DISTRICT COURT OF QUEENSLAND

CITATION:	*Nkamba v Queensland Childcare Service Pty Ltd* [2022] QDC 292
PARTIES:	**CHOMBA ANNIE KABWE NKAMBA** (plaintiff) **v** **QUEENSLAND CHILDCARE SERVICE PTY LTD (ACN 056 351 181)** (defendant)
FILE NO:	ID23/2019
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Ipswich
DELIVERED ON:	16 December 2022
DELIVERED AT:	Ipswich
HEARING DATE:	1, 2, 3, 4 February and 19 April 2021
JUDGE:	Horneman-Wren SC, DCJ
ORDER:	**1. Judgment for the plaintiff in the sum of $197,013.98;** **2. The parties are to file submissions on costs, limited to 4 pages, by 31 January 2023 or alternatively a proposed draft order if the parties are agreed, will be filed by 31 January 2023.**
CATCHWORDS:	TORTS – NEGLIGENCE – DAMAGE AND CAUSATION – where the plaintiff was employed by the defendant – where the plaintiff was setting up an activity yard in the course of her employment – where the plaintiff entered a shed and stood on a Lego/construction block and rolled her ankle – whether the block was present prior to the plaintiff entering – whether there was adequate lighting where the incident occurred – whether the defendant had in place a safe system of work – whether the plaintiff's injury was caused by the defendant's negligence TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – where an induction workbook was provided to employees – where it contained a policy requiring that, after the equipment has been taken out for

morning set up, the floor area of the shed to be clear of any equipment – where the light switch for the interior of the shed was defective – where the plaintiff notified her supervisor of the defect – where there was a maintenance book in which the defect could have been noted by the plaintiff – where the plaintiff did not write the defect in the maintenance book – whether the plaintiff is guilty of contributory negligence

DAMAGES – ASSESSMENT OF DAMAGES IN TORT – whether the plaintiff failed to mitigate her loss – whether the plaintiff is incapacitated to perform her former role – whether there was permanent impairment – whether the psychiatric condition was caused by the injury

LEGISLATION: *Worker's Compensation and Rehabilitation Act 2003* (Qld) ('WCRA')

CASES: *Benic v New South Wales* [2010] NSWSC 1039

Walker v Greenmountain Food Processing Pty Ltd [2020] QSC 329

Strong v Woolworths Limited (2012) 246 CLR 182

COUNSEL: C Newton for the plaintiff
O Perkiss for the defendant

SOLICITORS: McNamara Law for the plaintiff
BT Lawyers for the defendant

Introduction

[1] Generations of parents have admonished their children to put away their building blocks lest someone stand on them. That common and simple caution inherently recognises that a block on the ground may pose a risk to a person who steps upon it. On 29 August 2017, the risk posed by a block on the ground was realised by the plaintiff, Mrs Nkamba. In the course of setting up an activity yard at the defendant's childcare centre at which she was employed she stepped backwards and down from a storage shed onto an area covered with artificial grass on which there was a small block.[1] Her ankle inverted. She fell. How the block came to be there is central to this case.

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[1] The precise dimensions of the block were not established by the evidence, the particular block itself not having been identified.

[2] Having stepped on the block and inverted her ankle, Mrs Nkamba immediately felt pain. She had, it would subsequently be discovered, suffered a disruption of the anterior talofibular ligament of her right ankle joint. The therapeutic treatments which she received had only limited success and she suffers from a residual impairment. Her lack of physical improvement and the persistence of her injury, pain and associated impacts to, and limitations upon, her work and daily living caused her to become depressed such that she suffered an adjustment disorder with depressed mood from which she still suffers residual symptoms.

[3] Mrs Nkamba claims that her injuries were caused by the negligence of her employer, the defendant. She brings this proceeding seeking damages. For the reasons which follow, her employer was negligent and her claim should be allowed.

The parties pleaded cases

[4] It is convenient at the outset to make some observations about the parties, respective, pleaded cases. For reasons developed later, the cases as conducted, but particularly that of the defendant, were not entirely consistent with the cases as pleaded.

[5] The plaintiff pleaded duties owed to her by the defendant in the following terms:

> "Duties at law and as prescribed by s 305B of the *Workers' Compensation and Rehabilitation Act 2003* to provide a workplace free of significant and foreseeable risk of injury."[2]

[6] The defendant denied it owed the plaintiff those duties because:

(i) they do not properly state the duty of care owed by the defendant to the plaintiff;

(ii) the duty owed by the defendant to the plaintiff was a duty to take reasonable care to avoid the unnecessary risk of foreseeable injury arising out of the plaintiff's employment as modified by the operation of ss 305B, 305C and 305D of the *Workers' Compensation Rehabilitation Act*.[3] It is a fact agreed between the parties that the defendant owed the plaintiff a duty in terms that it set out at (ii):[4]

[7] The plaintiff pleads the facts relevant to "the accident" as follows:

> "At or about 5:55 am to 6:00 am, on or about 29 August 2017;

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2 Further amended statement of claim, para 2(d).
3 Amended defence, para 2(b).
4 Agreed facts, Exhibit 2, agreed facts, para 6.

(a) the plaintiff having arrived in darkness at the workplace at approximately 5:30 am;

particulars: the work roster was from 6:00 am but parents start dropping children at that time and the defendant expected staff to have the Senior Kindy Yard ("SKY"), the Junior Kindy Yard and the Baby Yard all set up before that;

(b) the plaintiff was accessing a storage shed ("the shed") to set up an obstacle course in the SKY;

(c) the plaintiff was working alone at the request of Beth Westgate as Beth was late to arrive so the setup was being performed under time pressure;

(d) the shed has a roller door and a stepdown from its floor level to an artificial grass surface ("the grass");

(e) as the plaintiff dragged a triangular A-frame from the shed she stepped backward down to the grass;

(f) as the plaintiff dragged the plaintiff stepped on plastic building blocks;

particulars: four piece square block hereinafter "the block";

(g) the block, unbeknownst to the plaintiff, was dragged out of the shed in the course of the setup;

(h) the plaintiff could not and did not see the block in the shed because;

(i) a regular overhead light (as distinct from a floodlight of any description) on the building face was of poor quality and did not shed any or any adequate light into the shed;

(ii) the internal fluorescent light did not operate at the time probably because the switch was defective;

particulars: on or about the same shift one week prior the plaintiff was working with (Natash Katte "Katte") when the defective light was observed and Katt said she would write it down in the maintenance book. On 29 August 2017 and prior to the accident, the plaintiff reported the continuing defective light to Beth who advised her it had been reported the previous week and maintenance would fix it;

(i) the plaintiff rolled her right ankle and fell to the ground suffering injury; which events are hereinafter referred to as 'the accident'."[5]

[8] The defendant denies those allegations because:

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5 Further Amended Statement of Claim, para 3.

"(a) they are untrue;

(b) the allegations therein do not accurately reflect the plaintiff's actions on 29 August 2017;

(c) the defendant does not know and cannot admit the plaintiff rolled her right ankle and fell to the ground. The defendant has made reasonable enquiries and cannot ascertain the truth or otherwise of the allegations;

(d) the defendant says if the plaintiff rolled her right ankle and fell to the ground ('the incident') (which is not admitted):

(i) the incident occurred at approximately 6.05 am;

(ii) it was light at the time the incident occurred;

(iiA) the plaintiff was working with Bethany Westgate in the setup of the Senior Kindy Yard;

(iii) the plaintiff was working alone accessing a storage shed to set up an obstacle course;

(iv) the plaintiff had been trained in how to access the storage shed and how to set up the obstacle course;

(v) the task of accessing the storage shed to set up the obstacle course was a task that could be safely performed by one person;

(vi) the plaintiff was not working under pressure;

(vii) the term 'under pressure' is vague, embarrassing and has not been properly particularised;

(viii) the shed:

(A) was well lit by a floodlight above the roller door, which provided light to the area immediately inside the roller door, and the area outside the roller door;

(B) was tidy;

(C) had a step at the entrance;

(D) the step was clearly delineated from the ground;

(E) the step was red in colour;

(F) the outside area was artificial grass and green in colour;

(e) the defendant does not know and cannot admit the plaintiff stepped on a plastic building block. The defendant has made reasonable enquiries and cannot ascertain the truth or otherwise of the allegation;

(f) the defendant says if the plaintiff stepped on a plastic building block, which is not admitted, the block:

(i) was brightly coloured;

(ii) was obvious;

(iii) prior to the incident had been stored in the storage shed on racking inside the storage shed;

(iv) was knocked to the ground by the plaintiff prior to the incident in the course of dragging out part of the frame from the obstacle course;

(v) was apparent to the plaintiff;

(vi) was observed or ought to have been observed by the plaintiff prior to the incident;

(g) the defendant says the shed and surrounding area was well lit by:

(i) Natural daylight;

(ii) Floodlight on the front wall of the shed, which:

(A) was on at the time of the incident;

(B) operated on a timer between 5.00 pm and 7.00 am daily;

(C) lit the area inside the shed and in front of the roller door;

(h) the defendant denies the plaintiff was injured; whether as alleged or at all;

(i) the defendant says if the plaintiff suffered injury, which is denied, any injury was a minor ankle strain which resolved completely within weeks, causing no ongoing symptoms or impairment."[6]

[9] The allegations that the accident was caused by its negligence are denied by the defendant because:

"(a) They are untrue;

(b) The events alleged in paragraph 3 of the Statement of Claim did not occur, by reason of the matters pleaded in paragraph 3 of this defence;

(c) Any injury sustained to the plaintiff was not sustained in the circumstances alleged in paragraph 2 of the Statement of Claim;

(d) The defendant was not negligent, whether as alleged or at all;

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6 Amended Defence para 3.

(e) The defendant had in place an adequate and safe system of work;

(f) The defendant provided adequate and safe plant and equipment;

(g) The defendant adequately trained and instructed the plaintiff in tasks she was required to perform;

(h) The defendant adequately trained and instructed the plaintiff and its staff, which included training and instruction in:

(i) Safe lifting- training and techniques;

(ii) Hazard identification;

(iii) Cleaning:

(A) In the defendant's Queensland Childcare Services Induction Workbook – v 10 at 25.0 – Cleaning, it states "each staff member is responsible for their own playroom, set of toilets and room equipment. These areas must be kept clean and tidy at all times"; and

(B) In the defendant's Queensland Childcare Services Induction Workbook – v 10 at 51.0 – Shed, Storeroom and Cupboard Policy, it states "staff are to ensure all sheds are fully unpacked when setting up in the morning and to ensure all equipment is neatly packed away into the shed in a safe and secure manner".

(iv) Incident reports/documentation:

(i) The plaintiff was not required to work in the dark or in poor lighting;

(j) The lighting in the area was proper and adequate;

(k) The block was properly stored prior to the incident;

(l) The block was not laying [sic] on the floor prior to the incident;

(m) If the block was on the floor, it was on the floor because it had been knocked to the floor by the plaintiff and the plaintiff failed to pick it up prior to moving the frame;

(n) The exercise of reasonable care did not require the defendant to engage the plaintiff to start work earlier or provide additional time to set up the obstacle course;

(o) The defendant provided adequate lighting, namely a floodlight on the front of the shed;

(p) The defendant provided adequate staffing numbers to perform the work activities;

(q) The defendant complied with its obligations pursuant to the *Work, Health and Safety Act 2011*;

(r) The obligations imposed on the defendant under the *Work, Health and Safety Act* do not constitute duties owed by the defendant to the plaintiff;

(s) The plaintiff may not maintain any action against the defendant in respect of any breach of the defendant of its obligations under s 267 of the *Work, Health and Safety Act*;

(t) The incident could not have been prevented by the exercise of reasonable care by the defendant."[7]

[10] The plaintiff alleges that as a consequence of the accident she suffered injuries comprising a right ankle injury with damage to the anterolateral ankle joint and anterior talofibular ligament and an adjustment disorder with depressed mood. She pleads she has suffered loss and damage comprising out of pocket expenses, past economic loss and future economic impairment and that she will incur expenses in the future.[8]

[11] The defendant denies these allegations as being untrue. As to the alleged injuries it pleads that the applicant was not injured at all. It pleads she has not suffered the alleged losses. It pleads that she has not suffered the symptoms and sequelae alleged.[9]

[12] Although not pleaded in the alternative to the earlier assertion that the plaintiff was not injured at all, the defendant pleads that any injury which she did sustain is *de minimis*, was a minor muscle strain which resolved in weeks, caused no ongoing symptoms or impairment and does not constitute compensable loss and damage. It denies her having suffered psychological injury and pleads that any psychological symptoms she suffers are not caused or contributed to by any injury sustained in the course of her employment and are the consequence of a pre-existing psychiatric disorder.

[13] It pleads that she does not suffer any functional physical impairment at all, and that any injury sustained by her is properly characterised as a minor ankle injury and should be accorded an Injury Scale Value of zero.

[14] The defendant further pleads that:

"(k) The plaintiff was not incapacitated for work by reason of any injury sustained in the course of employment beyond 29 October 2017;

(l) The plaintiff has an unrestricted capacity to work;

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7 Amended Defence paragraph 4.
8 Further Amended Statement of Claim paragraphs 5 and 6.
9 Amended Defence paragraph 6.

(m) The plaintiff has not suffered past economic loss whether of the quantum alleged or at all;

(n) Any past economic loss the plaintiff suffered has been fully reimbursed by WorkCover Queensland, which compensation must be deducted from any judgement the plaintiff obtains against the defendant pursuant to s 270 *WCRA*;

(o) The plaintiff remains fit and capable of working as a childcare worker;

(p) The plaintiff had not in the past and would not in the future earn $800 net per week;

(q) The plaintiff has not suffered any impairment of future earning capacity and will not suffer economic loss, whether of the quantum alleged or at all;

(r) The plaintiff has not in the past and will not in the future suffer loss of employer funded superannuation contributions;

(s) The plaintiff has not in the past and will not in the future require medication, treatment expenses or incur other special damages;

(t) Any special damages the plaintiff has incurred will be fully reimbursed by WorkCover Queensland, which sums must be deducted from any judgment the plaintiff obtains from the defendant pursuant to s 270 *WCRA*;

(u) Any loss the plaintiff has sustained and the type alleged is causally unrelated to injuries sustained in the course of employment with the defendant;

(v) The plaintiff had not commenced nursing qualifications prior to the incident and had taken no steps to secure appropriate qualifications or employment to facilitate work as a nurse;

(w) The plaintiff had no intention and never had any intention as working [sic] as a nurse;

(x) The plaintiff had no skills, qualifications, experience or other skills to permit her to obtain employment as a nurse or in the nursing industry;

(y) The plaintiff remains fit to work as a nurse."[10]

[15] The defendant further pleads the plaintiff has failed to mitigate her loss by failing to seek and obtain employment with similar remuneration when she is fit to do so and by failing to return to her employment with it when she was fit to do so.

[16] The following observations may be made about the pleaded cases. At paragraphs 3(d)(vi) and (vii) the defendant pleads, inconsistently, that the term "under pressure" is vague, embarrassing or not properly particularised, but nonetheless pleads, in an apparent understanding of the term, that the plaintiff was not working under pressure.

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10 Amended Defence paragraph 6.

[17] The plaintiff pleads, at paragraph 4(a) of the Further Amended Statement of Claim, a failure of the defendant to rectify lighting defects in the shed "despite being on notice of the defective light". At paragraph 4(b) she pleads that the defendant exposed her to a risk of injury from the absence of proper lighting when it was on notice of the problem. She does not provide particulars of the allegation of fact that the defendant was "on notice". The defendant does not, other than by its general denial of all the allegations in paragraph 4 of the FASOC because they are untrue,[11] and because it was not negligent,[12] join issue with the allegation of fact that it was "on notice" of the defective lighting.

[18] By paragraph 3(d)(viii)(a) of its Amended Defence, the defendant asserts that the shed was well lit by a flood light above the roller door which provided light to the area immediately inside the roller door, and the area outside the roller door. It does not assert that the shed, beyond the area immediately inside the roller door, was lit by the flood light above the roller door or by any other light source.

[19] By paragraph 3(g) of its Amended Defence the defendant asserts that the shed and surrounding area was well lit by natural daylight and a flood light on the front of the shed which "lit the area inside the shed". It, again, does not assert that the inside of the shed was lit by a light within it. Similarly, in denying the plaintiff's allegations of negligence, including the failure to rectify the lighting defects despite being on notice of them and exposing the plaintiff to a risk of injury from the absence of proper lighting, the defendant pleads that it provided "adequate lighting, namely a floodlight on the front of the shed". It asserts no provision of adequate lighting by a light within the shed.

[20] For reasons developed later, the pleading of the adequacy of the light in these ways is of some significance.

The plaintiff's account of the incident

[21] Mrs Nkamba was rostered to commence work on the day of the incident at 6am. She said that she arrived "at about 5.30ish".[13] She explained that when rostered to commence at 6am she would arrive early because three yards had to be set up and

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11 Amended Defence paragraph 4(a).
12 Amended Defence paragraph 4(d).
13 Trial transcript 1-14

parents would commence bringing their children to the centre as early as 6am and that the rostered staff would start opening for the parents "at about 5 past, or so". She further explained that "if you started at 6, you would not be able to finish setting up the yards before the children arrived".[14]

[22] Mrs Nkamba had originally been rostered to commence at 7.30am on that day. However, the staff member who was to commence at 6am had become unavailable and Mrs Nkamba had been asked to commence at 6am and open in her place. Mrs Nkamba was not the senior person commencing at that time and performing the opening on that day. The senior person was Beth Westgate. Ms Westgate was designated as a group leader. Mrs Nkamba explained that the senior person would have the keys to open up. The junior person did not have keys.

[23] Mrs Nkamba said that Ms Westgate arrived "at quarter to six". Having opened the front door and entered the centre, Mrs Nkamba said that Ms Westgate told her "you do the Senior Kindy, I will do the other side".[15] This was a reference to separate areas within the centre. The area which Mrs Nkamba was tasked to set up was the Senior Kindy Yard. Mrs Nkamba said that this was a change from usual practice which was that the two staff members engaged in setting up worked together.

[24] Mrs Nkamba knew where the keys for the shed for the Senior Yard were, so she went and got them and opened the shed. The shed contained various pieces of play equipment which had to be taken from the shed into the yard and set up. The equipment included items such as toys for the sandpit, small tricycles or pushbikes and items used in the construction of an obstacle course. The latter included benches and A-frames.

[25] No plans of the shed were put in evidence. Nor is there evidence of its dimensions. From the few photographs of it which are in evidence it can be described as a brick structure with a roller door entrance. At the entrance there is a step which appears to be about one and a half bricks in height. Outside is artificial grass.

[26] Mrs Nkamba described first removing the pushbikes which she explained had to be removed to gain access to the obstacle course equipment. However, having removed

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14 Ibid 1-15.
15 Trial transcript 1-17.

the bikes, she took out the benches which were smaller items used in the obstacle course after which she was going to get the frames which were the biggest components of the obstacle course equipment. She described having to drag out the frames. Usually, when two people were working together on the opening, the frames could be lifted and carried out.

[27] Mrs Nkamba described grabbing the A-frame in the middle and trying to pull it out walking backwards. As she did so, and as she was stepping out from the shed, she described standing on something, tripping and falling. When she checked, she saw that what she had stepped on was a building block.

[28] Mrs Nkamba said that at no time prior to falling did she observe the block. When asked whether she knew how the block came to be on the ground where she stood on it she said:

> "In my understanding, because I had already been in and out of the shed … more than three times because I had to get the things that were around there, and, in my understanding, when I tripped on this, the first thing that was – I came to remember that this block must have been in the way of one of the legs, – the right leg – of the frame because I had been in and out. So, if it was anywhere in the way, I would have stepped on it or kicked it or something."[16]

[29] When shown a photograph of the inside of the shed taken in January 2019,[17] she said that the frame that can be seen was not the same frame as that which was there on the day of the incident. She described the A-frame that was there on that occasion as being bigger and that it was not lying on its side as the one depicted in the photograph is. It was standing up.

