damage to people, representing consistently around 25% of all serious claims.*" Dr Kahler concluded that: "*In summary, 'Gravitational energy – falls of people' has been, and continues to be overrepresented in producing damage, (often permanent) to people. The size of the problem has been well documented for many years. Hence, when managing risk in any workplace, assessing the potential for people to fall (or near fall) must be a key priority."*

[30] It seems to me that the risk of injury by tripping on protruding pipes in the vicinity was elevated. A bricklayer paying careful attention to his work including moving around, using the stringline and assuring alignment and levelling, would suffer serious injury by tripping on pipes in the vicinity of his work area, and would land heavily on any proximate block stacks and the slab itself.

[31] In my view the risk was not insignificant.

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8 *Deans v Maryborough Christian Education Foundation Ltd* [2019] QCA 75.
9 *Meandarra Aerial Spraying Pty* Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319.
10 *Meandarra Aerial Spraying Pty* Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319 at [26].

In the circumstances, would a reasonable person in the position of the defendant have taken the precautions?

[32] In deciding whether a reasonable person would have taken precautions against a risk of injury, s 305B(2) requires the court to consider, among other relevant things:

1. the probability that the injury would occur if care were not taken;
2. the likely seriousness of the injury;
3. the burden of taking precautions to avoid the risk of injury.

[33] Other principles relating to liability for a breach of duty are in s 305C: the burden of taking precautions to avoid the risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

[34] The plaintiff alleges in paragraph 8 of his statement of claim that the defendant failed to take precautions against the risk of injury by:

(a) Failing to design, implement and enforce a safe system of work;

(b) Failing to ensure that the plaintiff's workplace in this case the building site did not contain features which constituted an unreasonable risk of injury to the plaintiff;

(c) Failing to make timely, adequate and appropriate inspections and assessments of the building site, to determine any unreasonable risks of injury to the plaintiff which were inherent there in, and thereafter to design, implement and enforce appropriate remedial measures to obviate those risks;

(d) Failing to ensure that the plaintiff was properly instructed, educated and trained in a safe and an appropriate methods of carrying out each of his work tasks at the building site;

(e) Failing to ensure that any instructions, education and/or training given to the plaintiff in respect of his work tasks were reinforced at reasonable time intervals by refresher instructions and/or refresher training;

(f) Failing to prescribe and communicate to the plaintiff clear written procedures for each work task, and/or instructions, education and training as to how such task was to be safely carried out, and/or warnings as to risks of injury which may result from not following those procedures and instructions;

(g) Failing to test the plaintiff from time to time in respect of tasks which may be carried out by him at the building site to ensure that the plaintiff properly understood the prescribed procedures and safety instructions, education and training in respect of the task, and could demonstrate on testing that he could carry out the task in a safe and appropriate manner;

(h) Failing in this case in particular, to prescribe and communicate to the plaintiff a safe and appropriate procedure, and appropriate safety

measures, which he was to adopt was moving around the floor slab whilst he performed his block laying duties;

(i) Failing in this case in particular, to carry out any, or any timely and adequate inspection of the building site, and in particular the floor slab, prior to work being commenced thereon, to identify any tripping hazards present on the floor slab, particularly in close vicinity to places where block laying was to be carried out, and to ensure that they were remediate with appropriate safety measures prior to work commencing;

(j) Failing in this case in particular, to ensure in particular that the protruding pipes were clearly marked and/or barricaded off, such that they would not present a tripping hazard to the plaintiff as he moved around the floor slab performing his block line duties, and/or that the markings and/or barricading would be of a type which would constantly remind him of the presence of the protruding pipes as he moved around the building site in the vicinity, and/or, in the case of barricading, would be of a nature that would draw his attention to the tripping hazard as he bumped up against it, and/or would prevent him from tripping over the hazard;

(k) Failing to warn the plaintiff in a timely fashion, with appropriate reinforcements, of the presence of the protruding pipes in the immediate vicinity of the area on the floor slab in which he was working;

(l) Failing to design, implement and enforce a safety policy at the building site to ensure the tripping hazards in the workplace where identified prior to the commencement of work in the vicinity, and thereafter adequately and sufficiently marked and/or barricaded off, and/or that appropriate, timely and reinforced warnings were given to the plaintiff to obviate the tripping hazard; and

(m) Failing to ensure the workplace health and safety of the plaintiff.

[35] The plaintiff's presented case was narrower than the pleading with a particular focus on the allegations expressed in sub-paragraphs (i), (j) and (k) as being particular to the case. These, I think are determinative of the proceeding, as such, I have elaborated below.

[36] I have concluded that the defendant did breach its duty of care to take reasonable precautions, such as inspecting, assessing and identifying the protruding pipes as a trip hazard, then marking them with colour paint, a bollard or witches' hat to alert of their presence, then barricading them by placing palleted block stacks immediately adjacent to the pipes, and/or warning of the risk. I think it is probable that a serious injury would occur by tripping if care were not taken by the defendant, and it would not have been unduly burdensome for it to take one or all of the precautions to avoid that risk of injury.

Objection to expert evidence

[37] The plaintiff relied upon expert opinion adduced from Mr Kahler, a consulting engineer, as to precautionary measures available to a builder.

[38] The defendant objected to the expert evidence of Mr Kahler for want of any expertise as to common practices for bricklayers in the building industry, and that the opinion

draws on assumption based on inadmissible hearsay and speculation.[11] It seeks to elevate the evidence of plaintiff, Mr Halliday and Mr Wilkins all with greater expertise and more advantageous positions than Mr Kahler, and that use of witch's hats, bollards, fluorescent painting or other delineation to be used for pipes protruding from the slab was not usual.

[39] I uphold the defendant's objection in respect of Mr Kahler's retrospective observations, including as to peripheral vision and behavioural practices of the builder and bricklayers on the site, and remarks about the state of the particular site. These are not matters of expertise but are properly for evidence of the other witnesses present at the time and basic human experience. I have no regard to opinion drawn on assumption based on inadmissible hearsay and speculation.[12] Further, his conclusionary opinions swearing to the issue for my determination, for example - "*these controls would have significantly minimised the likelihood of Mr Peter's incident occurring*" are inadmissible. However, it seems to me that a structural engineer does have the requisite expertise to report in compliance with r 428(2) of the *Uniform Civil Procedural Rules* to the extent that he provides an opinion on industry studies and guidelines, general principles of safety, foreseeability of risk of trips and falls on a construction site generally, and the commercially available precautionary measures capable of been used on a house construction site. I allow Mr Kahler's evidence in that regard.

Failure to inspect, assess and identify the protruding pipes as a tripping hazard.

[40] The plaintiff contends that the defendant failed to carry out any, or any timely and adequate inspection of the floor slab, prior to work commencing, to identify any tripping hazards in close vicinity to places where block laying was to be carried out, and to ensure that they were remediated with appropriate safety measures prior to work commencing.

[41] The defendant generally points to the defendant's Safe Work Method Statement, and the plaintiff's acknowledgment of its content for commercial work. The work statement does not involve any inspection, assessment and identification the protruding pipes as a tripping hazard for the subject site. It is not adequate risk assessment or safe work statement for the residential building site.

[42] The defendant also relied upon the plaintiff's familiarity by marking out the slab. I have found that the plaintiff was not involved in marking out the slab. In any event, such a task is not some sort of job safety inspection or survey of the site for the purpose of identifying tripping or other hazards to workers moving about the slab. Perhaps some casual observation may be made, but it is not reasonable to expect a bricklayer to maintain a working memory of the presence of the protruding pipes at a particular point on the slab which will vary with different house designs and necessary slab pipe penetrations.

[43] The defendant through Mr Wilkins does not accept that tripping over the protruding pipes was a risk of which it should be bothered with it all, much less consider

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11 Defendant's Submissions – "*Objections as to the admissibility of the reports form Messrs Kahler and Dorian dated 29 June 2018, 27 May 2019 and 30 May 2019*".

12 Defendant's Submissions – "*Objections as to the admissibility of the reports form Messrs Kahler and Dorian dated 29 June 2018, 27 May 2019 and 30 May 2019*" – in particular, p12 line 28, p.14 top, and p15 line 23.

remediating. Mr Wilkins didn't think that the presence of the protruding pipes was a hazard to a person moving around the slab, *"when you look [at] the same things every day of the week…"*. Mr Wilkins seems to be referring generally to protruding pipes on a slab, but there is no evidence that this particular slab was some standard house design familiar to the plaintiff.

[44] The defendant also points to a multitude of tripping risks on the building site, including:

1. Stepping onto the slab;
2. Stepping up the lip in the carport/garage area;
3. Stepping up the lip in the patio area at the back;
4. The set-down area for the shower;
5. The numerous protruding pipes over the slab;
6. The numerous starter bars were on site;
7. Trestles;
8. Pallets;
9. Pieces of wood;
10. Bricks holding up mortar boards;
11. Blocks;
12. Tools;
13. Co-workers; and
14. Boards that are used on the step ups (presumably to provide ramps for wheelbarrows and the like).