[30] From another photograph,[18] Mrs Nkamba identified a light above the roller door which she described as "a normal light" by which she meant that it had a normal bulb and was not a floodlight. As to the lighting in the shed at the time of the incident she said, "there was no lighting in the shed … so it was dark".[19] As to whether there was reflected light from the external overheard light she said "it was very dim. So it was dark in the shed"[20].

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16 Trial transcript 1-23.
17 Exhibit 1, page 72.
18 Exhibit 1, page 71 (also replicated at Exhibit 1, page 75)
19 Ibid.
20 Ibid.

[31] From a further photograph,[21] Mrs Nkamba identified a fluorescent light which was located on the interior ceiling of the shed. She said that she was not aware of any time when that light worked. She said that about a week before the day on which the incident occurred, when performing and opening with a person named Natash, they spoke about the need to have the light fixed because it was not working and because it was winter and it was dark. She described how, when they went to do the opening, they "would try to fidget with the switch, it was loose".[22]

[32] Of the previous week when she did the openings with Natash she said, "we're like, 'yes, we have to – we have to put it in the book'. And Natash, being the person in charge said, 'I'm going to record it in the book for – for this' or 'I'll record it in the maintenance book'".[23]

[33] On the day on which she fell she gave evidence of having had a discussion with Beth about the light in the shed. She said:

> "When Beth arrived as we're walking in, setting up, I was like, 'was that light fixed?' so we had this discussion about lighting. And Beth's response was, 'yes, yes, we're aware. It's been recorded to be fixed. It's already in the maintenance book'. And you're like, 'so you know we are going where – or still going to deal with a shed without a light'. So there was a discussion."[24]

[34] Mrs Nkamba said that after she fell she could not put weight on her foot, so she "hopped and walked – limped" towards the shed, closed and locked the shed. She started hopping into the closest room and yelled out for Beth. Beth did not come to her because she could not leave reception as there must have been a parent there, so Mrs Nkamba hopped through and told Beth that she had hurt herself.

[35] Mrs Nkamba was shown a Staff Incident Report Form which had been completed in relation to the incident.[25] She identified those parts of the form which she completed. Those parts were: her name, the date and time of the incident; the description of the incident; and that part of the action which records "ice pack applied".

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21 Exhibit 1, page 82.
22 Trial transcript 1-25.
23 Ibid 1-26.
24 Ibid.
25 Exhibits 1, page 74.

[36] When her attention was drawn to the time of the incident having been recorded as "06:05", she explained that this was the time when she was filling out the form and that the incident, including locking the shed and hopping back, had all happened before 6am.

[37] The details of the incident as recorded by Mrs Nkamba in the report were:

> "I was setting up the yard in the senior kindy yard this morning when I tripped and twisted my right ankle. I was getting the obstacle course frame and as I pulled it out of the shed a plastic block moved and dropped on the ground as I just stepped out and that's what I tripped over."

[38] Mrs Nkamba was reminded that "the defence pleads that what that means is you knocked the block off the shelves onto the floor and that's what you tripped on". To that proposition Mrs Nkamba responded "that's not correct because that's not what happened. All of the blocks were stored into the crates and on the day I didn't set up any building blocks".[26]

[39] Asked if she touched any of the crates, she answered, "I didn't touch any. And the frame I was dragging didn't touch any – any blocks and it did not touch the shelves".

[40] In cross-examination, Mrs Nkamba was shown a copy of her WorkCover Queensland claim form also completed by her on 29 August 2017, with the assistance of her husband, in which she identified 6:05am as the time at which the injury happened. When asked if she accepted that the injury occurred at that time she said, "according to the incident report. So I do not accept it happened at 6:05".[27]

[41] Mrs Nkamba was questioned about her answer to the question "how did the injury happen?" which was "tripped while setting up play yard". Particularly, she was asked whether she accepted that there was no mention of the Lego block in that description. Mrs Nkamba explained, "there isn't because of the space. I did say all of those things, and then he said to me, well, there's not enough space to fill in there".[28]

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26 Trial transcript 1-30.
27 Ibid 1-62.
28 Ibid 1-63.

[42] It was also put to her that there was no mention in the description of how the injury happened that it was because the light was poor or inadequate to which she responded, "yeah, all that wasn't there because of the space on this form".

[43] It is to be noted that the box on the form for providing a description of how the injury happened is only seven centimetres long and is sufficiently deep to accommodate only one line of writing. In fact, the six words written in response to the question did not fit entirely within the box. Mrs Nkamba's explanations as to why the greater details were not provided seems not only entirely plausible but self-evident. Furthermore, the absence of any reference to poor or inadequate lightning in this form should be viewed in the context of her answering the question as to 'how' the accident occurred, not 'why'.

[44] Counsel for the defendant reminded Mrs Nkamba of that part of the description of the incident in the incident report where she said: "I pulled it out of the shed, a plastic block moved and dropped to the ground as I just stepped out" and asked whether she accepted that the block fell because of her movement of the A-frame out of the shed.

[45] Mrs Nkamba answered, "Yeah. Like I said, it must have been in the line of the A-frame, so dropping onto the ground, it was – must have been on the floor in the line of the A-frame".[29]

[46] Mrs Nkamba rejected the suggestion that she heard the block "drop to the floor".

[47] It was then put to her that as she was moving out, "You have basically become the victim of your own misfortune and tripped on the block that had fallen". To this suggestion Mrs Nkamba said:

> "Well, as you said, I had gone in and out of that shed, so when I said according to my understanding, if it – it didn't drop off the shelf. It was in the line. So as I dragged, it must have moved with the frame, and it has dropped. Dropping meaning from a level to the ground, so not that I heard it dropping and stepped on it".[30]

[48] There was then the following exchange:

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29 Ibid 1-70.
30 Ibid.

> "I'm suggesting to you that the Lego block dropped as you dragged out the A-frame - - -?---Yes.
>
> - - - on the floor as you were pulling the A-frame out. You've heard it drop?---I did not hear it drop.
>
> Well, you knew that it had dropped on the floor because you said in your statement, 'that as I pulled it out a plastic block moved and dropped on the ground as I just stepped out'?--- Yeah, because I say that because I had been in and out of the shed and it wasn't on the ground so---
>
> So it wasn't left there the night before, was it? The block was not left there the night before?---I wasn't there the night before.
>
> No. And it wasn't there in the morning when you opened up?---It wasn't in the way where – it wasn't anywhere where I could have stepped on it. So when I said it must have moved with the frame, meaning it must have been in the line of the leg for the frame because it was anywhere where I'd been in and out more than three times.
>
> And that is because you could see the floor of the shed, couldn't you?---No, I couldn't see the shed. I'd taken out things in – in the – in the – where I was going in and out, I'd taken out the pushbikes. So there were things that I'd already taken out; the big objects.
>
> And you had seen the location of these objects. You'd seen the pushbikes. You'd seen the A-frame. You could see the floor?---It's – it's a situation where you're familiar. You have been doing open and close and you know where things are. So seeing them as seeing the colours. I would not say I was – I was seeing them as because of the light. I knew where those things were kept.
>
> You also could see the Lego block because you knew what colour it was and what it looked like, didn't you?---I didn't see the colour of the block. I did not see the block. That's not correct."[31]

[49] Mrs Nkamba frankly conceded that when she walked into the shed and saw the A-frame she did not see the block. The question was asked, so it seemed, to establish that if Mrs Nkamba could see the A-frame, she would also have been able to see the block. That should not be accepted. First, Mrs Nkamba said she was generally familiar with where the equipment was. It is one thing to locate something you expect to be there, another entirely to see something unexpected. Secondly, the A-frame was considerable larger than the block

[31] Ibid 1-70 – 1-71.

[50] Later she was asked, "And when you walked into the shed and you saw the A-frame you didn't see the block on the floor at that time?" and she answered, "No".[32]

[51] It was then put that she did not see it at that time "because the block, in fact dropped as you pulled the A-frame out" to which suggestion she responded, "It did not drop from the shelf".[33]

[52] In these exchanges, defence counsel put the defence case, as pleaded at paragraph 3(f) of the amended Defence, that in the course of dragging out the A-frame Mrs Nkamba knocked a block which had been stored on racking inside the shed causing it to fall.

[53] This case was again put to Mrs Nkamba shortly afterwards, when having confirmed she had been in and out of the shed three times, she was asked:

> "And the reason why you didn't see the Lego is because say, it's the third time you've come out, that is when you have knocked the block and it's fallen to the ground and you've tripped on it?"[34]

Mrs Nkamba answered:

> "Block being on the floor is the fact that [indistinct] to me was that when I moved this frame, this block must have been in the way of the leg of the frame, because I have been in and out and I've not stepped or kicked on anything".[35]

[54] There immediately followed an exchange in which Mrs Nkamba gave a very important explanation. When asked:

> "But yet in your contemporaneous incident report, completed moments after the event occurred on your evidence, you say that the block dropped and fell to the floor?"[36]

Her answer was, "What I meant by dropped was as it's being dragged with the frame, it has dropped from the floor of the shed onto the ground".[37]

[55] By that explanation of "dropped", Mrs Nkamba made plain her distinction between the floor of the shed and the ground outside. A close analysis of her evidence

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[32] Ibid 1-71.
[33] Ibid 1-72.
[34] Ibid 1-73.
[35] Ibid.
[36] Ibid 1-74.
[37] Ibid.

demonstrates that it is a distinction she maintained consistently throughout as to where the block fell and from where it fell from. She consistently gave evidence of her understanding that the block must have been on the floor and fell to the ground in the course of her moving the A-frame. That evidence, consistently given, is also consistent with the incident report.

[56] By contrast, the case put by defence counsel did not distinguish between the floor and the ground. The questioning proceeded as though they were interchangeable expressions for where the block had fallen to. This is particularly apparent from the question asked in the last quoted exchange which elicited Mrs Nkamba's explanation. In purporting to recite back to Mrs Nkamba what she had recorded in her description of the incident in the incident report, counsel had said, "You say the block dropped and fell to the floor". That is inaccurate. What Mrs Nkamba had said in the incident report was "a plastic block moved and dropped on the ground".

[57] The defence case, as pleaded and as conducted, proceeded from a misunderstanding of what had been described by Mrs Nkamba in the incident report.

[58] There is further evidence in support of the distinction which Mrs Nkamba makes between the floor and the ground and that the dropping of the block which she describes was from the former to the latter.

[59] I have already referred to the photograph of the exterior of the shed at page 71 of Exhibit 1. That photograph has been written on by Mrs Nkamba. She gave evidence of having marked an arrow on it and written the word "ground". The arrow commences on the raised floor of the shed and describes a downward arc onto the ground below upon which she has written "ground". On the photograph on page 72 of Exhibit 1 which shows the open shed, the A-frame lying in a position said not to be the position in which the A-frame was on the day of the incident, and various pieces of equipment on shelves, there are also written notations. There is an arrow pointing to the concrete slab inside the shed upon which is written the word "floor". Whilst there was no direct evidence concerning the hand-written markings on the photograph on page 72 of Exhibit 1, given Mrs Nkamba's evidence that the markings on the photograph at page 71 were hers,[38] and given the evident similarity

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38 Ibid 1-20.

in the writing itself, the use of an arrow (it too very similarly drawn) and the evident purpose of the markings to identify an area within the photograph, should it have been disputed that it was her handwriting on page 72, I would readily have concluded that it was.[39]

[60] Apart from Mrs Nkamba's denials that she had knocked the block to the floor, there was other evidence which contradicted the defence's contention that this was how the block came to be there.

[61] Bethany Westgate was a lead educator with the defendant and with whom Mrs Nkamba was setting up the Senior Kindy Yard on the day of the incident. Ms Westgate gave evidence that, unlike the A-frames depicted in the photograph at page 77 of Exhibit 1, which she described as being "concertinaed inside each other" the A-frames were usually stacked standing up. Although Ms Westgate could not exactly recall how they were positioned, this was consistent with Mrs Nkamba's evidence that they were standing up on the day of the incident.

[62] Ms Westgate said that when stacked in a standing position, as they usually were, the base of the frame would be towards the right-hand side of the shed as seen in the photographs. In that position they would taper away from the right to the left from the base to the apex. That taper would result in the frame becoming progressively further from the shelving on the right-hand side of the shed where the boxes containing the blocks were located. Mrs Nkamba had described grabbing the frame in the middle as she tried to pull it out walking backwards. Judging by the angle of the frame as best one can from the photograph, it would seem to me that grabbing and pulling a frame stacked in that way in that position would not cause the frame itself to come into contact with the shelving where the blocks were located. It would seem unlikely that part of the body of the person grabbing and pulling the frame would make contact either.

[63] Mrs Nkamba agreed that she did not have a code to enter the centre on the day of the incident, "because I was not their certified supervisor. Beth was the one in charge".[40] It was put to Mrs Nkamba that a swipe report would demonstrate what time she entered the centre with Beth. That evidence would have been wholly in the

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39 Section 159(2) *Evidence Act* 1977.
40 Trial transcript 2-88.

defendant's control. It led no evidence of whether Mrs Nkamba arrived according to its own records.

[64] When put to her that both she and Ms Westgate were in the yard on that day, she said: "We're not both in the yard. Beth was on the other side". She went onto to explain:

> "She was doing the – the – kindy yard. So we have the senior kindy and the kindy yard and the baby yard. So she was on the other side. I would not specifically say she was – she was on – in the kindy end because I would have heard her. So she was on the other side. That's why I'm saying she was on the other side."[41]

[65] Mrs Nkamba that she had a direct recollection of a conversation before the incident with Natash Katte when Natash was in charge, about the lighting in the shed in which Natash said that she would put it in the maintenance book. Mrs Nkamba said that any educator could make entries in the maintenance book, but she had not written in it about her concerns in regard to the lighting "because Natash said she would write it and the week I was doing – the day I did the opening with Beth on the Monday – on a Tuesday, said that's something that it was already in the book and that they were aware of it. So I personally did not write. The person in charge the week before, Natash, said she would write it down".[42]

[66] Mrs Nkamba again gave evidence that on the morning of the incident she asked Beth Westgate if the light had been fixed and Ms Westgate had said that it had not been, but that it had been reported and it would be fixed. She rejected the suggestion that there had been no such discussion.

[67] When Ms Perkiss suggested to Mrs Nkamba that she could see the A-frame when she opened the shed door, she said "I couldn't see the A-frame. It was dark in there. I could see that this is the shed, and being familiar of – being familiar with the place, you know you're going to take equipment out of there."[43]

[68] She again described entering the shed, grabbing the A-frame somewhere in the middle and starting dragging it out. It was put to her that as she as dragging the

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41 Ibid 2-93.
42 Ibid 2-94.
43 Ibid 2-97.

frame "you haven't seen the block that has dropped on the floor, have you?" Mrs Nkamba responded "no".[44]

[69] She was then asked "and – but if the A-frame were in that position, do you accept that there is nothing in terms of the A-frame that would be obstructing your view to see the block?" To that Mrs Nkamba answered:

> "It was dark, so like – like I said yesterday, I mean, you are talking about dropping the block. I don't see how the block would drop if it was stored in the – in the crates that we would – that we would keep them in, and that is why I have a problem each time when you are talking about a block dropping. So when you're talking about dropping, for me, when I – when I was dragging it, so it's not like it's dropping from a level from the shelf. And when you say seeing it, it was dark and we are familiar, so when you're taking things out, you go in and you get them.".[45]

[70] That evidence again demonstrates that the defence was putting a case – the block dropping to the floor from a shelf, rather than from the floor to the ground – seemingly on a misunderstanding of the description of the incident provided by Mrs Nkamba in the incident report. It also reiterates her evidence that she was entering a dark, but familiar, environment where the location of items to be removed was generally known to her.

[71] It was next put to her, "and therefore, all you're doing is just drawing an assumption of what you think happened on 29 August 2017?" To which she responded:

> "Just like you're leading me to say it dropped from the shelf, my reasoning, not assumption, is for the block – my reasoning was that it should have near the – one of the lengths of the frame."[46]

[72] The cross-examination continued:

> "But it – but you don't know that do you? You don't know that the block was there, do you? --- I don't know except when I tripped it, so if I knew then I would have avoided it, which I didn't see any.
>
> So again, that's just an assumption that you're drawing as to the circumstances of the event? --- that's my reasoning, not assumption."[47]

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44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid 2-97 – 2-98.

[73] When it was put to Mrs Nkamba that she did not see any block on the ground she said "it was dark and I didn't see any block, and like I said, they had taken things out. If there was anything in my way, which even if I did see, I would have kicked."[48]

[74] Mrs Nkamba was cross-examined about the exterior light mounted on the shed which she had described in her earlier evidence as normal and not a flood light. She again rejected the suggestion that it was a flood light.

[75] Following this, she was asked:

> "Okay, and that the block, the plastic block, – so as you are pulling out the A-frame, the plastic block moved, it dropped to the ground and then you stepped on it?"[49]

[76] Mrs Nkamba answered:

> "To my reasoning, because I had been in and out of the shed, and my reasoning, like I said, I think that's what's happened. It must have been in the way of the right leg of the – of the A-frame. So whilst I'm in the middle, so obviously it will be the first thing to go out before I even step down. That's my reasoning."[50]

[77] She was then asked if there could have been a cause or reason for the block to have fallen when she had gone into the shed or putting her arms into the shed, she said:

> "This building blocks were mainly stored in the crates, so it never left anything on the – loose on the – on the shelves, yes, so it was in the crate."[51]

[78] She was then asked:

> "Yes. And isn't it the case that the people who do the pack up of a night-time, have to do a thorough check of the shed to make sure that it's all put away safely?"[52]

[79] Mrs Nkamba answered:

> "Yes, unless someone didn't do their job."[53]

[80] That answer prompted this question:

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48 Ibid 2-98.
49 Ibid 2-99.
50 Ibid.
51 Ibid.
52 Ibid.
53 Ibid.

> "And that could be the only possible or probable cause if someone didn't do their job and the block was left on the floor?"[54]

[81] She answered:

> "Well, then that's not my – that's what has caused my accident, then."[55]

[82] The following exchange then occurred:

> "And what I'm going to suggest to you is that the – with the pack-up, as part of the procedure of the defendant's system of work, is that once the shed is packed up, the shed then needs to be reviewed and it needs to be sighted off and signed off as being clean and everything packed away? --- I tell you, the reality of opening and packing up, normally you would be under the pump where we still have children and you don't have time. You still have children and you're working in the ratios, to a point where you'd – when you start packing, you're friends with the children so the person packing may not even be careful enough to pack properly or even for the next person to come and sign to say you've packed properly because we are trying to still maintain the ratios. We don't have that extra person, I wish we could, or could kind of help with the packing. So they sign in to make sure that that was done, if it was – if the signing was done, it would tell you what the reality is different."[56]

[83] Implicit within Mrs Nkamba's answer is an acceptance of the primary proposition that there was, as part of the defendant's system of work, a review of the shed after it is packed up to establish that the shed is clean, and everything packed away. It also implicitly accepted the secondary proposition that the cleanliness and tidiness must be signed off. Mrs Nkamba's answer, although implicitly accepting those two propositions, was that the reality was different to the observance of the policy. Given that evidence, one would have expected evidence to be adduced in the defendant's case proving both the existence of the policy and its observance on the day prior to the incident, both as to there having been a proper and tidy packing of the shed and that fact having been signed off.

[84] For reasons which will be developed more fully, the policy was, at least to an extent, proven. Its observance was not proven, notwithstanding that counsel for the defendant said in her opening, that evidence would be adduced that it was. The

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54 Ibid.
55 Ibid.
56 Ibid 2-100.

evidence which was actually adduced would comfortably satisfy me that the policy was not observed, both generally and specifically, on the day before the accident..

[85] Mrs Nkamba agreed that she had walked in and out of the shed in the Senior Kindy Yard, including stepping up and off the ledge at least three times without injury.

[86] She was asked about the A shape of the frame. When asked if there was a middle bar, she said "not that I can remember". She agreed it was "just up and down and clear in between".[57]

[87] She was asked, immediately following:

> "Yes. And so, by the time you had gone back into the shed on, at least, after of these three occasions to get the A-frame, there was nothing obstructing underneath the shed, was there – underneath the A-frame?"[58]

[88] Mrs Nkamba answered, "there was nothing".

[89] When it was put to Mrs Nkamba that as she walked backwards dragging the a-frame out of the shed, at no time did she check whether it was safe for her to place her right foot on the grass before stepping off the ledge of the shed. She explained:

> "I did not check – because I – like I said, I had been in and out …. So obviously with the confidence that I have been – that there's nothing in my way, I am going backward and that's how I was going. So, for me to start checking when I've already been in and out, I didn't see any danger in the way, I did not check."[59]

[90] It was then put to her "because, when you walked in and out of the shed, the Lego block was not on the grass floor outside the shed, was it?". Mrs Nkamba agreed that it was not.

[91] It was then suggested that "the critical point is that you didn't look where you were stepping your foot before you stepped off the shed floor". To this suggestion Mrs Nkamba replied: "I did not look".

[92] The next suggestion was cast in these terms, "Yes. And – because I suggest to you, Mrs Nkamba, that, had you done so, you would have seen the Lego block on the

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57 Ibid 3-3.
58 Ibid.
59 Ibid 3-5.

shed floor and that you simply just failed to pay attention to where you were walking that morning".[60]

[93] This suggestion contains a non-sequitur; her concession that she did not look behind her as she stepped off the shed floor cannot lead to the conclusion that had she done so, she would have seen the block on the shed floor which was in front of her. Nevertheless, Mrs Nkamba answered saying that even if she had looked, it was still dark. Perhaps struggling with the inherent absurdity of the suggestion she continued, "and, if it was in the way, I'm backing out. So even if I had turned, I would not have looked there. I would have been looking – turning where I'm going out, not looking on the ground, considering I'm carrying an A-frame".[61]

[94] This non-sequitur is demonstrated by counsel's next suggestion which was "and I suggest to you, Mrs Nkamba, as you stepped off the ledge of the shed floor onto the synthetic grass and, had you looked on the synthetic grass, you would have seen the Lego block where you were placing your foot". Her answer to this suggestion was "it was still dark".[62]

[95] When this suggestion was again pressed by Ms Perkiss, Mr Nkamba expanded upon her explanation as to why she believed she would not have seen the block even had she looked. She said:

> "I don't think I would have seen it. Like I said, unless the block dropped right in front, would still – like I said, the lighting was good the lighting wasn't good. It was still dark and my – like I've said, my reasoning is that, as I am dragging, the frame has gone out first. So the block must have obviously dropped where I – even if I had looked back, I would not have looked immediately where I am standing."[63]

[96] It was suggested that had she paid attention, she would have heard the block drop onto the ground to which she said, "It's a plastic block. There was no way it could make a sound on the synthetic grass." This observation seems sound.

[97] She denied that daylight was breaking.

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60 Ibid 3-6.
61 Ibid.
62 Ibid.
63 Ibid.

[98] When the suggestion that had she looked she would have seen the block was further pressed, Mrs Nkamba again explained:

> "Like I said to you, there was no need for me to start looking when I have been in and out looking – meaning wanting to see if there's anything in my way because I had been in and out of the shed and I was confident to be just going backwards because I've been already"[64]

[99] Then further:

> "I'm saying I wouldn't have looked because I – there was nothing in my way. So I was backing out with all the confidence knowing that I have been in and out of this shed and I'm taking this and I'm familiar – I am familiar with the height of where I am coming in and out and yes, looking is a reflex, looking back. So for me to say I wouldn't have looked, it would depend on my reflexes on that day."[65]

[100] She reiterated, however, that on that day she did not look.

[101] Mrs Nkamba again stated that Beth Westgate had said to her about the setting up on the Senior Kindy Yard on this occasion, "you do that side and I'll do this side". She said that Ms Westgate "wasn't in the Senior Kindy Yard. She wasn't even in the vicinity."[66]

[102] It was put to her that it was the centre policy that when people unpack the shed, two people are to do it together. Mrs Nkamba agreed but said that on that morning Ms Westgate was not with her. She again explained that Ms Westgate was running late and she asked Mrs Nkamba to do the yard by herself, so she was not with her.

[103] Mrs Nkamba agreed that it was common practice for two people to unpack the shed.

[104] It was then put:

> "And so I'm suggesting that day there was nothing unusual about the common practice, that Beth was assisting you unpack the shed on that day?"[67]

[105] Mrs Nkamba answered:

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64 Ibid 3-7.
65 Ibid.
66 Ibid 3-8.
67 Ibid 3-9.

> "Beth wasn't with me. It was very unusual for me to be unpacking the yard because I was doing it – I was doing a two person job by myself."[68]

[106] This cross-examination caused me to later raise with Ms Perkiss that the factual contentions put to Mrs Nkamba were the antithesis of the case pleaded (to that point) in the defence which was that:

(k) The plaintiff was working alone accessing the storage shed to set up an obstacle course;

(l) The defendant had trained the plaintiff how to access the storage shed and how to set up the obstacle course; and

(m) Accessing the storage shed to set up the obstacle course was a task that could be safely performed by one person.

[107] This led to the amendment of the defence to include, subparagraph 3(d)(ii)(A):

> "The plaintiff was working with Bethany Westgate in the set-up of the Senior Kindy Yard."

[108] The allegation at subparagraph 3(d)(iii) remained:

> "The plaintiff was working alone accessing the storage shed to set up an obstacle course".

[109] Ms Perkiss would later inform the Court that she had a conversation with Mr Newton as to what she had put to the plaintiff and that the parties were in agreement that there was no policy of the defendant that the set-up was to be done by two persons but that it was "best – normal – best practice".[69]

[110] When it was suggested to Mrs Nkamba that daylight was breaking when she suffered her injury, she said that it was "still dark". Mrs Nkamba said that it was not just in the shed where she was working on her own, but in the yard and the shed. She said that it was first time she set up the yard by herself and was the first time she had ever dragged the A-frame out by herself.

[111] Mrs Nkamba rejected the suggestion that there was sufficient light for her to have been able to see the Lego had it fallen to the ground in the area closest to the step.

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68 Ibid.
69 Ibid 3-31.

She said "I was dragging the – I was going backward and there wasn't enough light. There wasn't light in the shed and there wasn't enough light. So I wouldn't have been able to see the Lego block.".[70] She accepted she did not look where she was stepping, explaining, "I was going backward".

[112] Mrs Nkamba was re-examined about her earlier evidence concerning the sign-off at the end of the day after the shed had been packed up and her suggestion the reality was different. She said, "the person – yeah, depending on the person who was packing up, they should have signed off. So the reality is different like I was saying."[71]

[113] She was asked whether what she meant was the fact that somebody signed off doesn't mean that they had done a check of the shed to which she answered, "they didn't –no. Yeah, that's what I mean."[72]

Evidence called by the Defence

[114] Ms Westgate gave evidence that when she was on openings, she would arrive at the centre at 5.45am to 5.50am. She explained that it was only lead educators and management who had keys. She said that parents were allowed on the premises from 6.15am and that the time between 5.50am and 6.15am was used to re-set the yards, putting all the equipment out. Understandably, Ms Westgate could not remember exactly what she did on the day of the incident.

[115] She said, in contrast to only lead educators and management having keys to the centre, keys to the sheds were kept on hooks in reception and were accessible to all staff; lead educators and assistants.

[116] She said:

> "So generally, we'd grab them and then open up the shed. It's a roller door, so push it all the way up. There's a light inside the shed, so turn the light on and start – start unpacking, starting from sort of the equipment at the front."[73]

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70 Ibid 3-41.
71 Ibid 3-51.
72 Ibid.
73 Ibid 3-109.

[117] She could not, however, remember whether she or Mrs Nkamba unlocked the shed on that day. Shown the photograph of the flood light on the outside of the shed at p 81 of exhibit 1, Ms Westgate described it as "very bright". She estimated it would cast light five to six feet out of the shed and probably a foot into the shed. Notwithstanding her evidence that she could not remember whether she unlocked the shed on that occasion, and her evidence that after opening the door, the light would be turned on by, I infer, the person who opened the door, she was, in evidence in chief, shown the photograph of the fluorescent light tube on the ceiling of the shed which is at p 82 of exhibit 1 and was asked "is that the light that you turned on 29 August 2017?" Ms Westgate answered "yes".[74]

[118] She was next shown the photograph at p 83 of exhibit 1. It, like all the other photographs, was taken on 14 January 2019, more than 16 months after the incident. In the photograph there is a casing for a light switch, but the switch itself is missing. Where it ought to be appears as a black void against the white casing. She was asked, "was there a light switch there that you used to turn on the light?", to which she answered "yes". Then she was asked "and you did turn on the light?", to which she answered "yes".[75]

[119] At that point, I asked her if she actually recalled that about 29 August 2017 or whether her evidence was based on her routine. Her answer was, "yeah, yeah. So someone would have turned it on. Whether it was me or Kabwe who opened the shed, one of us would have turned it on".[76]

[120] Ms Perkiss then asked, "so to be specific, the light was on in the shed on 29 August 2017" to which Ms Westgate answered "yes".

[121] Later in her evidence in chief, Ms Westgate was asked, "so in terms of 29 August 2017, where were you working in comparison to where Mrs Nkamba was working?". Having asked for clarification if she was being asked about the morning, Ms Westgate said, "we would have been together, if that's ---" At that point she was interrupted and asked, "and where was that?", to which she responded "we both have been in the – we'd go around together to set the yards up so we'd

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74 Ibid 3-111.
75 Ibid.
76 Ibid.

have been together". She was asked by Ms Perkiss, "in the Senior Kindy Yard?", and she answered "yes".[77] Earlier, she had said that she did not know where Mrs Nkamba was throughout the set-up process "but we generally set up together because of this – the size of the yard we generally do it together because it was quicker. We'd have been in the yard together".[78]

[122] However, Ms Westgate confirmed that she did not witness Mrs Nkamba fall – which suggests that they were not working together at that time. She said that when told by Mrs Nkamba that she had stood on a block and rolled her ankle, she helped her inside.

[123] Ms Westgate was asked if she knew what time Mrs Nkamba suffered her injury and she said, "it would have been before 6.15am, so between 6.00am and 6.15am".[79] Ms Westgate was informed that the incident form recorded a time of 6.05am, and of that time, she was asked "do you know what it was like in terms of the yard with the brightness of the day?" She answered, "it would have been pretty light, yes".[80]

[124] When asked why she said that, she responded, "because the lights – again the veranda lights and the shed light would have been – spread the light around, so it sort of gives ample light".[81]

[125] She was then asked about the sunrise having been at the agreed time of 6.06am and was asked how she would "describe the daylight around the shed – so in that yard, I should say, sorry?". Ms Westgate's response was, "yeah, I can't – I can't recall to be honest".[82]

[126] Later, Ms Westgate was asked if she could "recall at all, like, what – like the light of the day would have been like on that day?" Ms Westgate answered, "I can't exactly recall what the light on the day would have been like, but the lights that are under the veranda and the shed lights ***and the inside shed light is ample***, I believe, to – to set the yard up safely" (emphasis added).[83]

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77 Ibid 3-120.
78 Ibid 3-114.
79 Ibid 3-120.
80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid 3-117.

[127] She said she had never had any problems "with the lighting in the – when setting up the Senior Kindy Yard" and no one had ever reported any problem to her "about – setting up the Senior Kindy Yard".[84]

[128] Ms Westgate gave evidence that there was "a maintenance log that would live on the side of the filing cabinet and anybody, if you spotted an issue, was able to write it on there and inform management as well."[85]

[129] Ms Perkiss asked, "Ok. So you could either write it on there or inform management?", to which Ms Westgate said, "I would do both."

[130] Ms Perkiss asked, "You would do both?" and Ms Westgate confirmed, "Yep, I would do both. Yep."[86]

[131] This exchange concerning the maintenance book and what Ms Westgate would do leaves open the possibility that others may take one or other action, but not both.

[132] As to the more particular issue, Ms Westgate was asked,

> "And I take it, that on 29 August 2017, you did not make any notification in the maintenance book about lights or problems in the yard?"
>
> and, separately,
>
> "or problems with lighting in the shed?"

[133] To each of which she said "No".[87]

[134] When asked, "What about safety, any concerns about safety?":

Ms Westgate said,

> "Yeah, they could come to me but I would – if – I would usually point them in the direction to, sort of, go and speak to Sam. It's too – you know –".[88]

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84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid 3-118.

[135] At that point, Ms Perkiss interrupted the answer and offered, "I understand back then was also Stacie would as well". Ms Westgate agreed and said, "so to go and speak to management".[89]

[136] The reference to Sam and Stacie was to the two directors of the centre.

[137] Ms Westgate was asked, "And so if you needed to report or someone wanted to report something, you could go to Stacie and/or go to Sam?". She agreed with that proposition.[90]

[138] Notwithstanding her earlier evidence that if she spotted an issue she would both write it in the maintenance book and inform management of it, when asked if she ever had reason to write in the maintenance book her answer was more equivocal. She said:

> "I can't specifically remember but I would probably say yes, in my time I was there there would probably be something, sort of locks, door locks and bolts – for nappy changing areas usually."[91]

[139] It was put to her by Ms Perkiss (without objection) that she did not have a conversation with Mrs Nkamba on 29 August 2017 about a light to which she said, "not that I can recall". Ms Perkiss pressed on asking whether she had a conversation as best as she could recall. Ms Westgate again answered, "not that I can recall". Ms Perkiss then put it to Ms Westgate (again without objection) that, specifically, Mrs Nkamba did not tell her that the light inside the shed was broken to which assertion Ms Westgate answered, "no". Ms Perkiss went on (again without objection) to provide the explanation, "because your evidence is that it was working", with which Ms Westgate agreed.[92]

[140] Ms Perkiss then asked, "Had there been occasion for the light not working in the shed, what would you do?" Ms Westgate's answer was:

> "I would only go as far as the light outside the shed would allow me to. I wouldn't go further if it was – again, depending on the light, the sunlight and things like that – I would go as far as the outside would light up in the shed".[93]

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89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid 3-122.
93 Ibid.

[141] Ms Westgate's answer suggests that there had been an occasion or occasions on which the light was not working in the shed. It also suggests that there was a limit to the illumination which external light, natural or artificial, would project into the shed and thus limit as to how far into the shed Ms Westgate would proceed.

[142] Immediately following that evidence Ms Perkiss again asked, "And on 29 August 2017 your evidence is that that light was turned on", with which Ms Westgate agreed.[94]

[143] Immediately following that, Ms Perkiss asked, "Because otherwise, if it was not turned on, what would you do?". Ms Westgate answered:

> "I would, again, so I would go as far as the outside light would allow me and I wouldn't set the rest of it up if I – if the shed – if the light in the shed wasn't working, I wouldn't go in the shed."[95]

[144] When asked why, her answer was telling: "Because it's not safe".[96]

[145] When asked what, as a supervisor she would do, she said: "I would encourage others to do that as well. I would make that call".

[146] She was asked, "Ok. And did you make that call on this day?" Her answer was, "not that I recall, no".[97]

[147] She was then asked, "Because the yard was set up or being set up?" to which she said, "Yeah. And the lights were working".[98]

[148] That concluded Ms Westgate's evidence-in-chief. Her cross-examination by Mr Newton commenced with her frank agreement to the following proposition:

> "Is it fair to say, as you've said, you really have no recollection of what really happened on 29 August 2017. And everything, and every answer you've given to my learned friend, despite it being premised by your recollection of 29 August, is really what normally happened?"[99]

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94 Ibid.
95 Ibid 3-123.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.

[149] Ms Westgate agreed that her "evidence is limited to your normal practice and your normal expectation".[100]

[150] Later, she said that well over three years had passed before anyone asked her to try to remember what happened on that day and that is why she could not remember and relied entirely on what the practice had been.

[151] Ms Westgate did not accept that she said to Mrs Nkamba as they went to do the opening, "Cause we're running late, you do this side and I'll do the other side". She agreed that normally they would do it as a pair.[101]

[152] She did not agree that normally two persons would carry out the A-frame saying, "I wouldn't. I'm quite happy to. I find it manageable to do it by myself. And you don't lift it **you drag it**" (emphasis added).[102]

[153] Ms Westgate said that she believed she and Mrs Nkamba would have been together in the Senior Kindy Yard because that is what was normally done for safety. As to safety she explained that it was because you do not know if there may be someone else in the yard who had "climbed over a fence".

[154] She also did not agree that after Mrs Nkamba suffered her injury she hopped into the centre and called for her and that Ms Westgate had to go through to where she was.

[155] She did not accept that she had told Mrs Nkamba to write 6:05am as the time of the incident, saying she would have told her to write the time the incident had happened. Ms Westgate was asked about the fluorescent lights under the verandah about which she had earlier given evidence. When it was suggested that they would not contribute any light to the inside of the shed, she said, "probably not to the inside, no".[103]

[156] As for the light above the roller door, she confirmed her earlier evidence that this would cast light about one foot into the shed and that there was a shadowing effect from the fascia of the shed. She agreed that if the light in the shed was not working

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100 Ibid.
101 Ibid 3-124.
102 Ibid 3-125.
103 Ibid 3-128.

the light would be fairly inadequate at that time of day to see to the back of the shed.

[157] When it was put to Ms Westgate that on the day of the incident the internal light in the shed was not working, she answered, "I don't agree. The light in the shed would have been working".[104]

[158] At that point, the following exchange between the Court and the witness occurred:

> "Did you say 'would have been;? ---It would have – yep.
>
> Is that because you suppose that it would have been ---? --- No, sorry. It was working.
>
> ---that you have a memory that it was? ---No, sorry. It was. It was working. The light inside the shed was working."[105]

[159] When it was put to Ms Westgate that on the morning of the incident Mrs Nkamba had asked her "Has the light in the shed been fixed?" and that she had replied, "No, but it's in the book, and maintenance will fix it", she twice answered, "I don't recall that conversation". In light of that somewhat equivocal answer she was asked if such a conversation could have occurred to which she answered, "No, because I believe the light in the shed was always working".[106]

[160] Ms Westgate did not accept that the light switch was not working on the day of the incident. She again stated that if the light in the shed was not working she would not enter the shed because it would not be safe.

[161] She did not accept that there had been a departure from normal practice on the day of the incident such that she and Mrs Nkamba were setting up separate areas rather than working together because she had arrived later than usual. She agreed that it was not uncommon for parents to be hanging around from 6.00am or certainly 6.05am. She did not, however, agree that the parents would be accommodated when set up was completed.

[162] When re-examined, Ms Westgate indicated that the A-frames when standing would be between two thirds of a metre to a metre from the roller door inside the shed.

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104 Ibid 3-129.
105 Ibid.
106 Ibid.

She said that if the internal shed light is on, "it's bright", and that you would be able to see into the shed.[107]

[163] She was asked if one would be able to see the A-frame to take it out to which she answered, "with the light in the shed, yes". The clear inference being that one would not be able to see the A-frame if the internal light was not on.

[164] That inference can be drawn more readily in light of her answer to the next question she was asked which was, "And the light outside the shed?" Her answer was,

> "I would probably sort of say to where the legs are in this photo would probably be the limit for the shed, for the light outside the shed".[108]

[165] The positioning of the legs in the photograph is such that they are what appears a short distance into the shed. It can be inferred from other evidence as to the storage of the A- frames in the standing position that the legs at the base of the frame would be further into the shed. It is quite apparent from the photograph that the width of the frame at its base is less than the height of the frame from the base to apex. Therefore, with the frames pushed into the shed as described in the evidence,[109] they would go further back when standing, as opposed to lying on their side as depicted in the photograph.

[166] Ms Stacie Wood gave evidence for the defendant. Ms Wood was at the time of the incident a director of the child care centre. She described the role of director as "oversees the basic running of the service, communication between head office and the staff, basic manager position".[110]

[167] Ms Wood explained staff who commence in the morning are paid from 6.00am "to have the time to come in and have that time to set up the service". She explained that the centre opens at 6.15am and never earlier "because the insurances don't start for families and children to be on the premises until 6.15".[111]

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107 Ibid 3-137

108 Ibid.

109 Jemma Shanks at 4-44 gave evidence of them being pushed to the back of the shed. Mrs Nkamba gave evidence that it was not at the entrance: 1-73/12 – 19. Beth Westgate gave evidence that they would be pushed in: 3-134/4 – 13 confirmed in re-examination at 1-136/9.