[45] The duty does not involve an "all or nothing" approach. It is not every risk that must be addressed, rather the employer should take into account the magnitude of the risk of injury; whether it was a significant risk, and the degree of probability of its occurrence given the circumstances of expected work, including the necessity for the worker moving around in close proximity to the protruding pipes, when ordinarily his attention will be focused of his work when required; and where it would be reasonable to infer that there was a significant degree of probability that a trip and fall would occur.

[46] Dr Kahler referred to the Building and Construction Industry Workplace Health and Safety Guide issued in 2011 by the Queensland government, which Mr Wilkins had never seen before. The guide identifies the responsibility of a subcontractor on a building site to consider how certain activities may be carried out safely. On page 8 of the guide, it is states that such a subcontractor must manage risks from vertical reinforcing steel. The plaintiff draws an analogy with respect to vertical reinforcing steel, and managing risk associated with vertical pipes protruding from the slab in part of the workplace which is likely to be trafficked by workers as they carry out their tasks.

[47] I think a reasonable person in the defendant's position would have inspected the floor slab, prior to work being commenced, to identify and assess any tripping hazards present on the floor slab in close vicinity to block laying work areas. Such an exercise

would have been relatively simple, quick, cheap and effective. would have informed timely and appropriate safety measures prior to work commencing.

[48] It seems to me that the timely inspection would not have been too burdensome and would have reduced the probability of tripping and serious injury. Therefore, I think the defendant also breached its duty, to inspect, in a timely way, identify and assess any tripping hazards.

Failure to mark or barricade the protruding pipes.

[49] The plaintiff contends that the defendant failed to ensure that the protruding pipes were clearly marked and/or barricaded off, so they would not present a tripping hazard to the plaintiff as he moved around the floor slab performing his work.

[50] Whilst an employer could do little about protruding pipes, I do not accept that it could do little about the remediation of the tripping hazard posed by the protruding pipes.

[51] It seems to me that commercially and readily available measures identified by Dr Kahler would include using a coloured witches' hat or bollard. These come at some cost, but can conveniently be placed over or adjacent to the protruding pipes. Other simple measures could be taken, perhaps with less visual effectiveness, such as florescent ribbons and luminescent paint sprayed on the pipes. The plaintiff, Mr Halliday and Mr Wilkins indicated that these are not usual in their experience, but this is not to the point, nor does it serve to highlight the approach available for the location and nature of the particular pipes on this slap. There are, of course, common features of all house slaps including breaking wall alignments with step outs. For this slab, it was not the commonality of the step-out design for the bathroom area that was problematic, but rather the designed location and proximity of necessary pipes for a basin to be installed on a perpendicular internal. With his 41 years of experience, including 20 years with the defendant, I accept the plaintiff's opinion that the type of pipes were "*usually further away from the wall than them, so they're not in the area where you stand*"; that pipes are not usually located on the slab that close to the wall and work area; and that the pipes "*usually go up one of the holes in the besser block*".

[52] In my view an even simpler and cheaper measure could be employed. An employer should simply place their nearby stack of blocks up against the protruding pipes. Indeed, Mr Wilkins recognised the usefulness of putting a pallet of blocks up to a hole in the slab is used to prevent tips or falls.

[53] In my view, a reasonable person in the position of the defendant having identified the tripping hazard posed by the protruding pipes would have taken precautions to clearly mark them with coloured markings, a bollard or witches' hat, or at least barricaded them with palleted block stacks immediately adjacent to the pipes. I see no undue burden or expense or burden with any of these measures. A worker's attention is likely to be drawn directly or peripherally to the identified risk before and during his time working in the vicinity and his movements to and from the area before and after breaks. His awareness will likely be heightened if coupled with a timely warning as discussed below.

[54] Therefore, I think the defendant also breached its duty to, in a timely way, clearly mark and barricade the protruding pipes proximate to the plaintiff's work area.

Failure to warn of the protruding pipes as a tripping hazard.

[55] The plaintiff contends that the defendant failed to warn the plaintiff in a timely fashion, with appropriate reinforcements, of the presence of the protruding pipes in the immediate vicinity of the area on the floor slab in which he was working.

[56] The defendant relies upon the obviousness of the risk and relevant cases. As said in *O'Connor v Commissioner for Government Transport*:[13]

> "It seems … fanciful to suppose that a warning or special instruction was demanded about so simple and obvious a matter requiring neither special skill or knowledge to decide and ordinarily be treated as a matter for the man doing the job."

[57] Other statements of similar sentiment are seen in cases like *McLean's Roylen Cruises Pty Ltd v McEwan*[14]:

> "It is not reasonable to expect that the employer of an experienced 'worker' should be obliged to warn him of a danger which is obvious, and of which he is in fact already fully aware, unless there is some circumstance that indicates that a warning is necessary…"

[58] The defendant also relies upon *Raimondo v State of South Australia*.[15] In that case, the High Court considered a claim where the plaintiff, an experienced painter, was dismantling a trestle and a plank fell striking him in the head. He blamed his employer for failing to appropriately train him or otherwise warn him of the danger of a plank falling from a trestle onto his head. The court accepted that the practices used by the plaintiff and his co-worker were not entirely safe but noted that the risk of injury was not high. The court considered that an employer's duty did not require it to provide instruction or warning to the plaintiff, an experienced painter, of the risks of activities he was carrying out. The court said:

> *"I cannot think that by giving two experienced painters the equipment to which I have referred and by requesting them to paint the ceiling of the corridor – a very simple and uncomplicated task – without further instruction or caution, the Respondent unreasonably exposed them to risk of injury. It is against common sense to say that the taking of reasonable care by an employer call for the giving of an elementary instruction or caution in relation to the slight, albeit evidence, possibility of injury which an imprudent mode of adjusting the trestles would entail."*[16]

[59] This is a different case. I have found that in the circumstances, the protruding pipes did not present as an obvious risk, nor were they an incident of an unsafe work practice of a bricklayer such as the plaintiff; they were a feature of the workplace itself and did they involve some special skill or knowledge, or decision ordinarily for a bricklayer.

[60] The defendant generally points to the defendant's Safe Work Method Statement, and the plaintiff's acknowledgment of its content for commercial work, as well as his familiarity and experience with residential building sites. I do not accept that some

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13 *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 230.
14 *McLean's Roylen Cruises Pty Ltd v. McEwan* (1984) 54 ALR 3 at 8.
15 *Raimondo v State of South Australia* (1979) 23 ALR 513.
16 *Raimondo v State of South Australia* (1979) 23 ALR 513 – per Mason J.

general matters read and signed by the plaintiff suffices for appropriate job specific warnings in a residential setting.

[61] The defendant also relies on the plaintiff's acceptance that almost all residential building slabs have pipes protruding and that did not need to be warned about them. He was also cognisant of the need to keep a tidy slab and being aware of his surroundings. While the plaintiff answered with his characteristic candour, a general warning about tidiness, surroundings and protruding pipes is inadequate. There is no evidence that the slab was of a standard house design such that past general warnings would have carried to that day. The duty relates to warnings or safety instructions for a slab design with pipes in the vicinity of a bricklayer's work area.

[62] It seems to me that a reasonable person in the position of the defendant, in the absence of any markings or barricading, would have taken the opportunity to warn a bricklayer and reminded him of the location of the protruding pipes in the vicinity of the area on the floor slab in which he was working. I think a warning or reminder to a worker, before starting in that vicinity, would probably have prevented the risk of injury and I see no undue burden in doing so. The warning may be unnecessary if protruding pipes had been clearly identified, marked and/or barricaded and thereby identified as an obvious risk,[17] but they weren't.

[63] Therefore, I find that the defendant did breach its duty by failing to, in a timely way, warn and remind the plaintiff of the risk.

Was the defendant's breach of duty a necessary condition of the occurrence of the injury (or did it make it more severe) and is it appropriate for the scope of liability of the person in breach to extend to the injury so caused?

[64] Having found relevant breaches, proof of causation is subject to the two-limb test involving considerations of factual causation and the appropriate scope of liability in section 305D:

> **"305D General Principles**
>
> (1) A decision that a breach of duty caused a particular injury comprises the following elements-
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (factual causation);
>
> (b) it is appropriate for the scope of liability of the person in breach to extend to the injury so caused.
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty – being a breach of duty that is established but which can not be established as satisfying subsection (1)(a) – should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

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[17] Cf. *O'Connor v. Commissioner for Government Transport* (1954) 100 CLR 225 at 230, and *Raimondo v State of South Australia* (1979) 23 ALR 513 per Mason J.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach –

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purposes of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.