110 Trial transcript 4-4.

111 Ibid 4-6.

[168] Ms Wood said that she would have been somewhat involved in Mrs Nkamba's induction but she could not recall which aspects.

[169] Ms Wood was asked to explain the procedural process she would have taught staff for taking out the A-frame. Ms Wood said:

> "Well, because of the way the shed, like lift is, where you have to stand up, I would walk in and drag it forward a little bit so that you could then turn around and walk forwards out of the shed".[112]

[170] She said that this was something adopted in terms of her training with her staff, "because you wouldn't walk backwards, not being able to see where you're going".[113]

[171] That evidence seemed inconsistent with the description which she gave very shortly afterwards when she was asked how the A-frames came out of the shed and she said, "dragged – you would generally drag them anyway. Those ones aren't very heavy".[114]

[172] Apart from that inconsistency, to the extent that Ms Wood was asserting that staff generally and, by inference, Mrs Nkamba specifically, had been trained in a method of removal of the A-frames by which they push them whilst walking forwards rather than dragging them whilst walking backwards, I would reject the assertion. It was clearly not the method adopted by Mrs Nkamba. Nor was it the method adopted by other staff who gave evidence for the defendant. Two staff members consistently referred to dragging the A-frames from the shed. Their description of the method they adopted was consistent with that adopted by Mrs Nkamba.[115]

[173] The evidence of each of those witnesses was also consistent with the defendant's case as opened by Ms Perkiss that Ms Westgate would give evidence:

> "that the particular A-frame was dragging out on the day, and she says that the A-frame was traditionally stored upright. She'll say their of a light aluminium nature and easy to be dragged out of the shed and easily done by one person, and she has done it many times herself".

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112 Ibid 4-10.
113 Ibid.
114 Ibid 4-11.
115 See the evidence of Bethany Westgate at: 3-107/11; 3-114/9 – 13; 3-125/5 – 15; 3-132/19 – 27; 3-136/10 – 30;p 3-137/12 and Samantha Lane at 3-43/6 and Jemma Shanks at 4-44/16.

One staff member, Jemma Shanks, did describe a method of getting the A-frames out which was consistent with Ms Wood. She described pushing them out. However, there was nothing in her evidence which would cause me to believe that this was the method in which she had been trained rather than simply the method she adopted. She had earlier been asked if she was trained or inducted on operating procedures for opening and closing the shed. Her frank response was, "Not so much of the shed, but manual handling".[116]

[174] She went on to say:

> "So we were shown the sheds and, obviously, everything you would normally do at a new workplace and just, obviously, spoken about basic stacking and things like that in the shed and how it's got to be neat and tidy".[117]

[175] She described the A-frames being slid into the shed. She said that she would generally put them to the side for easier access and because "you can fit a lot more around it, but everyone does it differently, I suppose, but all very similar".[118]

[176] She said that normally the yards were packed up before the close and it was not necessarily always the closing staff who pack up the yard. If the yard did need to be packed up by the closing staff member, they would put everything that is outside into the shed and then shut the shed door and lock it ready for the following day.

[177] Ms Shanks gave evidence of staff members doing a walk-through outside making sure there was nothing left on the ground. If the shed was already packed up and something was found outside they could take it inside and place it on the shelf or in a box.

[178] Ms Shanks did not give evidence of a system of work which required the certified supervisor or another person to conduct a check of the shed as to everything being clean and packed away and for this to be signed off, as had been put to Mrs Nkamba and with which she had implicitly agreed. Ms Shanks' evidence would also support a finding that, as Mrs Nkamba said, such a system of work was, in reality, not followed.

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116 Trial transcript 4-43.
117 Ibid.
118 Ibid 4-44.

[179] Ms Wood said that she had on occasions opened the shed in the morning. She said, "the lighting was fine" even in winter.[119] She said that the light above the door provided sufficient light for her to open. As for the internal fluorescent light in the shed, Ms Wood believed that it was on a timer, which rather betrayed a lack of any real knowledge of the lighting inside the shed. She could not recall ever having opened the shed and turned on the light. She could not recall whether the light would be on or off when she opened the shed door. Again betraying any real knowledge of the internal shed lightning

[180] In relation to the maintenance book, Ms Wood said:

> "So the maintenance book in 1 and 2 was based on the side of the filing cabinet in the office. If any concerns were brought to us, it was written on there. Staff were also able to write on it if something needed to be fixed, and if it was anything urgent, say electrical, plumbing that was out of our means, then we would contact head office to get permission to contact Ben, for example, or the plumber."[120]

I infer that "Ben" as referred to by Ms Wood is Ben Humphreys, an electrical contractor who performed work at the centre and who gave evidence for the defendant. I shall return to Mr Humphrey's evidence shortly.

[181] Ms Wood confirmed that a broken light switch would be "something that you would see on the list".[121]

[182] Ms Wood said that she had been made aware on occasions of staff letting parents in earlier than 6.15am. She said that if informed of that, the staff member would immediately be spoken to about it "because it's not what should be occurring".[122] This evidence somewhat supported Ms Nkamba's evidence that parents would on occasion be let in earlier than the nominated opening time.

[183] Ms Wood in cross-examination said that at around 6.00am on 17 August, "the yard is pretty well lit up" by daylight. She said, "it's pretty well bright by that time of the morning". When it was put to Ms Wood that she was wrong and that at 6.00am

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119 Ibid 4-12.
120 Ibid 4-13.
121 Ibid.
122 Ibid 4-14.

it was not even sunrise, she said, "well that's your opinion". Ms Wood said, "I think it would be bright enough to see what you're doing".[123]

[184] Ms Wood appeared to me to be quite dogmatic in her view as to the level of brightness in the yard at that particular time of the year. It was not apparent to me how she would have such specific recollection of the state of light.

[185] Ms Wood also said that lighting from the car park would cast some light into the shed, noting that there was also other lighting across the verandah for the playground.

[186] Ms Wood went on to suggest that other lighting which would provide assistance in opening the shed were lights from the shops adjacent to the centre and lights under a verandah. She conceded that the latter "might not project directly in front of that shed, but it would at – like, help towards the lighting".[124]

[187] As for the shopping centre lights Ms Wood could not recall what specific lights were there or whether they would be on at 6.00 o'clock in the morning.

[188] I was unimpressed by Ms Wood's evidence.

[189] As to her evidence as to the trained methodology of removal of the A-frames from the shed, I formed the view that she was eager to give evidence of a safer methodology than the one evidently followed by staff members and to suggest that they had been trained in it contrary to all the other evidence. I also formed the impression that she was at pains to, quite literally, place the defendant's case in the best possible light.

[190] There is a further matter concerning Ms Wood's evidence which should be noted. It concerns what she did not give evidence of. In opening the case for the defendant, Ms Perkiss said that Ms Wood's evidence would also address closing procedures. Ms Perkiss said:

> "In terms of the closing procedure, it's her evidence that whoever does the close packs up the shed and checks to make

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123 Ibid 4-16.
124 Ibid 4-20.

> sure – they enforce a system that they check and make sure there's nothing left on the floor."[125]

[191] That evidence, had it been given by Ms Wood, would have been relevant to the defendant's pleading: that it had in place an adequate and safe system of work.; that the shed was tidy; that the block was properly stored prior to the incident; the block was not lying on the floor prior to the incident; and that the incident could not have been prevented by the exercise of reasonable care by the defendant.

[192] That evidence, had it been given, would have been consistent with what was put to Mrs Nkamba, and with which she implicitly agreed; that there was as a part of the defendant's system of work, a review of the shed after it is packed up to establish that the shed is clean and that everything is packed away. Her evidence about that would also have been relevant to Mrs Nkamba's evidence that the reality was different to the policy. Put simply, Ms Wood did not give any such evidence. It's absence is telling.

[193] Mr Ben Humphreys, the electrical contractor, to whom I have already referred, gave evidence that on 26 May 2017 he removed a 50-watt LED floodlight from a car park at the centre and re-installed it above the shed in the playground. His evidence is supported by invoices.[126] His evidence must be accepted. Mrs Nkamba's evidence that at the time of the incident three months' later, the light on the external fascia of the shed was a "normal light, and not a flood light" is incorrect.

[194] Mr Humphreys said that the lights outside the building were on a timer but the internal light in the shed was not. This evidence serves to demonstrate the limitations of Ms Wood's knowledge of the lighting within the shed.

[195] Of the flood light on the outside of the shed, he said it was facing outward and not down and was not designed to light up inside the shed although some light would go inside. It would light up the area of the step from the shed floor to the astro turf.

[196] Ms Natash Katte was called for the defendant. In opening the defence case, Ms Perkiss had said of Ms Katte:

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125 Trial Transcript 3-65
126 Exhibit 1, pp 92 and 93.

> "She was the certified supervisor, which means that she was responsible for opening and closing until the director arrives. She'll say that she was the certified supervisor for the close on the day before, on 28 August 2017. She says that it is her practice that when they pack up the shed, that they do a – they check the shed first to make sure everything's safely put away before they lock the door, and they also check the yard to make sure that there's no hazards lying around the shed that would pose any risk to anyone that's come into the centre the following morning."[127]

[197] Had she given that evidence, as opened by counsel for the defendant, it too would have been consistent with what had been put to Mrs Nkamba, and with which she had implicitly agreed, that there was a policy which required there to be a check conducted at the end of the day which had to be signed off by the person performing it. Had Ms Katte given that evidence then it would have been incumbent upon counsel for the plaintiff to put to her Mrs Nkamba's evidence that although there was such a policy, the reality was different.

[198] Ms Katte did not, however, give that evidence. She did give evidence that she had checked her roster and she did the close the night before the incident. When asked if she could remember what she did in her process of closing the centre on that occasion, Ms Katte said:

> "So at – towards the end of the closing we go around and we check all the doors and we go to check the yards and make sure there's no – obviously, anything that can be damaged or anything like that. And we always pick up items off the floor and stuff like that, and make sure we bring them inside as well."[128]

[199] She confirmed that a walk-around was conducted in all yards. When asked for further explanation, for example as to what she would be looking for, Ms Katte said:

> "Just any objects that are left lying about. Anything that can be an object that could hurt someone, or you know, be thrown through a window or something. Anything that can be damageable or anything like that."[129]

[200] Clearly, that evidence related to items which might have been left outside in the yard. When asked what she would do if she found something she said, "Pick it up. Move it".

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127 Trial transcript 3-67.
128 Ibid 4-31.
129 Ibid.

[201] When asked where she would put it, she said:

> "Usually where it goes. But if, like, obviously if the sheds are locked, we bring them inside. Usually place them on top of a shelf or in where the toys are inside as well."[130]

[202] From that answer, it is again apparent that the walk-around of which she was speaking is one of the yard areas and that it may be conducted at a time after the sheds have been locked. The "inside" of which she spoke is, in that context, clearly inside the centre, not inside the shed.

[203] When asked what sort of things she would be picking up and putting inside, Ms Katte said:

> "Sometimes kids leave shovels and buckets and other little things, like Lego blocks, puzzle pieces, pencils and all that kind of stuff."[131]

[204] Ms Katte was then asked, "So if – and – so there's a procedure where the she gets – the yard gets closed and locked up for the afternoon; do you do that procedure?" She answered, "No. Anyone can pack the shed away so long as you're not injured or pregnant".[132]

[205] She illustrated that point by stating that she could not, at the time of giving evidence, have performed that task as she was then pregnant.

[206] She was then asked, "and so when you do that walk around the yard, is that after the shed's already closed?" To this, Ms Katte answered: "Yep. It's usually towards the end of, like, the closing time at 6.15".[133]

[207] After Ms Katte was cross-examined I asked her about the walk-around at the end of the day. She said:

> "So myself, as the certified, I will go around and walk through and check the lights and all that, check the yards to make sure there's nothing out, so we – yeah we do a walk through."[134]

[208] Following that, Mr Newton for Mrs Nkamba asked a question which arose from the evidence given in answer to the Court's question. Mr Newton clarified that as he

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130 Ibid.
131 Ibid.
132 Ibid 4-32.
133 Ibid.
134 Ibid 4-40.

understood her earlier evidence, when the walk around was performed the sheds had already been packed up and locked. Ms Katte confirmed that this was the case. She then confirmed what was earlier to be inferred that "inside" where they put anything found was inside the main building.

[209] That evidence of Ms Katte is of some significance. Contrary to what had been said in the opening, she did not give any evidence of having on the day before the incident packed up the shed first to make sure that everything had been safely put away before locking the door. Much less did she give evidence of having signed off on that as had been suggested to Mrs Nkamba as being required under a policy. Ms Katte gave no evidence of even the existence of such a policy, much less of her compliance with it.

[210] There was, however, evidence of the existence of such a policy beyond Mrs Nkamba's implicit acceptance of that fact in cross-examination.

[211] Exhibit 11 was tendered in the defence case. It was a copy of the defendant's Induction Workbook. It was tendered to prove that Mrs Nkamba had completed the workbook on 4 November 2016.

[212] Throughout the workbook is reference to a "nominated supervisor" and a "certified supervisor". Persons holding those positions are ascribed roles and responsibilities throughout the workbook.

[213] Section 17.0 of the workbook deals with workplace health and safety. It sets out that the *Work Health and Safety Act 2011* imposes a specific duty on executive officers. To that end it sets out that in demonstrating due diligence in relation to ensuring health and safety, executive officers will need to show that they have taken reasonable steps to, amongst other things, ensure that the person conducting the business or undertaking has appropriate processes in place to receive and respond promptly to information regarding incidents, hazards and risks and has, and uses, appropriate resources and processes to eliminate or minimise health and safety risks arising from work being done.

[214] It states that the defendant understands and acknowledges its duty of care in respect of employees, families, children and visitors and in order to support this policy it is committed to providing, among other things, periodic maintenance and inspection

of tools, equipment, buildings and surroundings and consultation with employees on health and safety matters, methods to reduce workplace hazards and improve control systems.

[215] It provides that the defendant requires all employees to, among other things, report and, where practical, rectify hazards. It states that a hazard is an unplanned condition in a work system or workplace with the potential to cause injury, loss or damage.

[216] Section 51.0 of the workbook is the specific Shed, Storeroom and Cupboard Policy. That policy identifies that "the environment in a childcare centre includes all areas within: rooms, toilets, hallways, cupboards, storerooms, sheds, outdoor playground etc".

[217] Mrs Nkamba was cross-examined on this policy to suggest that she had not complied with that part of it which provides: "once the equipment has been taken out for morning set-up, the floor area at the shed or storeroom must be clear of any equipment. This allows staff to sweep the floor and ensure that no child can hide amongst equipment."

[218] It is clear, however, that on the date of the incident, Mrs Nkamba had not completed the task of taking out all of the equipment for morning set-up before she fell. Therefore, her obligation under that part of the policy had not yet arisen on that morning.

[219] Of greater importance is that part of the policy which states that:

> "Staff are to ensure all sheds are fully unpacked when setting up in the morning and to ensure all equipment is neatly packed away into the shed in a safe and secure manner."

[220] That part of the policy, although not requiring a check of the shed to be signed off each day, is consistent with there being a requirement to conduct a check, as was put to Mrs Nkamba and with which she implicitly agreed.

[221] The fact that Ms Katte gave no evidence of the existence of such a policy, or its observation by her the previous day, is consistent with Mrs Nkamba's evidence that despite there being a policy requiring a check to be conducted (and signed off) the

reality was different. From Ms Katte's evidence, one could not even be satisfied that she knew of the policy.

[222] It is also readily to be inferred that the policy was not complied with by Ms Katte in completing the close the day prior to the incident. It is readily to be inferred that the reality of which Mrs Nkamba gave evidence as a general proposition was in fact the reality of the day before the incident.

[223] There are other parts of the shed policy which are of some importance for reasons which will be developed later. They are those parts of the policy which provide:

> "All equipment is to be checked weekly and broken equipment is to be taken to the nominated supervisor/certified supervisor and reported immediately; and
>
> Every Monday the nominated supervisor/certified supervisor is required to check all sheds and document on the Monday checklist/programming checklist which sheds need to be cleaned."

[224] The existence of these policies which Mrs Nkamba implicitly acknowledged, but more so any evidence of their observance, particularly on the day preceding the incident, which was a Monday, would have been relevant to the defendant's pleading that the shed was tidy.

[225] The defendant led no direct evidence of the shed being in a tidy state. In so far as it might be inferred that the shed would have been in a tidy state because of the existence of a policy or policies which would ensure that end, I would not draw such an inference in the absence of any evidence of the observance of any such policies, either generally or specifically on the day prior to the incident. At least not to the extent that the pleaded tidiness of the shed would exclude the presence of a block on the floor.

[226] The provisions of the workbook as they relate to workplace health and safety generally, and hazard identification, reporting and rectification more specifically, and Mrs Nkamba's induction into them, are relevant to the consideration of the evidence concerning the state of the lighting inside the shed and whether the internal light was working or not.

[227] As already observed, the defendant does not plead that the internal light within the shed was working. Nor does it's pleading that the shed was well lit depend at all on the internal light contributing to that state of things. Notwithstanding that, various witnesses to whose evidence I have already referred testified to whether the light and its switch were working at the time and whether they had been party to a discussion with Mrs Nkamba about the fact that the light or switch were not working and whether this had been reported.

[228] In addition to the evidence already referred to, Samantha Lane gave evidence that at the relevant time she had been a nominated supervisor employed by the defendant at the childcare centre. Miss Lane gave evidence that the responsible person is the one who actually opens the centre in the morning. She later became a director of the centre but not until after the incident in about November or December of 2017. She said that if a staff member had a complaint, if they didn't feel they could go to her with it they could go to Stacie who was the other director or to "Tash" who was who she described as another director, or to head office.

[229] When asked specifically about staff complaints about safety, Miss Lane said "so they would let a director know". She said that at that time the directors were Stacie and herself. She went on to explain:

> "So, they would let a director know if there was a concern, or they could – depending on what the concern was, they can – there was access to a maintenance list. There was a filing cabinet with a list, a maintenance list attached to a clipboard with a sign if – when reporting maintenance how to document it. So it was like, an A4, laminated piece of paper, and it said, 'this is the maintenance list where you report incidents'."[135]

[230] Miss Lane was asked if she could remember around the time at least a week prior to 29 August 2017 as to whether the maintenance list was there. Miss Lane said it was and that "there were a few items written on it, but I don't recall what was on there. And the staff were – freely able to go into that room, that office, and write any maintenance issues on there, especially if we were not in attendance".

[231] When asked how staff would know that they were free to do that, Miss Lane said:

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135 Trial transcript 3-77.

> "Because we would talk at staff meetings about maintenance, handyman. At times we would walk around, directors, and ask, especially if we knew maintenance and handymen are coming to do work at the centre, we would walk around and ask staff if there were any concerns or anything – they knew that needed to be fixed."[136]

[232] She said the meetings were monthly.

[233] Miss Lane was asked about her going through business records to try and locate handyman job sheets. She identified a bundle of documents which she had located which she described as "our maintenance log". Of that document she said:

> "So, if it's for one and two, it normally will say, 'Woodcrest one and two'. So, when I send it to the boss, she knows what centre, so she can tell the maintenance man which centre the jobs have to get done at, and then have a copy of this list, and then they walk around and tick it off as it's completed".[137]

[234] She confirmed that the document was an accurate printout and presentation of the maintenance logs she found adding "and most of that is in my writing". When asked why it would be in her writing she explained:

> "Because when I walk around and ask staff, 'is there anything that needs to be fixed?', so when I did return to Woodcrest, I walked around a lot and had a look at what needed to be done, what the staffs feedback was, was there any concerns with anything, was there anything that needed to be fixed, because I didn't open every single cupboard. Staff work in the rooms, in the yards, and it's also their responsibility to let me know what needs to be fixed."[138]

[235] Miss Lane stated that she had not written down any complaint in relation to the Senior Kindy Yard and she didn't recall there being anything in relation to fixing any form of lights, and that she hadn't received any complaints to fix any lights.

[236] When asked if she was aware of whether any lights in the Senior Kindy Yard were broken, she said "not that I was aware of, no".[139]

[237] When asked what her system was for recording complaints made to her, she said "I record it straight away. I don't leave anything, I record it straightaway".[140]

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136 Ibid 3-78.
137 Ibid.
138 Ibid 3-79.
139 Ibid
140 Ibid 3-80.

[238] She said the record was made "onto the maintenance log. And if it's something that is urgency [sic], especially when it comes to leaking pipes or anything that's of urgent, I get someone out straight away".

[239] When asked specifically about broken lights, she said:

> "Well, if it's broken lights and there's no lighting at all to be able to see in a yard or in a room, they would get fixed, especially exit lights as well as inside the service because we rely on the exits lights when we're exiting when we're doing drills".[141]

[240] When asked if those were matters that she would "action quicker than the maintenance log" she said:

> "Yes. Yep. It depends on what it is. So, there's – when – if – if something comes to my attention, if it's something like a blocked toilet or a plumbing issue or there's exposed wires, if there's a safety issue, we get someone out straight away as soon as I'm aware, but it's hard to get someone out if you're not aware of something".[142]

[241] The document which Miss Lane had been referring to was not an original document. It was a copy. When asked by the court about the original document Miss Lane explained:

> "So, when we do a maintenance log, we scan it and send it off to the owners. And then, once the jobs are completed, we dispose of the list. We don't keep paper copies".[143]

[242] The bundle of copy documents became exhibit 23. It comprises 12 copied pages. Three pages bare the handwritten notation "WDC 1 and 2". Five pages bare the handwritten notation "July 17-WDC 1 and 2". Four pages bare the handwritten notation "WDC 3 and 4".

[243] Each is a proforma printed document titled "handyman job sheet". Each has two columns respectively titled "job location" and "comments". There are ten rows to each proforma printed sheet although on some sheets there are entries below the printed rows. Handwritten notations appear in the column headed "job location" in which a description of the maintenance were required as set out.

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141 Ibid.
142 Ibid.
143 Ibid 3-82

[244] Miss Lane could identify only two entries in the 12 sheets or some 120 or so entries which were not hers. Those two entries which were not Miss Lane's, perhaps in greater conformity with the form, had a location recorded in the "job location" column and a description of the works required in the "comments" column. For each of Miss Lane's entries she had included a combination of those matters in the "job location" column. Most notably, however, was the complete absence of any notation indicating the action taken in respect of any of the works or the time at which they were actioned.

[245] Miss Lane was cross-examined about a statement she gave to Workcover on 14 January 2019, the same day upon which the photographs at pages 75 to 83 in exhibit 1 were taken. Those photographs include the broken light switch for the internal shed fluorescent light.[144]

[246] Miss Lane confirmed that at no time had she made any enquires about when or how the internal light in the shed operated or whether it was operating. She said:

> "No, so when the – when the – the lady who came and did the investigation, she took a photo of the light switch, and it looked that the light switch little button had pointed in, and that was – as soon as I – she said – took the photo of it, I got that fixed pretty much straight away".[145]

[247] She accepted that on 14 January 2019 the internal shed light had a defective switch and said "but I could not say that it was defective at the day of the incident. I would not know because no one – no one informed me".[146]

[248] When asked if it might have been defective on the date of the incident she said "that's – I don't know".[147]

[249] When it was put to her that Mrs Nkamba says that it was not working on that day, Miss Lane responded:

> "Well, I don't recall because no one brought it to my attention, and it wasn't documented, and no one had voiced the concern that there wasn't enough lighting. With all the staff that open in the mornings and close at night, no one has brought it to my attention".[148]

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144 Page 83.
145 Trial transcript 3-92.
146 Ibid.
147 Ibid.
148 Ibid.

[250] Upon hearing that response, the court asked:

> "So do I take it from that, Miss Lane, that the system for reporting defects evidenced in the schedule of job maintenance records that we've seen might be such that there might not be a report of a defect such as a light switch with the rocker button pushed through for a period that might exceed 16 months?"[149]

[251] Miss Lane's answer was "Correct. No one had brought anything to my attention of any form of a light, and if they had, I would have had it fixed".[150] It is to be borne in mind that the discovery of the faulty switch was only made in the course of WorkCover's investigation. The Defendant's system, even at the time, did not identify it.

[252] Mr Newton drew Miss Lane's attention to the "comment" column of the handyman job sheets and asked how the next step of showing that somebody actually had dealt with the complaint was performed. Miss Lane said that the maintenance crew would tick off on the log when they had completed the task. She said:

> "They get a copy of that log when they come to the service. Its hanging on the clipboard, and as they complete the jobs, they tick them off to say that they've been completed."[151]

[253] She confirmed, though, that the copy that they ticked off on was not scanned to head office, only the one that hadn't been ticked off.

[254] Miss Lane then described the process by which she prepared the next maintenance log by including in it items which were on the previous log, but which had not been ticked off, but not those items which had been ticked off. She said, "I don't write a job down if the job has been completed."

[255] She illustrated the point with the following example:

> "If our maintenance crew had come yesterday, I would sit down and start developing next months and I would look at what they've completed, and if they haven't completed at all, I would then transfer it onto the next one".[152]

[256] When asked by the court, Miss Lane confirmed that from the documentation she could not establish any date upon which any of the entries in the log were made and

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149 Ibid.
150 Ibid 3-93.
151 Ibid.
152 Ibid.

nor could she establish any date upon which any of the matters entered were in fact actioned.

[257] Miss Lane was re-examined about whether the jobs on the maintenance records were, in fact, actioned. She said "Definitely. They all would have been actioned by now. They would have been actioned – most of them – depends on what needed to be done. If it was something as simple as filling in a garden bed with soil, that is not a priority task. So, it's all about prioritising what needs to be done."[153]

[258] She again confirmed that she would not be able to know when a particular matter was actioned unless she looked at the following months log to make sure it wasn't written on it. Those are documents not in evidence and seemingly never retained.

[259] Miss Lane identified Felix Garden Maintenance as the organisation which provided the services. Shortly following this evidence, Mr Newton, made an admission that a bundle of thirteen Felix Garden Care and maintenance documents dated between 26 July 2017 and 4 September 2017 did not reflect any repair of the internal light of the shed.

[260] Mr Newton would later submit that because the light switch was an electrical problem for which the services of an electrician would be required, it may not have been a matter which would be recorded in the maintenance log. That submission is unsupported by the evidence. The maintenance logs in exhibit 23 contain nine entries of an electrical nature including seven related to lights.

[261] Nonetheless, I cannot be satisfied that the absence of any reference to the internal shed light establishes either that the light must have been working or that there had been not report of it by Mrs Nkamba to Natash Katte, the week prior to the incident. Nor can I be satisfied that the absence of any reference to it in the logs establishes that there must not have been a discussion between Mrs Nkamba and Beth Westgate on the morning of the incident about the need for the light to be repaired having been recorded in the log.

[262] If the evidence of Miss Lane was intended to establish that the defendant had a system by which faults or defects requiring repair were identified by staff, recorded

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153 Ibid 3-99.

and addressed, it wholly failed to do so. To the contrary, Miss Lane's evidence supports a finding that the system relied upon for such matters was deficient. The fact that so few entries were made by staff other than herself suggests that insofar as the system included staff knowing that there was a log in which they could record maintenance issues, the evidence suggests that the system was not followed.

[263] Rather, the evidence supports the finding that, in practice, any system relied upon oral reporting from one staff member to another and, ultimately, to Miss Lane who would then record the issue in the log. The potential for such a system to fail such that issues requiring rectification may be overlooked and not recorded is real.

[264] Any system, such as it is, that relied upon Miss Lane, such that it was, that relied upon Miss Lane reproducing new logs from old logs on the basis of excluding in the new log items which had been addressed and including those which had not, also had a significant inherent risk that items which had in fact not been rectified would be inadvertently overlooked in the transposition of entries from one log to another. This risk was even more evident from the fact the date upon which action was taken was never recorded. Moreover, the inherent weakness of the system and the manifest risk that items requiring rectification or repair might be overlooked could be no more clearly demonstrated than by Miss Lane's further candid admission that a matter such as a faulty light switch might go unreported and, that therefore, unaddressed for more than 16 months and, even then, discovered only inadvertently by a third-party agency investigating a workers compensation claim. This last point being so clearly demonstrated by Miss Lane's candid acknowledgement that she could not identify the date upon which any entry in the maintenance log was either made or actioned.

[265] To the extent that there was a system, it was, in my opinion, on the evidence, one as likely to fail as to succeed.

[266] For reasons which will be developed later, these conclusions also have a bearing upon the defendant's contention that the plaintiff was guilty of contributory negligence because she failed to adhere to this system of reporting defects.

Conclusions as to how the plaintiff came to fall

[267] I am comfortably satisfied that, on the balance of probabilities, the incident occurred, essentially, in the way posited by Mrs Nkamba. An undetected block was on the floor of the shed at the time at which she was unpacking the shed to set up the Senior Kindy Yard. Particularly, at the time at which she was removing the A-frame structures for the obstacle course. In the process of dragging out the A-frame structure, the block was projected from its resting position on the floor of the shed to the artificial grass area on the ground outside the shed. In the process of walking backwards as she continued to drag the A-frame, she stood on the block and fell.

[268] Ms Perkiss' proposition to the plaintiff in cross-examination that she did not know precisely what happened is valid. So too, however, is the plaintiff's response to Ms Perkiss' suggestion that she was simply making an assumption as to what had occurred. Mrs Nkamba's response was that it was her reasoning, not her assumption. This is correct. There are certain facts known to her:

(1) she stood on or "tripped" on a block;

(2) she had not seen the block on the ground outside the shed on which she stood on it on the several occasions upon which she had crossed that ground that morning to enter and exit the shed;

(3) she had dragged the A-frame and, in doing so, its base moved across the surface of the floor of the shed;

(4) it is a mechanism which could cause an unseen block in its path on the floor to be projected such that it dropped from the floor inside the shed to the ground outside the shed;

(5) that action immediately preceded her stepping on the block;

(6) she can think of no other mechanism because she did not, for example, knock the shelving on which the blocks are stored (an alternative possibility advanced by the defendant);

(7) because it was dark inside the shed, she would not have seen the block on the floor;

(8) because she was walking backwards, she would not have seen the block which had been projected behind her to the ground.

[269] This is not the plaintiff making an assumption. To assume something is to take it for granted without proof. The plaintiff has not simply assumed these matters by taking them for granted. She has come to her "understanding" of what happened by a process of reasoning from facts she knows and from inferences which may reasonably be drawn from those facts, either on their own or in combination.

Indeed, it is the very process of reasoning which a tribunal of fact must undertake in any case in which there is any circumstantial evidence. It is the process of reasoning that this court must undertake in this case to conclude what, on the balance of probabilities, occurred on that day to cause the plaintiff to fall and be injured.

[270] In my opinion, it is what has been proven on the evidence and on the balance of probabilities to have occurred.

[271] Although, on the pleadings, the defendant does not admit that the plaintiff stepped on a block, the case has been conducted in a way, that accepts she indeed did so and that this occurred on the area of artificial grass immediately outside the shed.

[272] Accepting that this is clearly established, the presence of the block in that location must be explained. All of the evidence points to the conclusion that it came to be there in the course of the morning sometime after the arrival of Mrs Nkamba and Ms Westgate. The evidence supports no other conclusion for a number of reasons. First it is unlikely that the block would have been left lying in that location the previous evening. There was generally evidence of the grounds being checked at the end of the day. More specifically was Ms Shanks' evidence of a walkthrough of the outside area to make sure nothing was left on the ground and Ms Katte's evidence of a walk around check being conducted at the end of the day in all the yards during which they would be looking for any objects left lying about and that if any were found they would be picked up and taken inside. She specifically mentioned Lego blocks amongst the items which might be left lying around.

[273] I find that it is improbable that, had the block been in that location outside the shed the previous day, it would not have been discovered during the walk around and picked up.

[274] Secondly, it is uncontroversial that Mrs Nkamba had entered and exited the shed several times that morning prior to the occasion on which she stood on the block. The only real significance of her having entered and exited the shed several times earlier in the process of setting up is that, as she said, she would have seen or kicked the block had it been on the ground prior to her pulling out the A-frame.

[275] I would conclude from all the evidence about external lighting that had the block been on the ground on any of those earlier occasions she would have seen it. That she didn't supports the conclusion that it was in the process of dragging the A-frame that the block was projected from the floor of the shed to the ground outside.

[276] Once it is accepted that the block was not in that position on the ground outside the shed on those earlier occasions, then its projection by the mechanism of dragging out the A-frame becomes the only rational inference to be drawn. The only person entering and exiting the shed was Mrs Nkamba; so, no other person could have caused the block to be moved to the position. There is no other activity performed by Mrs Nkamba which could explain its presence there. The case conducted by the defendant that Mrs Nkamba knocked the block from the shelving to the ground was, for reasons explained above, conducted on a misunderstanding of what she had described in the incident report. It is also a mechanism which I would find improbable on the evidence. For that to have been the mechanism would have required some part of the equipment or Mrs Nkamba's body to have come in to contact with the block or shelving on the right-hand side of the shed. The positioning of Mrs Nkamba's body in dragging the A-frame out, holding it in the middle as she described, would suggest that it would be unlikely that her body would come into contact with the shelving. The tapering of the A-frame from base to apex would make it unlikely that it would come into contact with the shelving.

[277] The improbability of the block having been knocked to the ground by Mrs Nkamba leads to a third reason why the evidence establishes the projection of the block by the dragging of the A-frame as the probable mechanism by which it came to be on the ground outside; it was on the floor of the shed when Mrs Nkamba commenced dragging the A-frame out and was somewhere in the path of the base as she dragged it. Once the theory that she knocked it from the shelf to the floor is discarded, there is no conclusion open on the evidence other than it was already on the floor.

[278] That conclusion can be more comfortably reached when it is apparent that any system of work requiring a review of the shed after it was packed up to establish that it was clean or tidy, which was put to Mrs Nkamba and which she implicitly accepted, but which she said in reality was not observed, was in fact not followed the previous day. Ms Katte gave no evidence of having done so when closing the

previous day, despite it being opened that she would. As Mrs Nkamba has said the reality did not accord with the policy.

[279] Once it is accepted that it was already on the floor, there is no explanation open on the evidence for it having gone from that location to its later location outside the shed other than it having been projected there in the course of the A-frame being dragged out.

Conclusions as to the timing of the incident

[280] It is impossible to conclude from the evidence the exact time at which the incident occurred. However, on the balance of probabilities I find that it occurred at about 6:05am. That finding requires a rejection of Mrs Nkamba's evidence that the incident itself, her locking the shed following it and her hoping back to the centre, all occurred before 6am and of her evidence that her identification of 6:05am as the time of the incident in the incident report was in fact the time at which she was filling out the report. It seems unlikely that she would be completing an incident report within as little as five minutes after the event.

[281] The fact that Mrs Nkamba also recorded the time of the incident as 6:05am in the WorkCover claim form also supports my conclusion. The claim form was completed on the same day as the incident report, that is the day of the incident. It would not have been necessary for Mrs Nkamba to complete the claim form by reference to the incident report and the time identified in it.

[282] My rejection of Mrs Nkamba's evidence on this single issue does not cause me to have concerns for her credibility, or the reliability of her evidence, more generally. Particularly, I am inclined to accept Mrs Nkamba's evidence about the particular events of the day and in the period immediately preceding them. She is more likely to recall these events as they had a significant impact upon her. I formed the impression that she was genuinely recalling events of which she had an actual memory to the best of her ability. That is to be contrasted with the evidence of other witnesses for whom these events were of little relevance and who were clearly reconstructing events based not upon actual memory of them but upon likelihood based upon their general recollections of what usually occurred rather than what actually occurred on the particular occasion. That is understandable. As Ms

Westgate frankly conceded, well over three and a half years had passed since the incident before she was first asked to recollect the events.

[283] Having concluded that the incident occurred at approximately 6:05am, two further observations should be made. First, that it was still before the agreed time of sunrise that day being 6:06am. Secondly, while there was no evidence to led as to the state of daylight one minute before sunrise or five minutes before sunrise, simple life experience would lead me to conclude that there would be little appreciable difference in the overall condition of the natural lighting in that five-minute period.

Conclusions as to the state of the lighting

[284] Those two observations lead to a consideration of what the lighting conditions were at the relevant time; both outside and inside the shed.

[285] Dealing first with the outside area. I conclude that the outside areas were adequately lit. I conclude that the adequacy of the lighting was due, predominantly, to artificial lighting rather than natural daylight. I reach that conclusion for a number of reasons.

[286] Notably, nobody, and Mrs Nkamba in particular, gave evidence of any difficulty in performing the work in setting up the yards due to poor or inadequate light. Indeed, the evidence is to the contrary. As I have already identified, one of the matters that leads to the conclusion that the block was not on the ground outside the shed earlier was, as Mrs Nkamba said herself, it would have been seen by her on one of the earlier three occasions she had entered and exited the shed.

[287] As I have already recorded, Mrs Nkamba must be mistaken in her recollection that the light on the shed fascia was a "normal" light and not a floodlight; but that is of no consequence. Whatever the kind of light it was, on Mrs Nkamba's own evidence, it was adequate to light the relevant area of ground outside the shed.

[288] Next, I would conclude that the relevant area of grass outside the shed was lit by the floodlight with little, if any, contribution from other artificial lighting sources. The evidence concerning those other potential sources was vague and unpersuasive. I have already made observations about Ms Wood being an unimpressive witness in

that regard and in other ways. In the absence of meaningful evidence about the nature, location and strength of those light sources it is impossible to conclude what, if any, contribution they would have made to the lighting in the relevant area. However, even in the absence of any such evidence, one does not have to be expert in the properties of light to conclude that if an area is directly lit by a 50-watt LED floodlight the contribution of other distant, indirect light sources to the illumination of that area will be, at best, negligible.

[289] Next, I would conclude that it was that floodlight, rather than any pre-sunrise natural light that, predominately, caused the area to be adequately lit. Again, it was before sunrise. Mrs Nkamba's evidence was that it was still dark. Others gave evidence of the condition of the daylight on that day or more generally at that time of the year; but it was entirely speculative and of little if any probative value. I would conclude, however, that as sunrise was approaching there would be some emerging natural light. Again, however, the direct illumination of a 50-watt floodlight would overpower, in terms of illumination, whatever natural light there may have been.

[290] The state of the light within the shed is a different matter. I am satisfied on the balance of probabilities that neither the floodlight on the fascia of the shed, nor natural daylight, nor any of the speculated other light sources, provided adequate lighting to the inside of the shed.

[291] Mr Humphrey's evidence was that the floodlight faced outward and not down. Although some light would go into the shed, it was not designed to illuminate the inside of the shed. It would, he said, light the steps. Ms Westgate's evidence was that the light from the floodlight would go about one foot into the shed. That would be broadly consistent with Mr Humphrey's view. Ms Westgate's evidence was that there was a limit to how far the light outside the shed would permit her to go into the shed. She would not proceed beyond that point because it would be, in her words unsafe to do so.

[292] More generally, Ms Westgate agreed that if the internal light within the shed was not working, the light at that time of day would be fairly inadequate to see the back of the shed. This is consistent with Ms Westgate's evidence about the procedure which would be followed by those staff performing the opening. Although again

given in a generalised way about usual procedure, Ms Westgate said that upon opening the shed the internal light would be turned on. This evidence also suggests an inadequacy of light within the shed in the absence of the internal light.