[65] The requirements of these statutory provisions and the courts' approach were recently examined in a different context.[18] I am also assisted by other decisions dealing with work related injuries and systems of work introduced by employers.[19] Of course each case will turn on its own facts and circumstances.

[66] As to the considerations of causation the burden of proof is on the plaintiff pursuant to s 305E of the WCRA as follows:

"**305E Onus of proof**

In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[67] In *Woolworths v Perrins*,[20] McMeekin J emphasised that in order to establish the necessary causal link between any arguable negligence on the part of the employer and the injury suffered by the employee, it is necessary to show that the measures that it is said the employer failed to adopt would protect the employee from injury, not "could" or "might". He referred to *Turner v South Australia* where Gibbs CJ said:[21]

"When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury would probably have been averted, or,

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18 *Corbin v State of Queensland* [2019] QSC 110 at [239].

19 *Test v Forgacs Engineering Pty Ltd* [2012] QDC 318 where the Plaintiff was removing anodes from the hull of a boat; *Heywood v Commercial Electrical Pty Ltd* [2013] QSC 52 where the Plaintiff, an apprentice electrician, injured his elbow whilst descending a ladder - the elbow got caught on some scrap metal; and *Marshall v Queensland Rehabilitation Services Pty Ltd* [2012] QSC 168 where an assistant in nursing was injured in the course of rolling a resident over in bed. Also as to obvious risk - *Raimondo v State of South Australia* (1979) 23 ALR 513; *Ghantous the Hawkesbury City Council* [2001] HCA 29 and *Brodie V Singleton Shire Council* [2001] HCA 29.

20 *Woolworths v Perrins* [2015] QCA 207at [173] per McMeekin J citing *Queensland Corrective Services Commission v Gallagher* [1998] QCA 426 at [26] – [27] per de Jersey CJ citing *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319; *Turner v South Australia* (1982) 56 ALJR 839 at 840 per Gibbs CJ.

21 *Turner v South Australia* (1982) 56 ALJR 839 at 840 per Gibbs CJ citing *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 416-417, 419.

> in other words, that the safety measures would have been effective and that he would have made use of them if available."

[68] The plaintiff accepts that he carries the burden of proof having regard to all the evidence adduced in the case and available inferences, including the application of the observations of Lord Mansfield in *Blatch v Archer* (1774) 98 ER 969.[22] However, the defendant cautions against the plaintiff's analysis of breach of duty through the prism of hindsight, and emphasises the need for the plaintiff to prove that a relevant breach would, not might, have prevented the harm for causation under section 305D.[23]

Was the defendant's breach of duty a necessary condition of the occurrence of the plaintiff's injury?

[69] It is convenient to mention at this juncture that, for the reasons discussed later, I find that reasonable person in the plaintiff's position would not have regarded the protruding pipes as an obvious risk of harm. Therefore, the scope of the defendant's duties, for example, a duty to warn, is not diluted on account of an obvious risk.

[70] The case pivots on some critical factual issues about what happened on the date of the incident and the plaintiff's return and cessation of work. I deal with these first.

What happened with the plaintiff on 3 August 2015?

[71] I have been assisted by annotated photographs, diagrams and building plans of the construction site at Foxville Circuit in Smithfield showing various stages of the early post slab construction, location of the subject pipes, wall construction and the work area and pathways available to the plaintiff.

[72] There is some dispute about when the plaintiff started work on the slab. He recalled starting on the morning of Monday 3 August 2015. His co-worker, Mr Halliday also recalled the first day being 3 August 2015. However, it emerged with the assistance of a contemporaneous diary held by the defendant's director, Mr Wilkins, that the work started on the previous Friday 31 July 2015, which I accept. It seems, like Mr Halliday, the plaintiff's memory was innocently mistaken about the start date.

[73] Two pipes which protruded from the slab are the focal point of the case. The plaintiff recalled that they were copper pipes which extended about "*6 inches*" above the slab, being about 150 mm. On the other hand, Mr Wilkins and Mr Halliday testified that the pipes were at their usual height and estimated that they extended 300 mm above the slab. Mr Wilkins explained that the white pipe was a 50 mm diameter PVC waste pipe, and the other was a plastic water feed pipe, as was standard. He contrasted this with a copper pipe positioned so as to run up through a wall. The photographic depictions of the subject pipes are consistent with an estimate of 300mm. I prefer the evidence of Mr Wilkins and Mr Halliday as being more accurate than the plaintiff who, I think, was honestly mistaken as he was trying to draw on his perception immediately

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22 *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [17] per Gleeson CJ, [35]-[51] per McHugh J, [237] per Heydon J, & *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201; *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501 at [169]; *Michail v Australian Alliance Insurance Company Ltd* [2014] QCA 138; *Rossi v Westbrook & Anor* [2013] QCA 102 at [30] – [38]. See also Cairns regional Council v Sharp [2013] QCA 297 at [32].

23 Defendant's submissions paras 65, 78, 79, 136, 137 and Defendant's Reply Submissions paras 54-61.

after the incident as he lay traumatised on the concrete blocks for a minimum of five minutes after his injury.

[74] It seems to me that there were two collocated pipes protruding from the concrete slab in the vicinity of the plaintiff's work area. There was a working corridor of about 600mm to 800mm framed by the back wall under construction and stacks of blocks. It was conceded by the defendant that the distance between point A on the plan and the shower recess is 1.2m according to the plan scale. It was also conceded that the white pipe probably sits around the centre of the distance between those two points and that the other pipe which has been variously described as copper or plastic would be on the left-hand side of a mid-point being less than 600mm from the wall. I find that the pipes together were fixed and rigid, and extended about 300 mm above the slab, but were well below adult knee height. One pipe was PVC with a 50mm in diameter. The other pipe was a water feed pipe that was taller and narrower than the PVC pipe, and was either plastic or copper with a green covering.

[75] Mr Wilkins also gave evidence that the plaintiff assisted him to mark out the position of the walls on the slab on the Friday, 31 July 2015, before the block work commenced. The job of marking out the slab is carried out with the chalk line, moving around the edge of the slab, and concentrating on marking the slab precisely for the position of the walls. The plaintiff accepted that he had often marked out slabs with Mr Wilkins '*hundreds of times*', but he insisted that he did not mark out this site. He testified that he turned up to work expecting to mark out the slab, but upon arrival he saw that Mr Wilkins and the labourer, Shane Rimmer, had already marked out the job. Mr Rimmer was not a witness in the case.

[76] I accept that the plaintiff did not assist in marking out, but instead arrived when the slab was quite crowded. Even if the plaintiff did assist in the marking out first thing in the morning when the job commenced on Friday morning, 31 July 2015, this was three days before the incident occurring after '*smoko'* on the following Monday. Such a task does not involve some kind of employee job safety inspection or survey of the site for the purpose of identifying tripping or other hazards to workers moving about the slab. Perhaps some casual observation may be made, but it is not reasonable to expect a bricklayer to maintain a working memory of the presence of the protruding pipes at the particular point on the slab.

[77] When the plaintiff went to work on early Monday 3 August 2015 the slab was very crowded with stacks of blocks and other plant, equipment and materials to be used in the block laying work. The formwork and star pickets had already been removed, the slab was marked out, starter bars of steel rods protruded about 800mm above the slab along wall alignments ready to be encased by the blocks, stacks of blocks on pallets were placed adjacent to the work areas for ready access and plumbing pipes penetrated and protruded above slab.

[78] The plaintiff explained, and I accept, that after he arrived on site that morning he travelled through the proposed carport and walked generally up the middle then right side of the slab (by reference to the site photograph exhibit 2). His unremarkable journey would have taken him well to the right of the two protruding pipes that were obscured by a nearby stack of blocks. I accept that the plaintiff first constructed two hatched wall corners for about 1 and a half hours in the left-hand side wall of the house from a street perspective looking towards the back (position "C"). He progressively worked on the wall in a conventional way. By the time he stopped for '*smoko*' he had

laid blocks guided by a string line along the areas he marked with red line between corners marked "A" and "B". After his '*smoko,*' the plaintiff returned to that same position, which had been built up to about 600-800mm by then. Upon his return he decided to lift the guide string line a block higher, so he walked from just to the left-hand side of the exposed aggregate driveway at the front of the house where he says that he had smoko, across the slab, and between the two stacks of blocks to a position just near the end of the point of his pre-smoko work area close to position "A." He then realised that the rest of the wall further down had not been built up to the correct level for the line adjustment.