[293] As identified earlier in these reasons, the defendant pleads, perhaps somewhat inconsistently, that the shed was well lit by a floodlight above the roller door which provided light to the area immediately inside the roller door[154] and that the shed was well lit by natural light and a floodlight which lit the area inside the shed.[155]

[294] No part of the defendant's pleaded case relies upon the internal shed light to establish the adequacy of the lighting provided. Yet the defendant's evidentiary case was directed towards proving that the internal light was not only operational but illuminated on the day in question. Contrary to its pleaded case, the defendant's evidentiary case also proved, in my view, the inadequacy of the lighting within the shed in the absence of the internal light. It proved that neither the floodlight itself nor natural daylight, nor their combination, adequately lit the inside of the shed.

[295] In this regard several of the defendant's written submissions failed to engage with the plaintiff's final pleading as to the extent of any light shone into the shed by the light on the fascia. The defendant identifies, as one of the competing pleaded allegations upon which the case turns, "whether the light above the shed was of poor quality such that it did not shed *any light* in the shed? The defendant denies that allegation on the basis that the weight of evidence was that some light, albeit to what extent, which is in issue, did shed light into the sky shed" [sic].[156]

[296] Later,[157] the defendant submits that the plaintiff's claim should be dismissed, amongst other reasons, because "the plaintiff did not lead any evidence that would prove, on the balance of probabilities, that the light above the shed was such that it did not shed *any light* into the shed" and because "the plaintiff has not proved, on the balance of probabilities, that the floodlighting on the front face of the shed was poor such that it would not shed *any light* into the shed".

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154 Defence, para 3(d)(viii)(a).
155 Defence, para 3(g)(i)(ii)(c).
156 Defendant's written submissions, para 25(c).
157 Paragraph 26(b)(h).

[297] Those submissions failed to engage the plaintiff's pleaded case because by her Further Amended Statement of Claim she pleads that she could not and did not see the block in the shed because a regular overhead light (as distinct from a floodlight of any description) on the building face was of a poor quality and did not shed any or any adequate light in the shed and the internal fluorescent light did not operate at the time probably because the switch was defective. It was not the plaintiff's, ultimate, pleaded case that the light on the face of the shed cast no light at all into the shed. This is in fact recognised in paragraph 48 of the defendant's written submissions.

[298] On the findings I have made, the light on the fascia of the shed did not cast any adequate light into the shed, notwithstanding that, as I have found, it was in fact a floodlight.

Conclusions to the condition of the internal shed light

[299] I am satisfied, on the balance of probabilities, that the internal shed light was not working on the day of the accident.

[300] The competing direct evidence of the day comes from Mrs Nkamba who says that it was not and Ms Westgate who said it was. For two reasons, Mrs Nkamba's evidence is to be preferred.

[301] As set out earlier, Ms Westgate, having identified, in a general way, that turning on the light would be the first thing done after opening the shed before proceeding to unpack the equipment, went on to identify the fluorescent light in the photograph as that which she turned on that day. Having then been more equivocal and said that either she or Mrs Nkamba would have turned it on, she nonetheless said, specifically, that the light was on. Having then readily conceded in cross-examination that she really had no recollection of what really happened on the day in question, Ms Westgate, nonetheless, when pressed, firmed up her position from having said in one answer that the light "would have been working" to being adamant that it was. The ultimate adamancy of her evidence that the light was working on that day, against an obvious and conceded absence of any actual recollection, requires that evidence to be approached with great caution. It has the hallmarks of partiality. In my assessment it was evidence simply given to better the case for the defendant.

[302] On the evidence, there is every reason to conclude that it was Mrs Nkamba who opened the shed on that morning. On the evidence, and indeed the defendant's own pleaded case, there was every reason for Mrs Nkamba to have opened the shed and no reason for Ms Westgate to have done so. There is no evidence to even place Ms Westgate at the shed at any time such that she might have observed whether the light was working or not.

[303] Ms Westgate denied the conversation Mrs Nkamba said took place between them in which she was said to have said "You do the Senior Kindy, I will do the other side", but in any event, for some reason, there was a departure from the normal best practice that the set up was done by two persons; at least to the extent that Mrs Nkamba was working alone accessing a storage shed to set up an obstacle course.

[304] It is the defendant's pleaded case that Mrs Nkamba was working alone accessing the storage shed. The evidence established that any member of staff can access the keys to the shed. Whether they were working "under pressure" or not, the evidence clearly establishes that there was limited time. That would also seem to be the only explanation for the departure from normal best practice that they work together. I would readily conclude that all staff engaged in the set up were busy at that time doing those tasks required of them. There is no evidence to suggest that any task being performed by Ms Westgate required her to go to the shed. On the other hand, it is uncontroversial that Mrs Nkamba's assigned tasks required her to make several trips to and from the shed – the accident occurred on the 4th.

[305] In those circumstances, it simply flies in the face of logic that it would be Ms Westgate who opened the shed and turned on the light, for no apparent reason, as opposed to Mrs Nkamba who had every apparent reason to do so.

[306] Once Ms Westgate's evidence is discarded, as I am of the view that it must be on this issue, the only direct evidence is that of Mrs Nkamba. I accept that evidence and would do so even without any other evidence in support. It having been in some condition of disrepair is consistent with Mrs Nkamba's evidence that when she would attempt to switch on the light, she would have to fidget with it. However, the fact that there was later found to be a broken switch supports that evidence. Because that discovery was made 16 months after the day of the accident, I might have had

some reluctance to conclude that it was in fact supportive of the switch having been in that, or a similar, condition at a time so much earlier. That reluctance is, however, relieved even if not entirely removed, by the concession by Miss Lane to the quite extraordinary circumstance that she could not say whether or not it had been in that condition 16 months' earlier because the system of reporting defects was such that it might go unreported.

[307] Further evidence which tends to support Mrs Nkamba's evidence that the light was not working is the evidence of Ms Westgate which demonstrated that she knew the extent to which the external light cast light into the shed and that it would be unsafe to proceed past that point depending upon other light sources. Those matters, as I have said, suggest that there may have been an occasion or occasions on which the internal shed light was not working.

[308] To that may be added that Natash Katte had no recollection at all of whether the light was working in the week prior to the accident when she was opening with the plaintiff.

[309] Having been satisfied that the light was not working I am also satisfied that the light within the shed would have been inadequate for Mrs Nkamba to have seen a block on the floor positioned in the path of the A-frame at any point further into the shed than about one foot being that part of the shed partially illuminated by the external floodlight.

[310] On the balance of probabilities, I am satisfied that the block must have been so positioned; that is, beyond the illuminated section of the shed.

Was the defendant "on notice" about the lighting defect?

[311] From the way in which the case has been conducted it would seem that the plaintiff's allegation that the defendant was "on notice" of the defective light refers to Mrs Nkamba having told Natash Katte about the problem the preceding week and Natash having said that she would put it in the maintenance book, and Ms Westgate having acknowledged an appreciation of the problem on the morning of the accident by saying that it was in the maintenance book to be fixed.

[312] The first question, so it seems to me, is whether those conversations occurred. The second is, if they did, did this place the defendant on notice of the problem as alleged.

[313] Natash Katte said that she could not recall such a conversation with Mrs Nkamba in the preceding week. As already discussed, though, she has no recollection at all whether the light was working that week or not.

[314] As set out earlier, when put to her that there had been a conversation on the morning of the incident in which she had told Mrs Nkamba that the light had not been fixed but that it was in the maintenance book to do, Ms Westgate had twice answered, with the similar equivocation to that of Ms Katte, "I don't recall that conversation".

[315] Her response to the possibility that there could have been such a conversation was, in my view, unpersuasive. Her reason for rejecting that possibility was that she believed the light in the shed was always working. That reason, a belief that the light was always working, does not sit well with other evidence of Ms Westgate to which I have referred which suggests that there may have been an occasion or occasions when the light in the shed was not working. In my view, her evidence on this issue is another example of her moving, in the course of giving evidence, from a more understandable position of equivocation or uncertainty to a more certain position for reasons which are discordant with other evidence, including aspects of her own evidence. Such movement is, in my view, consistent with my impression that Ms Westgate in her evidence demonstrated a partiality intended to better the case of the defendant.

[316] For these reasons, I prefer the evidence of Mrs Nkamba to that of Ms Westgate on this issue.

[317] Having preferred the evidence of Mrs Nkamba and being satisfied that there was such a conversation with Ms Westgate, that assists in satisfying me that the conversation with Ms Katte, as described by Mrs Nkamba, also occurred. The conversation with Ms Westgate was in the nature of a follow-up: "Has the light in the shed been fixed?". This is consistent with Mrs Nkamba having previously raised the issue such that she might enquire as to whether it had been fixed.

[318] Mrs Nkamba says the earlier conversation occurred the previous week when she opened with Ms Katte. Ms Katte's evidence was that they did work together in opening that week. Ms Katte said she was the person in charge because she was the certified supervisor. Mrs Nkamba's evidence that Ms Katte being the person who was in charge saying she would record it in the maintenance book is consistent with the policies in the centre. Although directed to matters other than defect reporting, the policies in the induction workbook demonstrate a number of requirements for issues, including incidents with children and concerns of parents, to be reported by staff members to the nominated supervisor or certified supervisor. In my view, raising the matter with Ms Katte who was the certified supervisor is consistent with that and the hazard reporting process set out in the induction workbook and thus the defendant's policy.

[319] That nothing is recorded in the copy of the maintenance log about any defect in the shed lighting does not cause me to conclude that Mrs Nkamba must not have raised the issue with Ms Katte. Although Ms Katte said in cross-examination that if there was a lighting problem, she would both report it to a director and put it in the maintenance log, her initial response was that she would report that to the director. Her earlier evidence had been that she had never had to report anything to do with lighting, so her evidence as to what she would do is not evidence of what she had done.

[320] The copy maintenance logs in evidence do not support a finding that staff, as Ms Katte and others suggested, would both report maintenance issues up the chain of supervision and also record the issues themselves in the maintenance log. That only two entries in the copy logs were made by someone other than Miss Lane strongly suggests the contrary. The logs strongly suggest that although they may have been available for any staff member to make entries in them, in practice any maintenance issues were verbally reported such that when they reached Miss Lane, she would write them in the maintenance log.

[321] In my view, inherent in such a system is a likelihood that some issues will be overlooked such that they either do not come to a director's attention (Miss Lane's in particular) and do not get written in the log by other staff. The fact that the broken light switch discovered in the course of the WorkCover investigation

apparently was either never reported or never recorded in the log, together with Miss Lane's frank concession that it may have been unaddressed for 16 months, strongly supports this conclusion. In my view, there is also the real possibility that Miss Lane may overlook making an entry in the maintenance log.

[322] Furthermore, because no record is kept of when any particular maintenance issue has been addressed or rectified, and Miss Lane's process is one of writing up a new log from the last log, excluding what had been actioned, there is a very real possibility that an item once on the log and not actioned will be overlooked and inadvertently excluded in the preparation of the next log. If an issue fell through the cracks in the system, it would go unaddressed.

[323] For these reasons, I would not conclude that the absence of any reference in the copy maintenance logs of a lighting issue in the SKY shed or at or about the time of the incident tends to prove that there was no such issue or that it had not been reported by Mrs Nkamba as she said she had.

[324] I am satisfied that Mrs Nkamba reported the issue to Ms Katte as the certified supervisor. I am satisfied that reporting it to her in that way conformed with the practice in the defendant's centre and its policy.

[325] Having reported the issue in that way, I am satisfied that the defendant was on notice of the issue as alleged by the plaintiff.

Is it necessary that the defendant was "on notice"?

[326] It should be noted that the plaintiff's allegations of the defendant's negligence extend beyond the failure to rectify the lighting defects and an exposure of her to a risk of injury from the absence of proper lighting when it was on notice of the problem. More broadly, the plaintiff pleads that the defendant was negligent by failing to provide adequate and suitable floodlighting in the shed and on the front of the building.[158] The inclusion of "in the shed" was made by amendment. I would not read that part of the pleading literary. The case was not conducted on the basis that there ought to have been flood lighting in the shed. That part of the pleading ought to be understood as a pleading of a failure to provide adequate lighting in the shed.

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158 Further Amended Statement of Claim, para 5(e).

[327] Given that the pleading of the defence relies in no way upon there being a light within the shed to answer the allegations of inadequate lighting, relying only external lights and natural lighting to establish the adequacy of the lighting, the plaintiff could, strictly, succeed on this issue even in the absence of proving that the defendant was on notice of the lighting issues. This is reflected in a concession made by the defendant at paragraph 139 of its written submissions where it says:

> "The defendant submits that should the plaintiff, who bears the onus of proof, satisfy the court that the lighting was, on 29 August 2017, poor and further that the internal shed light was defective because of a broken switch, then it will concede that the risk of suffering an injury while unpacking the shed was foreseeable and it was also not insignificant. However, it denies it breached its duty of care."

[328] This concession can be contrasted with another made earlier, inconsistently, at paragraph 55 of the defendant's written submissions. There, the defendant had submitted:

> "If the defendant had actual knowledge that the internal shed light was defective and that the lighting conditions at the time were poor, then the defendant accepts that the risk of injury to the plaintiff was foreseeable within the meaning of s 305B(1)(a). If the plaintiff fails to prove the matters above, the risk of injury is not foreseeable."

[329] The "matters above" were the plaintiff's allegations that the defendant was on notice of the defective lighting.

[330] I reject this earlier submission. It suggests that the plaintiff must prove not only that the defendant knew that the shed light was defective, but also that it knew that the lighting conditions at the time were poor.

[331] On the defendant's pleaded case, which depends in no way upon the shed light to establish adequacy of lighting, knowledge, even knowledge of a defective light, is irrelevant. This is, correctly, reflected in the concession made at para 139. Proof of a defective light would be sufficient. Knowledge of that need not be proven.

[332] This is also consistent with the way in which the case for the defendant was conducted. This is best demonstrated by the case as put to Mrs Nkamba in cross-examination. Having asked Mrs Nkamba if she could be mistaken as to whether the light inside the shed was working or not, and Mrs Nkamba having answered that the

light inside the shed was not working and that the switch was broken, it was put to her:

> "And I'm going to suggest to you that the light – **irrespective of whether the light in the shed was on or off, the external light – the 50- watt light, – is sufficient enough to highlight and light up the entire senior kindy yard --- including the shed.**" (emphasis added)

[333] A suggestion with which Mrs Nkamba disagreed.[159]

Statutory Framework for Liability

[334] Civil liability for an injury to a worker arising out of course of their employment is governed by chapter 5, part 8 of the *Workers Compensation Rehabilitation Act* 2003. It is uncontroversial the defendant owed a duty of care to the plaintiff.

[335] S 305B provides:

> "**305B General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury."

[336] The plaintiff submits that "the true source of the potential injury is the risk inherent in either failure to properly clean and pack the shed the night before and/or the additional source that if one does not have proper lighting in or into the shed, one may not detect the problem and of course in this case, the causal mechanism is the

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159 Trial Transcript 1-72.

existence of that block on the floor of the shed, undetected by the plaintiff and apparently dragged out of the shed in the setup up process".[160]

[337] The defendant submits "that it is appropriate to identify 'the risk of injury' for the purpose of s 305B(1) as the risk to a worker, such as the plaintiff from suffering personal injuries in circumstances where the plaintiff did not, and could not, see an object on the shed floor because, as particularised:

> (1) an overhead light [above the shed] was of poor quality; and
>
> (2) the internal light was not operational at the time".[161]

[338] The plaintiff's characterisation of the risk is to be preferred. It, correctly in my opinion, identifies that the risk emanates from the presence of the block on the floor. It identifies that the lighting issues are an alternative or additional source of risk. In my view, the lighting issues were an additional source of risk or, more accurately, increased the risk that the block would go undetected, for reasons I shall later address when considering factual causation.

[339] The defendant's characterisation of the risk requires there to have been the lighting issues before there was any risk. It confines the risk to circumstances where the block could not be seen. It ignores the risk posed by the mere presence of the block on the floor.

[340] In that regard, another submission of the defendant should be rejected. It relates to whether the risk of harm was foreseeable. The submission is that "the plaintiff's case is not the defendant *ought* to have been aware of the alleged lighting issues, but rather one of actual notice".[162] That submission followed immediately a passage from the judgment of Garling J in *Benic v New South Wales*[163] where it had been said:

> "In my opinion, the plaintiff must satisfy the Court that the defendant, at the date of the alleged negligence, knew of the alleged risk of harm, or else, by reference to other facts, matters and circumstances ought to have known it. Those other matters will vary from case to case but may include such things as the common knowledge and experience of others in the similar position of the

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160 Plaintiff's written submissions, p 14, para 2.
161 Defendant's written submissions, para 49.
162 Defendant's written submissions, para 52.
163 [2010] NSWSC 1039 at [92].

> defendant, public notoriety of a particular risk of harm, publications and academic knowledge which might be expected to be read by people in the defendant's position and the obviousness or the likelihood of the event happening when using common sense."

[341] It is important to understand that the knowledge his Honour was there referring to was knowledge of the alleged risk of harm. It was the foreseeability of that risk, whether because the defendant knew of it or ought to have known of it, to which his Honour was referring.

[342] The defendant's submission, purportedly based upon that passage, confuses knowledge of the risk of harm with knowledge of particular facts; the light issues. To say that the plaintiff's case is not that the defendant ought to have been aware of the lighting issues, but rather one of actual notice, misdirects attention from the proper subject of knowledge, the risk of harm, to a singular factual issue, albeit one which may relate to the risk.

[343] In *Walker v Greenmountain Food Processing Pty Ltd*,[164] Applegarth J explained the identification of risk of injury in this way:

> "In applying the relevant provisions, the risk of injury must be identified so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. The "risk of injury" referred to in the section is not to be confined to the precise set of circumstances in which the plaintiff was injured. It is well-established that, in order that a defendant be held to be negligent, it is not necessary that the defendant should have reasonably foreseen that the particular circumstances in which the plaintiff was injured might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred. Necessarily, the risk must be defined taking into account the particular harm that materialised and the circumstances in which that harm occurred. As Leeming and Payne JJA stated in *Coles Supermarkets Australia Pty Ltd v Bridge*:[165]
>
> > 'What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury … or because it too narrowly focuses on the particular hazard which caused the injury …, or because it fails to capture part of the plaintiff's case'."

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164 [2020] QSC 329 at [77].
165 [2018] NSWCA 183 at [22].

[344] Applying that reasoning to this case, the risk of injury here is not to be confined to the precise set of circumstances that a block originally left lying on the floor of the shed might be projected to the area outside the shed and there upon be stood on by a worker walking backwards dragging an A-frame. It is sufficient in this case to identify the risk of injury as that of a worker suffering personal injury as a consequence of stepping upon an object left lying about the presence of which was undetected by the worker. That is the risk which the defendant knew or ought to have known for it to be foreseeable. Understood in this way it was entirely foreseeable.

[345] On the evidence, the defendant had actual knowledge of that risk. It is reflected in its Shed, Storeroom and Cupboard Policy at s 51.0 of its Induction Book requiring staff to ensure all equipment is neatly packed away in the shed in a safe and secure manor. It is perhaps also reflected in that part of the shed policy requiring staff to fill out the outdoor shed checklist when packing up the sheds. That may have been that part of the policy about which Mrs Nkamba was questioned which suggested that the packing up of the shed had to be signed off. I cannot make a definitive finding about that because no such checklist, or other sign off document, was put into evidence by the defendant.

[346] What I am able to make a definitive finding about is that any policy or system of ensuring that the shed was packed away such that it was tidy, as pleaded by the defendant, whether that be the written shed policy or any other system, it was not adhered to generally nor specifically on the day prior to the incident.

[347] That it was not adhered to generally is readily inferred from the absence of any evidence from the defendant that it was. This is particularly so when it was said in opening the defence case that a director, Stacie Wood, would give evidence that a system of checking was enforced to make sure there was nothing left on the floor was enforced. Not only was no evidence given of the enforcement of such a system, no evidence was given of its existence in practice.

[348] The inevitable conclusion is that accepting the theoretical existence of such a policy, Mrs Nkamba's evidence that the reality was different was credible and accurate.

[349] That foreseeable risk existed even in the absence of the lighting issues. The lighting issues increased the probability that an object may go undetected. Indeed, the provision of adequate lighting such as an internal light within the shed, is itself a precaution taken to guard against the risk. However, it was not necessary for there to have been lighting issues before there was any foreseeability of the risk.

[350] I am also readily satisfied that the risk was not insignificant. The evidence establishes that there was much equipment. The evidence also establishes that there was a daily requirement to set up and pack up. The evidence establishes that this required a worker in the position of Mrs Nkamba to make multiple trips to and from the shed.

[351] The third matter which must be satisfied for there to have been a breach of duty to take precautions against the risk of injury is that, in the circumstances, a reasonable person in the position of the defendant would have taken the precautions.

[352] In the plaintiff's written submissions,[166] the following further precautions that a reasonable person would have taken are identified:

> "(a) by ensuring there was adequate time and opportunity and training to make sure the shed was left in a safe condition the night before; and
>
> (b) by providing proper lighting; and
>
> (c) by allowing more time for the setup."

[353] These precautions, particularly (a) and (b) I would accept. Indeed, in respect of (a) those precautions would simply have been an adherence to a system of work said to have been in existence and enforced. Any general enforcement of, or adherence to, such a system was unproven. It's specific enforcement or adherence on the day prior to the incident was in fact disproven by the evidence in the defendant's own case.

[354] That above would be sufficient for the plaintiff to succeed in proving that there had been a breach of duty by the defendant.

[355] Beyond that, I would make the further finding in respect of (b), the provision of proper lighting, that this precaution would extend not only to having an internal

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166 Page 14, para 3.

light within the shed to guard against the risk by reducing the possibility that an object on the floor may go undetected. It would extend to having a system of ensuring, so far as practicable, the light was in working order including by having a system of checking for defects and having those defects rectified in a timely manner. Clearly there was no such system. Again, the absence of any suitable or proper system was established on the evidence in the defendant's own case; the frank admission by Ms Lane that a faulty or broken light switch may go unreported and, therefore, unrectified for as long as 16 months.

[356] I would make the further finding that, in circumstances which the defendant was on notice that the light was not working, reasonable precautions would have included repair of the light in the week preceding the incident.

[357] I record, however, that neither of these findings concerning reasonable precautions as to the lighting would be necessary to establish breach of duty. Breach would be satisfied simply by failing to take the reasonable precaution to ensure the safe condition of the shed.

Causation

[358] Pursuant to s 305D determining causation, that is a breach of duty that caused the injury has two 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 the liability of the person in breach to extend to the injury so caused (scope of liability).

[359] The defendant submits that the plaintiff's claim must fail because she has not proved any fact relevant to causation. It submits "the plaintiff has failed to prove that the defendant was negligent and further that had lighting been improved, the defendant would have done anything different and therefore would not have suffered the injuries as alleged on 29 August 2017."[167]

[360] That submission should be rejected. It based upon an incorrect narrowing of the plaintiff's case. It was preceded by the submission that:

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167 Defendant's written submissions, para 162.

> "The plaintiff is not alleged in the pleading, nor lead evidence that the system, of work was unsafe. The plaintiff's pleading focuses solely on the lighting at the time, which it says constituted a risk to the health and safety of the plaintiff. Similarly, the plaintiff has not led evidence that had the lighting conditions at the time differed, she would have done anything different that morning."

[361] The plaintiff's case, as conducted, is not so confined. The defendant's case, as pleaded and conducted, reflects that.

[362] On the findings I have made, it would be sufficient for the plaintiff to prove the breach alleged at paragraph 4(c) of the Further Amended Statement of Claim was factually causative of her injuries. That breach, which I have found proven, was failing to ensure a proper clean-up the day before, particularly ensuring the block was properly and safely stored and not left lying on the floor of the shed. Of course, in deciding whether the plaintiff has proven that (or any other matter) on the balance of probabilities requires the Court to consider all of the evidence in the case relevant to the issue, not just that led by the plaintiff. As explained above, there was evidence in the defendant's case, when taken with Mrs Nkamba's evidence including what she said about the existence and observance of a system of checking that the shed was properly packed up at the end of day, which readily satisfies me on the balance of probabilities that to the extent that there was any such system, it was not observed generally or particularly on the day prior to the incident.

[363] Factual causation was explained by the High Court of Australia in *Strong v Woolworths Limited*.[168] In the context of the analogue provisions in the *Civil Liability Act 2002* (NSW), as follows:

> "The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence …
>
> …
>
> Under the statute, factual causation requires proof that the defendant's negligence was the necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that the defendant's negligent act or omission which is necessary to complete a set of

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168 (2012) 246 CLR 182 at [18], [20], [32] and [34] per French CJ, Gummow, Crennan and Bell JJ.

> conditions that are jointly sufficient to account for the occurrence of the harm or meet the test o factual causation within s 5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of harm. …
>
> The appellant was required to prove on the balance of probabilities that Woolworths' negligence was a necessary condition of her harm. Woolworths' negligence lay in its failure to employ a system for the periodic inspection and cleaning of the sidewalk sales area. Proof of the causal link between the omission and an occurrence requires consideration of the probable course of events had the omission not occurred. Here, the appellant was required to prove that, had a system of periodic inspection and cleaning of the sidewalk sales area been employed on the day of her fall, it is likely that the chip would have been detected and removed before she approached the entrance to Big W.
>
> …
>
> Woolworths' submission that it was necessary for the appellant to point to some evidence permitting an inference to be drawn concerning when the chip was deposited must be rejected. It was incumbent on the appellant to prove that it was more probable than not that Woolworths' negligence was a necessary condition of her fall, but this onus could be discharged by consideration of the probabilities in circumstances in which the evidence did not establish when the chip was deposited. …"

[364] Applying those principles in this case, I am satisfied on the balance of probabilities that the defendant's breach was factually causative of the injury suffered by Mrs Nkamba.

[365] Again, I am satisfied the defendant's negligence in failing to ensure that the shed was properly packed away the previous day and particularly to ensure the block was safely stored and not left lying on the floor was a necessary condition of her injury. She would not have suffered her injury but for the defendant's negligence in that regard. The presence of the block on the floor is the circumstance from which the risk of injury emanated. Had there been the observance of the defendant's shed policy or the system of checking to make sure there was nothing on the floor, in all probability its presence would have been detected and the block removed and safely stored. I am satisfied that this would have occurred in all probability because that was the very purpose of the policy or system. An item, such as a block, may go undetected or overlooked when a person is engaged in an activity such as taking out equipment or entering the shed for any other purpose, as it was by Mrs Nkamba. That is part of the risk. However, when the very activity itself is the looking for

such objects the likelihood of them being undetected or overlooked diminishes enormously. Of course, if such an object was found, it would be removed and put in a safe place. Again, that is the very purpose for looking. It is inconceivable that an object such as a block if located lying on the floor would be left there.

[366] Had the defendant's omission not occurred, the probable course of events would have been the location and removal of the block. Mrs Nkamba could not have stood on it where it initially lay. It could not have been projected from the shed to the area outside. Mrs Nkamba could not have stood on it there. She would not have sustained her injury.

[367] On this basis there is factual causation even without reference to the issues concerning the lighting. Therefore, I do not consider that the broken light, or otherwise absence of adequate lighting were necessary conditions of her harm. The identified breaches of duty of the defendant in regard to them are not necessary conditions of her harm. I do not consider that, but for those breaches, she would not have suffered her injury. I do not consider either of them necessary to complete a set of conditions which are jointly sufficient to account for the harm. That is because I consider the conditions sufficient to account for the occurrence of the injury existed in the defendant's failure to ensure the system that the shed was checked, and everything safely put away. The precaution of enforcing or adhering to that system would have alone removed the risk.

[368] The lighting issues made the risk that a worker such as Mrs Nkamba may not detect the presence of the block on the floor more probable; but it was not essential to it.

[369] Mrs Nkamba was a person engaged in work within the facility who would in the performance of her duties be exposed to the identified risk of harm. It is appropriate for the scope of liability of the defendant to extend to the injury caused to her that injury is of kind which might readily be sustained in the event the risk of harm manifested itself.

Conclusion on negligence

[370] For all these reasons, Mrs Nkamba's injury was caused by the negligence of the defendant.

Contributory Negligence

[371] The defendant contends the plaintiff's injury was caused solely by her own negligence as follows:

> "(a) failing to comply with instructions given to her for her health and safety at work by the defendant, contrary to s 305H(1)(a) *WCRA*;
>
> (b) undertook an activity involving obvious risk and failed so far as was practicable to take account of that obvious risk contrary to s 305H(1)(f) *WCRA*;
>
> (c) otherwise failed to take reasonable care for her own safety;
>
> (d) failing to keep a lookout;
>
> (e) failing to pick up the block prior to moving the frame in circumstances where;
>
> (i) the plaintiff knocked it to the ground; and
>
> (ii) the plaintiff knew it was there.
>
> (f) further, or in the alternative, the plaintiff's injury was caused by the contributory negligence which the plaintiff's damages should be reduced 100 percent pursuant to s 305G *WCRA*."

[372] Each of these can be dealt with rather briefly.

[373] The factual findings I have made are that Mrs Nkamba did not knock the block to the ground and she did not know it was there. The alleged failure to pick it up cannot be made out.

[374] The failure to comply with instructions was, on the defendant's pleaded case, her failure to comply with the Shed, Storeroom and Cupboard Policy. As noted above,[169] she was cross-examined about that. As also already noted,[170] the identified obligation which it was suggested she had failed discharge on the morning of the incident had not yet arisen.

[375] The failure to comply with instructions identified in the defendant's written submissions is different. It is a failure to properly report hazards having been trained to report any safety concerns to her supervisor and/or centre director and to note any incidents in the maintenance log. It is submitted that had she followed her

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169 At [217].
170 At [218].

training and instructions and reported the hazard, the defendant, by its conduct, would have acted swiftly and rectified the issue.[171] I reject that alleged failure.

[376] Mrs Nkamba's report was to Ms Katte. Ms Katte was her supervisor. The evidence was far from compelling that there was a requirement to report any hazard and to write it in the maintenance log. Indeed, the balance of the evidence is to the contrary. As set out earlier, some witnesses said they would do both, but I would not find that there was a requirement to do so. For example, Ms Lane said that a staff member with a concern about safety would let a director know. She went on to say that depending on what the concern was there was access to the maintenance log.

[377] S 305F(1) provides that the principles applicable in deciding whether a person has breached a duty also apply in deciding whether the injured worker has been guilty of contributory negligence in failing to take precautions against the risk of injury. S 305(f)(2) provides for that purpose the standard required of the injured person is that of a reasonable person in their position and the matter is to be decided on the basis of what the person knew ought reasonably to have known at the time.

[378] I would not conclude that a reasonable person in the position of Mrs Nkamba would have taken the further precaution of recording in the maintenance log that which she had told Ms Katte. The paucity of entries in the maintenance log by persons other than Ms Lane suggest that others did not record entries in the maintenance log. Ms Lane also gave evidence when asked about staff complaints about safety that "they would let a director know". She gave evidence of walking around getting staff feedback about what needed to be done. That was her explanation for most of the entries being in her writing. Similarly, Ms Wood's evidence included "if any concerns were brought to us, it was written on there. Staff members were also able to write in it if something needed to be fixed." An ability to write something in the log is not a requirement to do so.

[379] The evidence supports the conclusion that this is not a precaution that a reasonable person in the position of the plaintiff would have taken. This is particularly so given that Ms Katte had said it was in the maintenance book.

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171 Defendant's written submissions, para 170.

[380] In terms of s 305H(1) I am not satisfied that on the balance of probabilities that in failing to write the lighting defect in the maintenance book, having notified Ms Katte of that, Mrs Nkamba failed to comply with instructions. Her conduct seems consistent with the majority of the evidence as to how matters came to be reported or included in the maintenance log.

[381] The defendant's contention that Mrs Nkamba exposed herself to an obvious risk, or in terms of s 305H(1)(f) undertook an activity involving obvious risk or failed to take account of obvious risk, also should be rejected. An obvious risk to a worker is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the injured worker.

[382] The defendant expresses this aspect of its case in this way:

> "The defendant submits that given the obviousness of the risk that the plaintiff exposed the plaintiff [sic], by walking backwards while dragging the A-frame, while it 'was still dark' with 'poor light' while failing to look at not only where she walked, but where she placed her right foot before stepping down from the shed constitutes an obvious risk and a departure from the standard expected of a reasonable worker."[172]

[383] It submits that "given the obviousness of the risk that the plaintiff exposed herself to, the plaintiff's departure from the standard expected of a reasonable worker was substantial and the causal effect on the occurrence of her injury was significant".[173]

[384] The risk identified by the defendant, which it contends was obvious, does not have as an element that the worker may step on an object causing them to trip or fall. That is, it excludes the ultimate injury causing event from the obvious risk.

[385] I do not accept that the risk to the worker can be confined in that way. It is not that the plaintiff simply tripped or fell walking backwards while looking forwards. She stepped on an object while walking backwards.

[386] The obvious risk is expressed by the defendant can be tested in this way: was the plaintiff, in performing a standard task, in a manner in which other workers performed it, at the time of day at which it must be performed and thus in lighting conditions in which it must be performed, undertaking an activity which involved a

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172 Defendant's written submissions, para 174.
173 Para 175.

risk that, in those circumstances, would have been obvious to a reasonable person in her position? In my view, the answer must surely be "no".

[387] Alternatively: did the plaintiff at the time fail to take account of a risk that, in those circumstances, would have been obvious to a reasonable person in her position? Again, the answer must surely be "no".

[388] When one reformulates the expression of the risk to include the risk of stepping on an object which may cause a trip or fall, as I consider it must, the answer to those questions is even more surely "no". The circumstances of the worker which would then be relevant would include that in three prior trips to and from the shed, including upon approaching the shed immediately before engaging in the activity of dragging out the A-frame, there was no object on the ground outside the shed on which she could step.

[389] It is not merely a question of did she need to look where she was placing her foot. It was a question of did she need to look where she was placing her foot because she may step on an object.

[390] That reasoning also dispenses with the further allegations that she failed to keep a look out or otherwise failed to take reasonable care for her own safety.

[391] Mrs Nkamba is not guilty of contributory negligence. The defendant is solely liable for her injury.

Quantum

[392] Before embarking upon an assessment of damages which the plaintiff should be awarded, some general observations and factual findings should be made about matters which inform the assessment process.

[393] There is little between the orthopaedic surgeons as to their assessment of the overall impairment to the plaintiff as a consequence of her right ankle injury. Dr David Morgan who assessed Mrs Nkamba for medico legal purposes on 18 September 2018 assessed a 4% whole of person permanent impairment: 3% being restrictions in her right ankle joint; and 1% being ongoing pain in that joint.[174]

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174 The Morgan report, exhibit 1, pp 95-109.

[394] Dr Lloyd King who assessed Mrs Nkamba for the purposes of an Independent Medical Examination Report on 31 March 2019 assessed a permanent impairment attributable to her right ankle injury of 2%.[175]

[395] The real difference between Dr Morgan and Dr King is in their respective opinions as to ongoing impacts of the injury upon Mrs Nkamba's capacity to work, particularly in her former employment as a childcare worker.

[396] Dr Morgan in his report was asked to what degree Mrs Nkamba's impairment affected her ability to undertake tasks required of her in her chosen field with employment. He answered:

> "From a purely orthopaedic perspective, it is probable that she can continue working as a childcare educator whilst wearing some form of ankle support."

[397] Dr Morgan was subsequently provided further material, including Dr King's report and the report of an occupational therapist, Ms Rebecca Hague.[176] Ms Hague's report was prepared in November 2018. It was informed by, amongst other things, Mrs Nkamba's account of her experience when she had returned to work with the defendant on light duties in November 2017. Ms Hague records:

> "Upon her return to work she experienced difficulties with prolonged periods of standing and walking (when supervising and interacting with children), crouching (to play with children and assist with toileting) and lifting and carrying (to change nappies and set up play equipment). She initially worked four hours per day (five days per week) for a period of one month before attempting to return to fulltime hours.
>
> Mrs Nkamba suffered aggravation of her right ankle pain with her attempt to return to fulltime hours. Standing and walking throughout the childcare centre was a significant aggravator. She felt she was less efficient at work and was unable to respond quickly to children. She was reliant on medication to manage her symptoms. She avoided setting up outdoor play equipment and lifting children (where possible). Her pain was particularly aggravated by the end of the working day and week. She subsequently ceased work. She has not worked since."[177]

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175 Independent medical examination report and permanent impairment assessment, exhibit 1, pp 160-175.

176 Exhibit 1, pp 144-159.

177 Ibid, paras [10]-[11].

[398] That record of what she was told by Mrs Nkamba is broadly consistent with Mrs Nkamba's evidence on thpe trial. I would accept that, to the extent she was able, Mrs Nkamba attempted to return to work. Ultimately, further accommodation of her return to work by way of the identification of suitable duties was not able to be progressed. To the extent that the defendant maintains the contention that Mrs Nkamba failed to mitigate her loss, I would reject the contention.

[399] Ms Hague expressed the following opinion as to Mrs Nkamba's capacity to return to her former employment:

> "Mrs Nkamba was previously working fulltime as a childcare worker. She was unsuccessful in her attempts to return to this work post-accident. In my opinion she is unfit for work in her pre-injury role or childcare roles more generally. Occupational barriers include long periods of standing and walking when supervising children; lifting and carrying children and play equipment; crouching to assist children with play, feeding, dressing or toileting; and running to attend to children quickly (e.g., if a child falls over or is hurt)."

[400] Dr King in his report had observed:

> "The duties required in childcare are various and do require a lot of standing and walking. There are uneven and unpredictable surfaces. Supervision of children requires a certain level of physical agility.
>
> It was apparent to me that Mrs Nkamba is not currently capable of carrying out all her duties at the childcare centre as she did previously. She could perform her duties in a modified fashion. If she were provided with the facility to sit as required and not be expected to lift or carry repetitively or perform for long standing duties without opportunity to sit, she could participate in employment as a childcare educator. I do not consider that is unsafe for her to do so. A graduated return to work should reasonably aim to have her employed again fulltime.
>
> Employment in this setting would require some commitment on behalf of her employer to undertake a review of her work role and make allowances for the condition affecting her ankle. Overall, with some good will on the behalf of her employer I can see that Mrs Nkamba would be able to participate in childcare as a fulltime employment option. I do not consider it to be unsafe for her to continue in this type of employment."[178]

[401] Having been provided with those reports of Ms Hague and Dr King, Dr Morgan was asked, having regard to the comments made by them as to the effect of her injury on her continuing ability to work as a childcare worker, whether it was reasonable that

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178 Section 11, exhibit 1, p 172.

if Mrs Nkamba was on her feet for various periods of time that would lead to unacceptable pain levels. Dr Morgan said that was a reasonable expectation.

[402] He was further asked whether even wearing an ankle guard could still result in swelling to the ankle. He said that he accepted that can occur.

[403] He was also asked whether there are distinct aspects of childcare work that she can not reliably do. He said that he accepted that assertion.

[404] He was then asked, given the comments of Ms Hague, whether he agreed that other than with a very empathetic employer and perhaps on a part-time basis, Mrs Nkamba was no longer fit to work as a childcare worker. Dr Morgan responded, "I am not in a position to contradict the assertions made by Ms Hague".

[405] In my view, that candid deference to Ms Hague on the issue of Mrs Nkamba's capacity or incapacity to work as a childcare worker reflects an appreciation that there are matters for consideration in assessing capacity which fall beyond a functional orthopaedic assessment. That, so it seems to me, was also reflected in the opinion expressed by Dr Morgan in his earlier report where he opined that she was probably able to continue in that occupation "from a purely orthopaedic perspective".

[406] A conference was conducted between the lawyers for the defendant and Dr King on 19 January 2021. From that conference a file note was prepared dated 28 January 2021. It was signed by Dr Lloyd on that date.[179]

[407] At section 4 of that file note Dr King said:

> "Having taken the time to reread my earlier opinion, I wish to clarify my opinion as to the plaintiff's capacity for work as I can see how my opinion can confuse the reader.
>
> I did previously and currently maintain the opinion that the plaintiff *does* have the capacity to work in childcare because she does have the capacity to perform duties that involves some standing and walking. Ideally, employment that allows her to alternate between seated and standing positions would be considered ideal. In that context, I am of the opinion that the plaintiff has the capacity to work fulltime until her anticipated age of retirement.