[79] The plaintiff described his manoeuvre which brought him to grief as he focused on the correct positioning of the string line and alignment of the block wall without looking down to where he was placing his feet. He described that he stepped sideways to reposition a string-line by taking "*one big, wide step sideways*" and rotated to his left in *"a little circular turn, anticlockwise"* when the outside of the heel of his left work boot caught on the protruding pipes, and then he "*went over backwards*." He recalled falling straight back onto another partially depleted stack of blocks which were about a metre behind him as he tripped and fell. During his evidence he demonstrated to the court which parts of his body struck the blocks as he fell. The relevant area was just under the right shoulder blade, down to a position at the "*true waist*." He described that it was his back that first struck the corner of the blocks. He says that when he hit the blocks: "*I twisted the left and fell on the left-hand side onto the slab… My arm dragged down the blocks and I tore the skin off my arm here…. My hips were still straight, and my upper body was twisted… to the left.*" He says that he ended up: *"…on my left side with my – my right arm was – and upper back worse still, you know caught on the blocks, sort of thing I was twisted sideways.*"

[80] The plaintiff described severe pain in *"…my whole back, upper back and lower back, my rib cage especially. They were badly bruised. In my left leg… Down my left side to about halfway to the knee."* He explained that he was lying in that position partly on and partly off the stack of blocks for: *"…about five minutes, I guess… I couldn't let anyone touch me to pick me up… They were going to. I said no, no, don't… I was in that much pain."* He estimated his pain at level 'ten' using a on a scale from 1 for the least pain, to 10 for the worst. The plaintiff's description of the mechanism of his injury is consistent with that recorded by Dr Low who identified that it was the back pain and left leg pain that was *"the real problem."*

[81] The defendant submits that it is unlikely that the plaintiff's mere circular turn would create enough momentum for him to fall backwards and urges acceptance of Mr Halliday's version of the plaintiff's fall. Mr Halliday testified that the plaintiff was walking backwards at the time; and did not trip after taking a sideways step and turning from a stationary position. While I accept that Mr Halliday may have perceived the plaintiff to so move, I prefer the plaintiff's recollection as being more naturally likely and having sufficient momentum to cause his twisting fall that he described and demonstrated during his evidence.

[82] The plaintiff describes that when he eventually got up off the floor and blocks, he was in very significant pain, and he could not straighten up. He was helped up, and still had the back and leg pain. He says he initially sat in the corner for a few moments, but he couldn't stand the pain when sitting down. He says he then got up and tried to walk out to the front of the house to the smoko area and finished up on his hands and knees dry retching. He thinks it was because of shock. The plaintiff estimated his pain "*was*

a ten" on a scale of 1 to 10. He described severe pain in his whole back, hips and legs, and indicated that the pain went up *"...those two strong muscles up the side of your back.... you know down the butt cheeks. That muscle all the way down to there... in my left leg... mid thigh."*

[83] Mr Halliday said that he was watching the plaintiff after the fall and saw him sitting out the front of the site and would have noticed him dry reaching, but he did not. Mr Wilkins described that after the accident that the plaintiff told him that he was a "*bit sore*" and that he was "*a little bit laggard*". He said that the plaintiff held his arm up and he had an abrasion on his arm. He recalls the plaintiff saying, "*my back's a little bit sore and my arm's a bit sore*". He then took him in his truck to the medical centre. There Dr Wijewardna noted:

> "*WorkCover injury. He with boss. Breathing okay. No SOB. Past history of lower T spine fracture. Now has pain in right lower posterior ribs. Although on Celebrex. Graze to posterior arm."*

[84] On that date a WorkCover certificate was issued diagnosing a *'possible ribs fracture, soft tissue injury right lower back, right arm skin tears'*. The plaintiff was treated accordingly with the strong pain reliever Endone and paracetamol/codeine.

[85] Evidence was given by the plaintiff's then flatmate, Mr Ramsden, who saw the plaintiff when he returned home after his injury. Mr Ramsden described that the plaintiff: *"...couldn't even get out of his car properly. I had to help him get out of his car when he got home."* He then had to help him get out of bed to go to the toilet. Mr Ramsden did all the cooking and cleaning that the plaintiff *"couldn't do."* He said that the plaintiff *"was struggling with everything. He complained of pain in his ribs and lower back"*. The plaintiff told Mr Ramsden that he fell over and had a cracked rib, and he could not breathe properly, and the plaintiff complained particularly of pain in his back.

[86] It seems to me that the plaintiff's initial state including any dry reaching on his hands and knees, may not have been apparent to Mr Halliday or Mr Wilkins at the time that saw him, and had well passed by the time he saw the doctor. I do not accept the defendant's contention that the plaintiff was overstating his post-accident state. The plaintiff impressed me as a stoic and understated male. I accept his evidence about his injury, including feeling shock and pain, inducing dry reaching as he described.

What happened with the plaintiff's return to work up to 8 February 2017?

[87] The plaintiff returned to work on about 26 September 2015 after a six-week absence and worked continuously for 15 months until he finally stopped on 8 February 2017.

[88] The defendant asserts that the plaintiff managed his hard and rigorous bring laying work over that 15 months without taking time off, without once telling his GP of any ongoing symptoms (despite attending 15 times for other issues), he returned to proactive physiotherapy for treatment, and without complaint to either Mr Wilkins or Mr Halliday. It think that is overly simplistic and mischaraterises the plaintiff's plight and stoic determination.

[89] On 5 August 2015 the plaintiff went to his usual doctors at Omega Health Medical Centre. Dr Rajpal noted the reason for visit as being *"fall. Chest injury"* and issued a

medical certificate in which he diagnosed *"soft tissue injury over right chest wall"* and ruled him off work until 9 August 2015. Later medical certificates issued with the same diagnosis dated 7, 10, 14 and 18 August 2015. Although there is a reference in the certificates to problems with the plaintiff's back, it clearly remained problematic. The doctor's notes of 14 August 2015 refer to '*thoracic back pain'*, and more pertinently on 18 August 2015 Dr Singh recorded his reason for the visit as a back injury and the need for a CT scan. He noted - *"Lumbar spine (torsion injury lower back).? Stress fracture, back pain.?? (Disc lesion).* His diagnosis was *"lumbar disc bulge."*

[90] The plaintiff was prescribed Celebrex on 18 August 2015 (usually taken for spine/back pain), and prescribed Panadeine Forte on 24 August 2015.

[91] In the meantime, the plaintiff felt pressure to return to work. He recalled Mr Wilkins telephoning *"probably every couple of days"* and complaining about the cost resulting from the plaintiff's WorkCover claim. I accept that he told Mr Wilkins that he was in severe pain but was prepared to go back to *work "for a trial run"* about a fortnight or three weeks after the accident. I accept that he could only work for a few hours *"...then I couldn't handle the pain anymore, so I went home again and took some more painkillers."*

[92] The CT scan of the plaintiff's lumbar spine was taken on 19 August 2015. The radiologist recorded the history of a torsion injury to the lower back, lower back pain, and queries whether there was a stress fracture or a disc lesion. The report for the CT scan included: *"Degenerative changes are noted at L4/5 and L5/S1. There is some foraminal disc bulge at L4/5 in the left side with probable mass effect on the left nerve root L4 in its foramen. There is no other evidence of foraminal nerve root compression at any level."*

[93] This seems incongruous with a clearance to return to work a month later, when on 18 September 2015 Omega Health issued a medical certificate with a medical treatment plan - *"No problems – fully recovered – fit to return to normal duties"*. This is also inconsistent with the plaintiff's chiropractor's note of the next day, 19 September 2015: *"Low back pain not too bad at all, still mild pain and occasional sharp pain in lower back – 85% better."*

[94] The plaintiff returned to work on about 26 September 2015 after a six-week absence and worked continuously for 15 months until he came to grief on 8 February 2017.

[95] Although during 2015 the plaintiff commented to his co-workers that he was "*a bit fed up at that time*", he was not intending to cease work. When he returned to work he assumed his usual work laying up to 400-500 blocks per day each weighing 17 kilograms. He also did one job for Wayne Williams but had to stop because of shoulder pain. He also did some work at the Cool Waters Holiday Park for someone else.

[96] I accept the plaintiff's evidence that he perceived himself working slower and about two thirds as hard as usual after the August 2015. Although his loss of efficiency and productivity was not similarly perceived by others. Neither Mr Wilkins nor Mr Halliday noticed any ongoing problems, reduced pace or effort. Mr Wilkins said he would not have tolerated such had he noticed. These matters, I think, are consistent with the plaintiff's stoic presentation, skills, experience, and respected and reliable

work ethic. However, I accept the plaintiff's evidence that he did inform Mr Wilkins that he was experiencing low back pain on occasions during the period from his return to work at the end of September 2015 up to 8 February 2017, particularly when bending down to do low block laying work. I also accept his evidence that Mr Wilkins did not appear to react to his comments.

[97] Mr Ramsden, the plaintiff's flatmate, described that the plaintiff particularly complained of pain in his back, and showed an apparent disability for *"a couple of months"* after his injury. And when Mr Ramsden visited the plaintiff from time to time (after he moved out) and he saw that the plaintiff *"still wasn't functional"*, and *"...he was still struggling with a back pain and stuff"*.

[98] The plaintiff's capacity to continue working despite his ongoing state is also consistent with the medical evidence which I accept as discussed in more detail later. Dr Low was not surprised of his perseverance in the presence of relatively low grade chronic lower back pain and left leg pain, nor did it affect the opinions of Dr Burke or those doctors which identified the incident of 3 August 2018 as either the sole cause of the plaintiff's back injury. Dr Williams likewise was supportive of some apportionment to the accident of 3 August 2018 as a significant controlling factor, with respect to the increase in lower back pain and disability on 8 February 2017.

[99] On 8 February 2017 the plaintiff was unremarkably performing his normal block laying duties. He described that he turned to his right, picked up a block and at that stage noticed that a starter bar was wrong and tried to bend it with his foot and at the same time, tending to bring the block around. At this stage he felt a 'pop' in his back. He described suddenly feeling more severe lower back pain and left leg pain - this time also extending down his right leg as well as his left leg.

[100] The plaintiff was unable to continue working and he has not worked from that time.

Was this an intervening event?

[101] I considered this question against the background of what happened on from 3 August 2016 and 8 February 2017, which I accept, of chronic but variable, lower back pain and left leg pain which he had been experiencing since his return to work in late September 2015.

[102] In *State Government Insurance Commission v Oakley*,[24] Malcolm CJ provided a neat synopsis of the position as follows:

> "In my opinion, where the negligence of a defendant causes an injury and the Plaintiff subsequently suffers a further injury, the position is as follows:
>
> (i) Where the further injury results from the subsequent accident, which would not have occurred had the Plaintiff not been in the physical condition caused by the Defendant's negligence, the added damage should be treated as caused by that negligence;
>
> (ii) Where the further injury results from a subsequent accident, which would have occurred had the Plaintiff been in normal health, but the

[24] *State Government Insurance Commission v Oakley* (1990) ATR 81 – 003. See also *Nilon v Bezzina* [1988] 2 Qd R 420.

damage sustained is greater because of aggravation of earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the Defendant's negligence; and

(iii) Where the further injury results from a subsequent accident which would have occurred had the Plaintiff been in normal health and the damage sustained includes no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as causally independent of the first."

[103] I accept the plaintiff's evidence about his symptoms since the 3 August 2015 injury, his plight and continuing symptoms on his return to work, and since 8 February 2017. This is supported by the evidence of Dr Low and Dr Burke, which I prefer, while Dr Williams has a differing opinion.

[104] Dr Bruce Low, orthopaedic surgeon, produced three reports and gave evidence. In his first report of 28 July 2017, Dr Lowe noted good preservation of the plaintiff's discs of the lumbar spine. He thought the low back pain was most likely discogenic or facet in origin. He opined that after the incident of 3 August 2015 the plaintiff experienced symptomatic degenerative disc and facet disease, ongoing symptoms of backache and leg pain, with non-verifiable radiculopathy causing his leg pain.

[105] While Dr Low referred to the CT lumbar spine scan dated 10 February 2017 after the aggravating/exacerbating incident in this first report, he apparently overlooked the earlier CT scan of the lumbar spine taken on 19 August 2015 only 16 days after his injury, which is a significant factor supporting his settled opinion.

[106] In his second report 21 November 2018, Dr Low noted the significant mechanism of injury in the incident of 3 August 2015 consistent with the plaintiff's evidence which I've accepted. He accepted that the plaintiff then suffered another significant aggravation/exacerbation of his low back pain on 8 February 2017. The doctor refers to the CT scan of 19 August 2015 *"which I must have overlooked,"* evidencing a pathology of L3/4 spinal canal stenosis, with a left-sided disc prolapse causing left L4 nerve root compression. He noted that this pathology was not evident on the CT scan of 10 February 2017. He opined that the injury on 3 August 2015 caused structural damage to the lumbar spine which was before then not symptomatic. He considered that the plaintiff's continued performance of block laying duties, when his spine was already injured, made him more vulnerable to exacerbation and aggravation.

[107] In his third report of 30 May 2019, Dr Low confirmed his previous opinions. He describes the sequence of injuries as *"a significant injury in 3/8/2015 with and aggravation in 8/2/2017."* He said that that it was not a typical disc protrusion, but rather it was more in the foramen, and is more the ganglion then the nerve root itself. He considered that the early CT scan was not inconsistent with the plaintiff's complaints of low back pain and left leg pain, and was due to a significant injury to the L4/5 disc with a lateral protrusion into the foramen, and L4, causing mass effect on the L4 nerve root. The doctor explained the incident of 8 February 2017 was "…*merely being in aggravation of the pain which was already present. His pain would have been to the extent that he could put up with it with Nurofen or Panadol and keep working after the initial injury. It would have been annoying but not incapacitating, but after 8/2/2017 with further aggravation of his lumbar spine his pain became so incapacitating that he can no longer work*."

[108] In his evidence at trial, Dr Low did not recoil from these opinions attributing a primary cause to the 3 August 2015 incident, and an exacerbation/aggravation to the 8 February 2017 incident, while acknowledging in relation to the second event:

(a) 17 kilograms is a "*significant weight to be lifting one handed*";

(b) Lifting blocks, one handed whilst lifting his foot to kick a bar whilst bringing the block across his body was a mechanism which could give rise to an injury to even someone who doesn't have degeneration in their lumbar spine;

(c) He did not believe that the pop in itself was significant but that "*it's the subsequent complaints of back and leg pain that is the significant issue*"; and

(d) When asked – "*Well, could it be described that Mr Peters had pre-existing degeneration of the lumbar spine which flared up in 2015 and then flared up again due to a separate incident in 2017?"* Dr Lowe answered: "*Yes, that would be more in keeping with what I would see this is an injury – an aggravation rather than a new injury".*

[109] Dr Nicholas Burke, occupational physician, produced reports dated 19 April 2017 and 5 July 2017, a memorandum signed 20 May 2019, and gave oral testimony. The recent memorandum taken in conference seemingly attributed a minor component of impairment to 2015 incident and a major part to the 2017 incident. This may have been an incident of receiving assistance to distil the *"voluminous*" material. However, Dr Burke promptly corrected his position when he gave oral testimony saying that the two dates in the memo should be reversed such that the first injury "*was the more significant*" being consistent with his impression of first seeing the plaintiff. In doing so, he regarded the state of the L4 disc shown in CT scan taken on 19 August 2015, and the plaintiff's return to work with chronic low back pain, albeit at a much lower level *"not too bad at all; 85% better"* as noted by Cairns Chiropractic on 19 September 2015. But he opined that once the plaintiff that had one exacerbation, and had one episode of symptoms, he was much more likely to have more symptoms in the future. Dr Burke maintained that the 2015 event was the most significant exacerbation of the underlying degeneration. Accordingly, he attributed 5% impairment for the first injury in 3 August 2015 and nil percent for the second injury.

[110] Associate Professor Richard Williams, orthopaedic surgeon, also examined the plaintiff and reported on 9 August 2017 and 6 December 2017. It seems that he relied upon the absence of back compliant to the plaintiff's treating doctor to opine that his injury of 3 August 2015 likely resolved and enabled him to work full duties as a brick layer completely free of all lower back pain until 8 February 2017. I have found otherwise. But having approached the assessment on this basis, Associate Professor Burke opined that the plaintiff's incapacity for work since February 2017 is causally unrelated to the 2015 accident. The associate professor ascribes 50% of the total of his assessed 6% whole person impairment to the incident of 3 August 2015 and 50%, another 3%, to the event of 8 February 2017. He says: *"Of themselves, the events of 3.8.2015 and 8.2.2017 have not had any material effect on the progression or otherwise of the pre-existent process ... The event of 3.8.15 could be said to be an exacerbation (temporary) of the pre-existing lumbar degenerative process and the event of 8.2.2017 can be said to have been an aggravation, that is to say an increase in symptoms which represents an increase in whole person impairment by 3% or greater for a period of 12 months or more."*

[111] I prefer the evidence of Dr Low, which is generally consistent with that of Dr Burke and the plaintiff's evidence, which I accept. In contrast, the foundation of Associate Professor Williams' opinion was not established on the evidence, and I do not accept his evidence. In my view but for the events of 3 August 2015, it seems to me that the plaintiff would not have suffered the severe aggravation or acceleration of his pain symptoms and disabilities in his lower back as he did on 8 February 2017 which on its own was unlikely to cause injury to his lower back.

Failure to inspect, assess and identify the protruding pipes as a tripping hazard.

[112] The defendant made no effort to inspect, assess and identify the protruding pipes as a tripping hazard having regard to the identified risk of tripping on pipe protrusions in the vicinity of the plaintiff's work area, discussed above.

[113] It seems to me that a timely inspection, assessment and identification of the protruding pipes presenting as a tripping hazard may not, on its own, meet the threshold of being a necessary condition of the occurrence of the injury resulting from the plaintiff's trip in the vicinity of his work area. However, it is a necessary precursor process to inform the defendant of the need to take further precautionary steps to alert the plaintiff to the risk by barricading and/or warning of the risk. These precautions cannot happen in a vacuum.

Failure to mark or barricade the protruding pipes.

[114] I do not accept the defendant's contention that marking the pipes with coloured ribbons, witches' hats or bollards would have led to an "*almost ridiculous conclusion*" of "*scores and scores of witches' hats and bollards on the site*". Each building site and associate slab will be treated appropriately such that attention need only be given to particular pipe protrusions in a bricklayer's work vicinity and therefore, identified as a tripping hazard.

[115] The plaintiff's brick laying work area is readily identifiable in the vicinity of the wall alignments and his occupational movements to and from his point of brick placement, set the work string lines, collect bricks, obtain and apply mortar, etc. I do not accept that he has some familiarity by earlier setting out the bare slab, or was moving backwards at the time. As I discuss above, I think he was working in the usual expected way on the wall near where the pipes were framed between the partially constructed wall and the blocks of pavers. He was regularly in the vicinity of those pipes as he carried out the exacting tasks involved in laying a good quality and even block wall and adjusting the string line to ensure there was always perfectly level. He was attentive to his task of assuring alignment and moving accordingly when he struck the pipes with is foot, so close were they to the vicinity of his work area.

[116] I agree with the plaintiff's submission that it is highly likely that the adoption of the remedial measures of marking the pipes with spray painting with fluorescent paint, brightly coloured ribbons, witches hats and/or bollards, would all have been likely to have either drawn the plaintiff's attention in a timely fashion to the presence of the protruding pipes. Those measures of using colour and more prominent items would have emphasised the thin pipes below knee height. The plaintiff would have noted the marked pipes as he moved around doing his work before smoko, and thereby have a fresh reminder of their presence when he came back from smoko, and/or he would have noted them in his peripheral vision as he performed the line block adjustments immediately after smoko which he has described in his evidence.

[117] Further, the remedial measure of placing the stack of blocks up close up against the protruding pipes would have actually eliminated a hazardous feature of the protruding pipes, namely that they were in an isolated position 6 inches in from the edge of the work area. Such a measure would not have necessitated any observations by the plaintiff at all, and the pipes simply would not have been located in any path of travel at all as he moved around the workspace concentrating on his work tasks.

[118] Therefore, I think that the defendant's failure to, in a timely way, clearly mark and barricaded the protruding pipes proximate to the plaintiff's work area was a necessary condition of the occurrence of the injury resulting from the plaintiff's trip.

Failure to warn of the protruding pipes as a tripping hazard.

[119] The plaintiff has sustained a case that no warnings or safety instructions were given for this slab design or at all about the pipes in the vicinity of his bricklaying work.

[120] A separate oral warning may have been obsolete if the defendant had marked the pipes so as to provide a ready visual warning, or by simply abutting the stack of blocks against the pipes and thereby eliminating or effectively neutralising the risk of tripping. But these precautions were not taken, and I think a timely warning at the commencement of his work in the vicinity of the pipes would have alerted (or at least reminded) him to the presence, hazard, and risk presented by the pipes.

[121] Therefore, I find that the defendant's failure to, in a timely way, warn and remind the plaintiff of the risk was a necessary condition of the occurrence of the injury resulting from the plaintiff's trip.

Contributory negligence

[122] The defendant alleges that the plaintiff solely caused, or alternatively he contributed to the incident by his own negligence such that damages should be wholly reduced, by him:

(a) Failing to watch where he stepped;

(b) Failing to keep a proper lookout;

(c) Failing to take proper care for his own safety;

(d) Failing to take adequate account of the obvious tripping hazard created by the presence of the plastic pipe was obvious and known to the plaintiff and an obvious risk for the purposes of s 305I of the Act.

[123] Contributory negligence must be considered in the context of liability as a whole.

[124] In *McLean v Tedman* (1984) 155 CLR 306 at [315] the Mason, Wilson, Brennan and Dawson JJ said as follows:

> *"...the question is whether that failure should be characterised as mere inattention or inadvertence or whether it amounts to negligence, there being a well recognised distinction between the two. It is accepted that in considering whether there was contributory negligence by an employee in a case in which the employer has failed to provide a safe system of work, the circumstances and conditions in which he had to do his work must be*

taken into account. And the issue of contributory negligence is essentially a question of fact.

As Windeyer J observed in Sungravure when an employee…sustains injury, the jury in considering contributory negligence may have regard to "inattention bred of familiarity and repetition, the urgency of the task, the man's preoccupation with the matter in hand, and other prevailing conditions". It is then for the Tribunal of fact to determine whether any of these things caused some temporary inadvertence, some inattention or some taking of a risk "excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man"".

[125] Later in *Bankstown Foundary Pty Ltd v Braistina*[25] Mason, Wilson and Dawson JJ said at 310:

"A worker will be guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he would expose himself to risk of injury. But his conduct must be judged in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks. The question will be whether, in the circumstances and under the conditions in which he was required to work, the conduct of the worker amounted to mere inadvertence, inattention or misjudgement, or to negligence rendering him responsible in part for the damage"

[126] The Act relevantly provides as follows:

305F Standard of care in relation to contributory negligence

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the worker who sustained an injury has been guilty of contributory negligence in failing to take precautions against the risk of that injury.

(2) For that purpose—

(a) the standard of care required of the person who sustained an injury is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.

305G Contributory negligence can defeat claim

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

305H Contributory negligence

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25 *Bankstown Foundary Pty Ltd v Braistina* (1986) 160 CLR 301.

(1) A court may make a finding of contributory negligence if the worker relevantly—

…

(f) undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account of obvious risk; …

(2) Subsection (1) does not limit the discretion of a court to make a finding of contributory negligence in any other circumstances.

(3) Without limiting subsection (2), subsection (1)(f) does not limit the discretion of a court to make a finding of contributory negligence if the worker—

(a) undertook an activity involving risk that was less than obvious; or

(b) failed, at the material time, so far as was practicable, to take account of risk that was less than obvious.

[127] The general law is supplemented by the Act. It seems to me that the legislative provisions do very little, if anything, to alter the common law.[26] They affirm the application of the common law in relation to workers (s305F&G); highlight some circumstances where a court "may" make a finding of contributory negligence (s305H); and draw attention to the term 'obvious risk' (s 305I).

Did the plaintiff's activity involve an obvious risk?

[128] The Act defines an 'obvious risk' as follows:

305I Meaning of obvious risk for s 305H

(1) For section 305H, an obvious risk to a worker who sustains an injury is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the worker.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

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26 Cf. *Osbourne v Downer EDI Mining Pty Ltd* [2010] QSC 470 at [74].

[129] Whether a risk is an 'obvious risk' is determined objectively, having regard to the particular circumstances involving the plaintiff. The plaintiff's state of mind is not determinative, instead, what a reasonable person in the plaintiff's position would regard as obvious is determinative. So, the question is whether the plaintiff failed to take account of a risk of harm which would have been obvious to a reasonable person in his position. The position of the plaintiff will include the plaintiff's knowledge and experience of the area and conditions and the particular circumstances in which the risk materialised and the harm was suffered.[27]

[130] The plaintiff had worked for the defendant as a block and brick layer almost exclusively since 1994. He impressed his employer as a committed and good worker who worked pretty hard always doing a good day's work, and he was very good at what he did and he was trustworthy.

[131] Mr Wilkins was the defendant's representative on the job site who was responsible for all issues relating to job safety assessment, safe work procedures and job safety training of the defendant's employees, and generally discharging the obligations of the defendant with respect to workplace health and safety. He was usually physically present on job sites and also worked alongside the plaintiff as he was a qualified bricklayer.

[132] The plaintiff had been working on the site 12 hours prior to his fall - 8 hours on Friday 31 July 2015 and about 4 hours on Monday 3 May 2015. Before any block laying work, the concrete slab was clean with absolutely no obstructions, such that if attention was drawn to the subject protruding pipes they would have been obvious and easily seen. But there is no evidence of that level of observation or even that the plaintiff was to make that observation in his duties as a bricklayer. On his return to the site on the Monday there were stacks of blocks on pallets and other material on the slab. The photographic evidence shows the pipes dwarfed, surrounded and obscured by other material across the slab. The pipes were not in a thoroughfare, and there was no reason for the plaintiff's attention to be drawn to their location in the course of his work. I do not expect the plaintiff, or any such worker, would have retained a good recollection of the site to retain an appreciation of the location, protrusion and hazard of the particular pipework in that vicinity. There was a corridor between the wall and the blocks of pavers which were 600mm-800mm away from the wall. The plaintiff was working on the wall adjacent to the pipes located at the end of the area where the blocks were being laid, but his focus was on his is work and the subject wall as he moved.

[133] It seems to me that a reasonable person in the plaintiff's position would not have regarded the protruding pipes as an obvious risk of harm. So, it cannot be said that the plaintiff failed to take account of a risk of harm which would have been obvious to a reasonable person in his position. In that event, the defendant will not be relieved of any of its duties to the plaintiff.

[134] The plaintiff's activity did not involve an obvious risk, and therefore, contributory negligence on that count cannot be sheeted to the plaintiff on that basis.

Did the plaintiff cause or contribute to his own injury and damages by his own negligence?

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[27] Cf. *State of Queensland v Kelly* [2015] 1 Qd R 577 at [33]–[34] and [57] per Fraser JA, considering the analogous s 13 of the *Civil Liability Act* 2003.

[135] Of course, an absence of a finding of an obvious risk will not limit the discretion of a court to make a finding of contributory negligence if the plaintiff's activity or failure involved a risk that was less than obvious. In this this regard the defendant maintains that the plaintiff ought to be solely and wholly responsible for his injuries because he:

(a) Failed to watch where he stepped;

(b) Failed to keep a proper lookout;

(c) Failed to take proper care for his own safety; and

(d) Failed to take adequate account of the pipes as a tripping hazard.

[136] Here, the defendant also relies upon the plaintiff's concession that he did not look where he was stepping immediately prior to the fall.

[137] This is not a case where the plaintiff adopted some unsafe work practice in the face of some obvious risk. It was reasonably foreseeable that the plaintiff would pay close attention to his work, including the positioning of the string line and wall alignment, with a degree of familiarity and repetition in the task at hand. It seems to me that he was working in a diligent and competent manner, paying close attention to his work duties, and in doing so inadvertently failed to notice the presence of the tripping hazard in his immediate vicinity. This was a mere inadvertence, inattention or misjudgement on his part. This is also in the context of the pipe's presence not being drawn to his attention, them being not readily distinguishable from the busy surrounds, and unusually close to his work area.

[138] In the circumstances and under the conditions in which he was required to work, the plaintiff's conduct did not amount to not negligence rendering him responsible for any of the damage.

Conclusion on liability

[139] I conclude that the defendant is liable to the plaintiff for breaching its duty to take precautions against a relevant risk and thereby caused his injuries. I assess damages on this basis.

DAMAGES

[140] The assessment of general damages requires an injury to be categorized within Schedule 9 of the *Workers' Compensation and Rehabilitation Regulation 2014 (Qld)*. For the dominant injury, Schedules 8 and 9 in Part 2 are relevant

[141] The plaintiff contends that his injury is a *Moderate Thoracic or Lumbar Spine Injury* which falls under Item 92 and has an ISV range of 5 – 10. The defendant relies upon its arguments of causation (which I have rejected) and the report of Dr Williams, to contend that the injury calls in the *Mild* range in Item 93 with an ISV of 3.

[142] Dr Bruce Low, orthopaedic surgeon, first assessed the plaintiff as having a 6% whole person impairment in relation to the injury of 3.8.15. In his second report, Dr Low maintained his assessment 6% total impairment of 6%, and, of that, he attributed 1% to the exacerbation and aggravation on 8 February 2017. This is generally consistent with the assessment of Dr Nicholas Burke, occupational physician. He attributed 5% impairment for the first injury in 3 August 2015 and nil percent for the second injury.

[143] Associate Professor Richard Williams, orthopaedic surgeon, ascribes 50% of the total of his assessed 6% whole person impairment to the incident of 3 August 2015 and 50%, another 3%, to the event of 8 February 2017. Since this is founded on the assumption that the plaintiff's first injury had resolved, which is contrary to my findnings on the evidence, I prefer the assessmnet of Dr Low, which is generally consistent with that of Dr Burke. But I do not accept the opinion of Associate Professor Williams since its foundaiton was not established on the evidence.

[144] I find that the plaintiff's injury is a *Moderate Thoracic or Lumbar Spine Injury* which falls under Item 92 and has an ISV range of 5 – 10. This is characterised by a significant and permanent aggravation of pre-existing degeneration with radiological and clinical evidence of persistent left L4 nerve root compression/irritation which has been permanently aggravated and is now permanently productive of symptoms. I allow an ISV of 8 of the regulations.

[145] Therefore, I assess general damages in the sum of **$11,990.00**.

Economic loss

[146] The plaintiff is entitled to compensation for economic loss.

[147] The court must make a practical assessment of the likelihood of the plaintiff obtaining employment in some new or other occupation. In *Arthur Robinson (Grafton) Pty Ltd v Carter,*[28] Barwick CJ observed that lost earning capacity "ought to be the subject of evidence and not of mere suggestion on the part of the judge or advocate", a remark interpreted by Malcolm CJ in *Morgan v Costello*[29] as supporting the proposition that "the defendant who contends the plaintiff has a residual earning capacity has the evidentiary burden of adducing evidence of what work the plaintiff is capable of performing and what jobs are open to a person with such capacity."

[148] In addition to his continuing impairment, the plaintiff has been burdened with other medical conditions. He smoked 20 to 40 cigarettes per day and drank relatively heavily daily. His medical records disclose a myriad of illnesses and injuries. He sustained a fractured vertebra in his thoracic spine back in 1983 for which he received hospital treatment and sought ongoing chiropractic treatment. He suffered lumbar spine pain in 1995 for which he received hospital treatment. He has endured left and right shoulder tendonitis since November 1997, for which he has received four or five cortisone injections over several years. His right shoulder flared up in 2007. He suffered 'tennis elbow' in 2001. In 2016 he received cortisone injection for left hip pain. He has also experienced respiratory issues associated with chronic obstructive airway disease, in the context of him requiring 6 weeks off his studies in 2018. In addition, he has been diagnosed with gastro oesophageal reflux disease with Barrett's oesophagus and schizophrenia.

[149] The plaintiff impressed in his effort to undertake a course at "STEPS Training College" Cairns in an endeavour to improve his literacy and numeracy, in hope that he will improve his employability in more sedentary employments. He received an achievement award recognising his *"good positive attitude"*. However, Ms Anne Riley, the principal of that college, assessed his skill levels remained below grade 12 in school despite his efforts. She said that the plaintiff would not be at a level where he

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28 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 657.

29 *Morgan v Costello* [2004] WASCA 260 at [99] per Malcolm CJ (Murray and Wheeler JJ agreeing).

could get work where he was required to use a computer regularly. His digital literary skills are still low. He didn't complete the basic certificate.

[150] Dr Low maintains that the plaintiff is not suitable for any work involving lifting carrying or bending, and that he was at an extreme disadvantage in the open labour market due to his injury and symptoms when competing with another able-bodied applicant. In his second report 21 November 2018, Dr Low confirmed that the plaintiff had no work capacity which is likely to be indefinite.

[151] Dr Burke also opined that the plaintiff would not be able to continue working. He considered that it was unlikely that the plaintiff would have worked to age 67 and was even unlikely to work to the age of 65.

[152] Mrs Helen Coles, occupational therapist, also assessed the plaintiff on 4 November 2017 as unlikely to ever return to any realistic commercial employment. This is probably a bit dated and too soon after the events to find a confident assessment. In her evidence Ms Coles was asked about the plaintiff's capacity to undertake food processing duties, to which she explained that the plaintiff *"may be able to do some food handling, under ideal conditions, but certainly not full-time factory food processing"*. She accepted that if he was able to do such work then his circumstances would have significantly changed from when she saw him. She thought that in certain circumstances he could do work such as quoting for jobs and possibly setting out proclaimed jobs. As to the plaintiff's capacity to work until age 67 with all his impairment and other health conditions, Ms Coles testified that "*He may well have not worked – it would depend on the advancement of those conditions. He may well have not worked in that particular role. But I presume there were other lighter roles or less strenuous roles in the construction industry that he may have been able to do. For example, even working as a paving machine screed hand. That's a person that works behind – in the road construction, where they're just working and taking depths levels. That's just one example of a light – of a lighter area of – in the – in the construction industry."*

[153] It seems to me that the plaintiff does not now have any realistic prospect of commercially viable employment and/or remunerative capacity to work in the labour market. Whist he is willing and motivated, his occupational skills are limited, and his re-training will be heavily impacted by his age, narrow skill base, limited education, and poor computer, literacy and numeracy skills.

Past Economic Loss

[154] The plaintiff claims past economic loss of income of **$6,006** for the approximate 7 weeks up to 26 September 2015 at $858 net per week, and a further weekly loss at a slightly increased rate of $875 net per week since leaving work on 8 February 2017.

[155] I think the plaintiff was likely to have sustained regular employment as a skilled brick layer until the present, however, I think he would have experienced diminishing capacity and his income was likely to have fluctuated commensurate with the ebbs and tides of the building industry. The plaintiff's earnings in the year ended 30 June 2015 is about $858 net per week, otherwise his income has vacillated between roughly $600 to $900 per week in the years leading up to the accident. I will adopt a mean of those part earnings being $750 for the purposes of the calculation of part economic loss to date.

[156] I assess the plaintiff's **past economic loss** at **$109,204.80** calculated using $858 net per week for 7 weeks after 3 August 2015, and $750 net per week for 174 weeks since 8 February 2017, and then applying a discount of about 20% for the plaintiff's vicissitudes of life and vocational contingencies.

[157] I also allow **interest** on past economic loss (less weekly Workcover and Centrelink receipts) using the agreed 10 Year Treasury Bond rate calculated for the period from incident until this judgment.

[158] I will allow **past superannuation** loss of **$10,374.46** using the average rate for past employer superannuation contributions over the period of 9.5%.

Future Economic Loss

[159] The plaintiff claims $135,000 for future economic loss of income calculated at the present capital value of a continuing loss of $900 net per week until age 67 with discounts of 15% for the usual contingencies of life, and a further 25% to allow for a reduced capacity due to pre-existing degeneration of the spine and/or the contingency that he may not have worked to age 67.

[160] An award for future economic loss should equate to the reduction in the plaintiff's earning capacity to the extent that it may be productive of financial loss. This is difficult to assess with precision using a defined weekly loss since the plaintiff has not realised a successful return to work, he has a pre-existing condition subject of permanent aggravation, limited skills, poor education outcomes, other significant ailments impacting his health and future work capacity. I am unable to precisely calculate the loss in the circumstances.

[161] Section 306J of the Act provides:

> ***306J When earnings can not be precisely calculated***
>
> *(1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.*
>
> *(2) The court may only award damages if it is satisfied that the worker has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.*
>
> *(3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.*
>
> *(4) The limitation mentioned in section 306I(2) applies to an award of damages under this section.*

[162] In *Allianz Australia Insurance Limited v McCarthy*,[30] White J remarked about the analogous provision, s 55 of the Civil Liability Act, as follows:

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[30] *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312.

"[47] ... Section 55(2) of the *Civil Liability Act* mandates that a court may *only* award damages if satisfied that the person injured will suffer loss of earnings. In this, the provision does not alter the common law.

[48] In *Graham v Baker* Dixon CJ, Kitto and Taylor JJ noted:

"… an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss."

That is, it must be demonstrated that the injured person's impairment has resulted in loss in monetary terms. This statement of fundamental principal was restated in *Medlin v State Government Insurance Commission*:

"A plaintiff in an action in negligence is not entitled to recover damages for loss of earning capacity unless he or she establishes that two distinct but related requirements are satisfied. The first of those requirements is the predictable one that the plaintiff's earning capacity has in fact been diminished by reason of the negligence-caused injury. The second requirement is also predictable once it is appreciated that damages for loss of earning capacity constitute ahead [sic] of damages for economic loss awarded in addition to general damages for pain, suffering and loss of enjoyment of life. It is that the diminution of … earning capacity is or may be productive of financial loss."

[49] In *Nichols v Curtis* Fraser JA, with whom the President and Chesterman JA agreed, observed of a finding by the primary judge that there was no evidence that the plaintiff had lost employment or, in seeking employment, had rejected work because of her injury:

"The effect of those findings was that the applicant did not merely fail to prove that it was more probable than not that she would have earned more money if she had not been injured; she failed to establish that there was any real prospect that that [sic] she would have earned more money. On that basis there was no room for the application of *Malec v JC Hutton Pty Ltd*."

[50] His Honour continued:

"Nor did the primary judge make the mistake of thinking that damages for economic loss were awarded for loss of earnings rather than for loss of earning capacity. Whilst damages are awarded for loss of earning capacity, they are awarded only to the extent that the loss produces or might produce financial loss. In *Medlin v State Government Insurance Commission*, Deane, Dawson, Toohey and Gaudron JJ held that a plaintiff in [an] action for negligence is not entitled to recover damages for loss of earning capacity unless the plaintiff establishes both that the plaintiff's

> earning capacity had been diminished by reason of the negligence-caused injury and that the diminution of earning capacity was or might be productive of financial loss."" (*Footnotes omitted*.)

[163] The plaintiff completed his schooling up to grade 10. He was not a good scholar. He completed an apprenticeship as a block layer and bricklayer. He worked almost continuously for about 45 years. He acclaimed himself as a skilled, competent, respected and reliable tradesman. He is stoic and has a good work ethic.

[164] Whilst I accept that the plaintiff was keen to work for as long as he was able given his financial circumstances, he has a poor financial state and outlook. He does not own a home and has very limited superannuation. He had a financial imperative to work and he said that, but for the subject accident and its after-effects including the subsequent aggravation and/or exacerbation, he would have worked a few more years.

[165] But having regard to the medical evidence, I think it is likely that the plaintiff would have struggled working as a brick layer until age 65 despite his will to do so. He could have continued doing some other jobs such as cleaner, hospitality, delivery driver, gardener. He may have transitioned to a supervisory role utilising his skills in block work and site layouts in conjunction with some lighter physical work. He would have seen a loss of income commensurate with his reduced work capacity.

[166] The plaintiff is almost 63 years old and likely to have retired near to 65 years of age albeit with a diminishing capacity in the rigours of his trade in the building industry.

[167] I will allow a global award of **$50,000** for **future economic loss**. In doing so, I rationalise the outcome by adopting about one third loss of earning capacity, being $600 net per week and using the 5% multiplier of 99 for 2 years to achieve about $59,400, and then applying a discount of about 25% for the plaintiff's vicissitudes of life and vocational contingencies.

[168] I also allow **$5,000** for **future superannuation** being 10% of future economic loss.

Fox v Wood Component

[169] The plaintiff has been subject of tax on benefits of $1,089.00 which will be taken into account.

Special Damages

[170] WorkCover paid $3,287.94 by way of outlays relating to management's claim which is refundable. The plaintiff faces a refund of $1,936.55 to Medicare Australia for appropriate treatment relating to the aggravation/exacerbation on and from 8 February 2017, which I have found is consequential to the original injury of 3 August 2015.

[171] The plaintiff claims an additional sum of $1,500 as an estimate of expenses which he has personally paid, particularly for medication and travel for purchasing medication. In the absence of vouchers for these expenses I will allow $1000.

[172] I assess the plaintiff's special damages at **$6,224.49**.

[173] I also allow interest on the plaintiff out-of-pocket expenses of $1000 to be calculated the agreed 10 Year Treasury Bond rate for the period since the injury to the date of judgment.

Future Expenses

[174] The plaintiff claims $10,000 for future medication, some travel to purchase medication and occasional physiotherapy. Dr Low has opined that he should attend a pain clinic, and he feels that he may gain some therapeutic benefit from that. Some contingency could be allowed for possible surgery opined by Dr Williams.

[175] Taking a global approach having regard to the plaintiff's life expectancy I allow the plaintiff's future medical expenses of **$6,000.00**.

Quantum Summary

[176] In summary, I assess **$191,383.70** as damages after refunds to WorkCover summarised as follows:

General damages	$11,990.00
Past economic loss	$109,204.80
Interest on Past economic loss less for WorkCover receipts of $4,800.20 net of tax and Centrelink of $44,882 at the rate of 0.34% pa for 3.3 years since 8 February 2017.	$667.38
Past superannuation	$10,374.46
Fox v Wood Component	$1,089.00
Future economic loss	$50,000.00
Future superannuation	$5,000.00
Past special damages including refunds	$6,224.00
Interest on out-of-pocket past special damages of $1,000 at the rate of 0.34% pa for 3.3 years since 8 February 2017.	$11.20
Future special damages	$6,000.00
Sub-total	**$200,560.84**
Less WorkCover refund	$9,177.14
Total	**$ 191,383.70**

Conclusion

[177] For these reasons, subject to hearing further from the parties:

1. I will give judgment to the plaintiff against the defendant **$191,383.70**.

2. Unless either party applies for a different costs order within 14 days of this judgment, I will also order that the defendant will pay the plaintiff's costs of the proceeding (including reserved costs) to be assessed on the standard basis.

Judge DP Morzone QC