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179 Exhibit 1, pp 217-222.

> In hindsight, I should not intermentioned (sic) the phrases 'permanent in capacity' and 'partially and permanently incapacitated for work' as I can see how this has caused some confusion.
>
> I am of the opinion that the plaintiff is:
>
> (a) fit to work, fulltime in her former occupation as a childcare worker;
>
> (b) not fit to work in warehousing and/or similar industries as she has no capacity to consistently work at heights or on other unreliable surfaces."

[408] In cross-examination of Dr King, it was put to him, effectively, that this was not a clarification of his earlier opinion, but rather the statement of a different opinion. That, in my view, is a fair characterisation of the change.

[409] The following exchange took place between Mr Newton and Dr King:

> "Mr Newton: The proposition I'm putting to you, is she is unfit to be an enrolled nurse because of her ankle and because she would substantially be on her feet all day, the same applies to her pre-accident job as a childcare worker, in a different context, but where on occasion she has to go on uneven surfaces and, in particular, sandpits. Where she certainly has to be able to constantly monitor and deal with children, which means crouching, running, occasionally lifting children, and for those reasons she has- given the pain level her ankle causes her on any inversion, she is incapacitated to work in her pre accident employment?
>
> Dr King: Given what you – accepting what you have told me as the nature of her employment as a childcare worker, I would still maintain, given the nature of her injury, that she would be able to manage that role. The – there is not structural failure of her ankle such that I would expect that it would deteriorate or cause her to suddenly or unexpectedly lose the capacity to engage in those activities. And I expect that – you know, at the end of the day the injury is not so severe that I would expect that it would result in that incapacity."[180]

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180 Trial transcript 2-34.

[410] This may be compared with Dr Morgan's candid deference to the opinion expressed by Ms Hague as to Mrs Nkamba's capacity to work in childcare, given the observations of both Ms Hague in her report and Dr King in his earlier report. Dr King, in my view, seemed reluctant to defer in any way to the view of Ms Hague. That is so notwithstanding that Ms Hague's opinion was more consistent with the opinion he had earlier expressed, and that her opinion was based upon Mrs Nkamba's report that she was unable to perform particular duties of a childcare worker in the circumstances in which such work must be performed, which themselves are consistent with those identified by Dr King in his earlier report. In expressing his altered opinion, Dr King did not explain how those matters earlier identified by him as being difficulties she would experience in the performance of childcare work were now overcome.

[411] Indeed, I thought that the cross-examination of Mrs Nkamba as to what she would be able to do within a childcare setting assumed an unreal, static and controllable method of doing the work unreflective of the dynamic circumstances identified by both Ms Hague and Dr King in his earlier report.

[412] For those reasons, I am more inclined to accept the opinions of Dr Morgan and Ms Hague as to Mrs Nkamba's incapacity to perform her former role.

[413] Accepting that Mrs Nkamba is incapacitated to perform her former role has a major bearing upon the areas of damages most in dispute between the parties; past and future economic loss.

[414] The psychiatric evidence can be dealt with briefly. Dr David Storor, psychiatrist, was called on behalf of Mrs Nkamba. He expressed, in a report dated 28 August 2018,[181] the opinion that Mrs Nkamba is suffering from an adjustment disorder with depressed mood of mild to moderate severity caused by her workplace injury. He records that Mrs Nkamba told him that she developed a depressed mood due to ongoing pain and restriction caused by her injury. Dr Storor's opinion was that that stated mechanism of injury was consistent with her current psychiatric condition.

[415] As to the affect that her adjustment disorder may have on her employment, Dr Storor expressed the opinion that her past employment had been, and her future

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[181] Exhibit 1, pp 129-138.

employment would be, affected in that she lacks confidence in her work abilities and had a fear of reinjuring herself through activity. In his opinion that lack of confidence and fear of reinjury, which was a feature of her disorder, would adversely affect her future employment opportunities in the open job market.

[416] In a further report dated 29 July 2020,[182] Dr Storor expressed the view that Mrs Nkamba continued to suffer from an adjustment disorder with depressed mood as a consequence of her injury. Further, he expressed the view that she suffered a degree of permanent impairment caused by that condition, which was unlikely to alter significantly, with or without further treatment. He assessed her incapacity, using PIRS as a whole person impairment of 4% having assessed her to have a median class score of 2 and an aggregate score of 9.

[417] For the defendant, Dr John Chalk, psychiatrist, was called. In a report dated 1 June 2020[183] Dr Chalk expressed the opinion that Mrs Nkamba had developed a mild adjustment disorder with depressed and anxious mood as a result of her injury. His opinion was that it was her frustration over the injury and its effects that have been significant factors. He added that, from her account, she had found the whole process of litigation very difficult and indeed stressful.

[418] He expressed the opinion that Mrs Nkamba could return to fulltime work in an occupation which she was suited by virtue of her training, education, experience and within her physical limitations. From a psychiatric perspective, he did not think that Mrs Nkamba is, or had been, incapacitated for work.

[419] It should be observed that there is nothing at all in any of the psychiatric evidence which would lend any support whatsoever to the defendant's pleading that any psychological symptoms she suffers from are the consequence of a pre-existing psychiatric disorder. There is no evidence to support that there has ever been such a pre-existing disorder. The evidence, even in the defendant's case, is that there has never been. Parties should be cautious about pleading such matters in the absence of evidence.

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182 Exhibit 1, pp 203-212.
183 Exhibit 1, pp 181-196.

[420] The real issue which emerges from the psychiatric evidence is whether the diagnosed adjustment disorder with depressed mood should impact upon the assessment of the Injury Scale Value under s 306O of the WCRA having regard to the ranges mentioned in sch 9 of the *Workers Compensation and Rehabilitation Regulation 2014,* applying the rules mentioned in sch 8 as required by s 129 of the Regulation. Essentially, the plaintiff contends that there should be a 25% uplift of the ISV to reflect that it is for multiple injuries. The defendant contends that the psychiatric condition would have no impact upon the assessment of the ISV.

General Damages

[421] There is no dispute that the range of Injury Scale Values under Schedule 9 is 6 to 10 applying item number 142, Moderate Ankle Injury.

[422] Item 142 of Schedule 9 provides that an ISV at or near the bottom of the range will be appropriate if there is a DPI for the injury of 6%. As noted above, Dr Morgan assessed a whole-body impairment of 4% and Dr King assessed a whole person impairment of 2%.

[423] I have come to the conclusion that an ISV of 8, that is in the middle of the range, would be appropriate for the ankle injury itself. However, I am of the view that there should be a 25 percent uplift for the psychological injury as such that the total ISV will be 10. Applying that ISV, general damages are assessed at $15,600.

Past Economic Loss

[424] The approaches of the parties to this head of damage vary differ markedly in a number of respects.

[425] The defendant's contention is that the plaintiff's claim for past economic loss should be restricted to the statutory compensation paid, being $17,778, with 15 percent uplift to compensate the plaintiff for the variation in her actual versus net weekly earning. This would result in an award of $20,500.

[426] There are several reasons why the plaintiff's approach should be rejected.

[427] First, it limits the period of past economic loss to the time at which the plaintiff provided her last medical certificate and Workcover ceased her claim for weekly benefits. The defendant submits that that was the time at which the plaintiff

provided her last medical certificate. The plaintiff submits that the defendant's contention should be rejected because the action taken by Workcover in ceasing the claim is irrelevant.

[428] The defendant is correct. An injured worker does not cease to suffer economic loss compensable as damages simply because Workcover Queensland determines not to pay further weekly benefits.

[429] As noted above when considering the expert orthopaedic evidence of Dr Morgan and Dr King, their differing views as to Mrs Nkamba's ongoing incapacity, or capacity, to perform her pre-injury work is material to both the assessment of past and future economic loss. If Dr King's opinion were accepted, and it was further accepted that she had capacity to return to that employment from about the time which the plaintiff identifies, then, arguably, that would be the appropriate end to the period during which she suffered past economic loss. However, rejection of Dr King's opinion in that regard and acceptance of Dr Morgan's opinion that she is incapable of returning to that work leads to the conclusion that she continued to suffer economic loss from that time until trial.

[430] Next, the defendant rejects the methodology for calculation of past economic loss contended for by the plaintiff because it says that, properly analysed, Mrs Nkamba suffered no weekly loss of earnings because her average rate of pay prior to the injury was $696.72 net per week, not $800 net per week as claimed in the plaintiff's Updated Statement of Loss and Damage. Furthermore, her average weekly earnings after she commenced her present employment on 22 August 2020 exceeded her pre-injury earnings. The defendant also claims that income protection insurance payments of $37,214 and Centrelink payments of $7,620 must be brought to account in assessing whether the plaintiff has suffered a loss of income during that period.

[431] The plaintiff, correctly in my view, contends that amounts which Mrs Nkamba received under a policy of income protection insurance should not reduce the damages awarded.

[432] The defendant calculates average weekly earnings of $696.72 by dividing the net income paid to the plaintiff in the period of her employment with the defendant

commencing on 7 November 2016 to the end of the 2016/2017 financial year by the number of weeks being a little more than 33.5. The PAYG payment summary for that period[184] shows gross payments of $27,526 and tax withheld $4,186 resulting in a net total payment of $23,340. That was for a period of 33 weeks and four days. By dividing the total net amount by that number of weeks ($23,340 by 33.5 weeks), the defendant derives the average net weekly earnings figure of $696.72.[185]

[433] The plaintiff rejects that methodology. In an employment schedule attached to its written submissions, it identifies that the plaintiff's taxation notice of assessment for the year ended 30 June 2017 discloses gross income of $37,377 with tax payable on that amount of $3,694.52 and a Medicare levy of $747.54 totalling, in round terms, $4,442. That $4,442 equates to an effective tax rate on the gross earnings of $37,377 of 11.88 percent.[186]

[434] In a similar way, the plaintiff analyses her PAYG payment summary for the period[187] of her employment with the defendant from its commencement on 7 November 2016 to the end of that financial year. Her gross earnings were $27,526 which, she contends, equates to $1,019.48 gross per week over a 33-week period. A tax rate of 12 percent is then applied to that average gross per week figure to arrive at an average net per week figure of $897.14. On the basis it is then contended for the plaintiff that the $800 net per week claimed in the Updated Statement of Loss and Damage is arguably conservative.

[435] The Plaintiff's methodology is generally sound. The Plaintiff's maths, however, are incorrect.

[436] In order for total gross earnings of $27,526 to result in gross earnings of $1,019.48 per week, the period over which the gross sum was earned would have to be 27 weeks; not 33. Adopting the plaintiff's methodology, the correct weekly gross figure, applying 33.5 weeks, would be $821.67. Further adopting the plaintiff's methodology of applying an effective tax rate of 12 percent, the net earnings per week would be $723.07. Calculated over a 33-week period, the gross weekly

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184 Exhibit 1, p 388.

185 By Exhibits 21 and 22, the defendant also attempted to demonstrate that Mrs Nkamba's pre-injury working hours averaged only 27 per week. It is a false analysis but nothing seems to turn upon it because that 27 week figure does not otherwise feature in its calculations.

186 The Notice of Assessments to be found at Exhibit 1, page 384.

187 Exhibit 1, page 388.

earnings per week would be $834.12. Applying an effective tax rate of 12 percent, the net weekly earnings would be $734.

[437] In my view, the defendant's approach of arriving at net earnings of $23,340 by simply deducting the tax withheld from the gross payments is inappropriate. The plaintiff's Notice of Assessment demonstrates that the plaintiff was entitled to a tax refund demonstrating that the amounts withheld were in excess of the tax liability.

[438] The plaintiff's method, although not perfect, is to be preferred. It is not perfect because there were earnings from another employer brought to account in the 2016/2017 financial year. The analysis performed in the table at paragraph 223 of the defendant's written submissions shows income from the PCYC for the period 1 July 2016 to 25 August 2017 in the gross amount of $11,133 and a net amount of $8,857.[188] Adding the $11,133 from that source to the $27,526 derived from the defendant results in a total income of $38,659 for the 2016/2017 financial year. That accords with the total gross payment for salary and wages disclosed in the plaintiff's 2017 tax return.[189]

[439] Adopting the plaintiff's methodology, the total tax and Medicare, in my view, when deducted from that slightly higher gross figure would result in an effective tax rate of 11.5% rather than 12 percent. If that 11.5% were applied to the $834 average gross weekly payment for the 33 weeks worked for the defendant in the 2016/2017 year the resulting net average weekly payment would be $738.

[440] In my view, that is the correct amount to apply in calculating past economic loss.

[441] Applying that amount to the 156 weeks to 24 August 2020 as claimed in the statement of loss and damage, the total amount would be $115,128. The difference between the $680 per week on average being earned as a casual Lifestyle Support Assistant with her present employer would be reduced from $120 per week, as claimed, to $58 per week. Applying that to the claimed period of 20 weeks from 24 August 2020 results in a total amount of $1,160.

[442] For past economic loss I would award $116,288.

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188 In the table, the defendant has incorrectly identified as gross earnings as having been derived in the 2015/2016 financial year.

189 Exhibit 1 pages 378 to 380 at page 379.

[443] Interest at the rate of 1% for 3.5 years would apply to $53,676 ($116,288 - $17,778 (Workcover) - $&,620 (Centrelink) - $37,214 (AIA)). This amounts to $1,878.

Superannuation as Past Economic Loss

[444] Superannuation on past economic loss calculated at a rate of 9.5% on $79,074 ($116,288 - $37,214) amounts to $7,512.

Future Economic Loss

[445] In her Updated Statement of Loss and Damage, the following summary of the plaintiff's claim for future economic loss appears at page 16:

> "The plaintiff is currently earning an average net weekly wage of approximately $680.
>
> In the circumstances, the plaintiff claims a net weekly loss of not less than $400 net per week over 14 years from 25 August 2020 until retirement at age 67. The claimed loss of $400 net per week being the difference between the possible earnings of a nurse or a childcare person and her current position as a casual lifestyle support assistant. On the five percent tables using a multiplier of 529 and discounting 10 percent for contingencies, that would be a claim of $190,440."

[446] The basis for the claim of a difference between current earnings and possible earnings of a nurse relates to the plaintiff's ambition to have become an enrolled nurse. The defendant submits that the plaintiff only undertook training as an enrolled nurse not to work in such a capacity but, rather, to undertake those studies so as to develop and enhance her work with children.

[447] The plaintiff's Updated Statement of Loss and Damage includes, at page 11:

> "Ms Hague noted that the plaintiff reports her vocational goal to complete further studies to become qualified as an enrolled nurse. In Ms Hague's opinion, she is now unfit for this physically demanding work. Contrary occupational demands include long periods of standing and walking throughout the hospital; crouching to assist with personal cares or wound dressing and assisting with transfers or pushing wheelchairs. In Ms Hague's opinion she will now be unable to achieve this vocational goal. As a guide to the Australian average net week income of an enrolled nurse is $1,070."

[448] It is from that average weekly income of $1,070 that the $400 loss is calculated.

[449] I can find no basis upon the evidence upon which such a loss could be related to a comparison of her present level of earnings and those of a "childcare person". The

difference between her current level of earnings and those of a childcare person would be the $58 per week already identified.

[450] Later in the updated statement of loss and damage at page 15, the following appears:

> "The plaintiff is now 53 years of age and has a prospective working life of 14 years.
>
> The plaintiff had pursued some nursing qualification but is unsuited to work as a nurse although it may give her an opportunity to get into a medical centre or an aged care facility in a principally administrative assistant position.
>
> The plaintiff had commenced nursing qualifications post-accident but not with the view to becoming a nurse so much as improving her value as an employee in the childcare sector."

[451] It is from that last quoted paragraph that the defendant's submission as to the intended purpose for Mrs Nkamba's study as an enrolled nurse is derived.

[452] In my view, the plaintiff's claim for future economic loss should not be allowed. The plaintiff's future economic loss or lost earning potential should not be assessed on the basis claimed.

[453] As demonstrated above, at her present level of earnings compared with that which she was earning in her former employment, Mrs Nkamba has a loss of $58 per week. That, in my view, is an appropriate basis upon which to project future economic loss of a person in their mid-50's over the future course of their working life.

[454] In her evidence she explained a number of benefit or advantages of her current employment as a support worker. These included that there is a range of things they do in personal care and support of the residents in the aged care facility. It was not full-time care of bedridden residents. Sometimes they would just show up and support the residents. There was also the advantage that sometimes they would be rostered just to perform social support by keeping them company and interacting with them. She described it as "much, much better than being a full-time aged carer." She was able to make that comparison because she had previously had a three week placement in such a role in an aged care facility. She described a flexibility in this work.

[455] Mrs Nkamba works 4 days a week in the role. This would appear to be within her physical capacity. There is no evidence to suggest that her employment is insecure.

[456] She expressed an interest to pursue training in diversional therapy which would no doubt lighten her workload further because it would involve those aspects of her current role which do not require actual care work. She thought she could get a certificate 4 and then a diploma. That was, she said, something she could study online, part-time in her present role or full-time for 18 months.

[457] I do not accept the Plaintiff's submission that one method of calculating her future economic loss would be to give her "full freight" for two years to allow her to study diversional therapy and then a reduced amount, or global amount, for the period thereafter. There are too many contingencies to make that an appropriate method of awarding damages. The evidence about what she would need to do to quality is vague and uncertain. On the evidence of Ms Hague, jobs for diversional therapists are quite rare compared with aged and disability carers so there would be uncertainty of her securing such employment.

[458] In any event, if Mrs Nkamba is compensated for the difference in income between her current and former positions, she is, effectively, in the same position as she was previously, should she wish to pursue training as a diversional therapist.

[459] Applying a loss of $58 per week with a multiplier of 529 from the 5% tables results in future economic loss. Given the approach I have taken, discount for contingencies would be a modest 5%. Given The award would be $29,148.

[460] In my opinion, some award in addition to those weekly earnings should be made for the loss of opportunity of employment in the field of enrolled nursing. That opportunity, however, was, in my view, also highly contingent. First, it would have required Mrs Nkamba to qualify as an enrolled nurse. Secondly, it would have required her to have secured work in that capacity as a person in at least her mid 50's without any earlier experience. To that must be added the consideration that working in that role was not primarily her reason for pursuing those studies.

[461] Taking all of those matters into account, I am of the view that a global award of $20,000 would adequately compensate Mrs Nkamba for that loss of opportunity. It

equates, in rough terms, to $27.50 per week over the balance of her 14-year working life. I would award a total of $49,148 as future economic loss.

[462] I would allow superannuation on the whole of that sum at the rate of 11.33 percent being an amount of $5,568.

Past out of pocket expenses

[463] The defendant does not take issue with the plaintiff's claim for past special damages in the sum of $12,490.82. That amount will be allowed.

Fox v Wood[190]

[464] The defendant does not take issue with the plaintiff's claim for a *Fox v Wood* component in the amount of $3,098. That amount will be allowed.

Future Out of Pocket expenses

[465] The plaintiff claims a number of items of expected future expenditure. Some are more contentious than others.

[466] It is accepted, on the evidence of Dr Morgan, that Mrs Nkamba will continue to need to use an ankle brace into the future. Dr Morgan estimates the costs will be approximately $150 per year. This equates to $2.90 per week. The plaintiff uses a multiplier of 866 from the 5% tables to calculate a figure of $2,494.08. She applies no discount for contingencies.

[467] The defendant uses a multiplier of 856 to calculate a figure of $2,482.20 which it discounts by 15% for contingencies.

[468] Using the Plaintiff's multiplier, I would award $2494.00. I would not discount it.

[469] The Plaintiff also claims for orthotic inserts. The evidence about them is sparce. She says she has bought them. There is no evidence of the benefit she derives from them. The orthopaedic specialists said nothing about them. There are no receipts in evidence.

[470] I would not allow anything for this claimed item.

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190 [1981] HCA 41

[471] There is a claim for future pharmaceutical expenses in the sum of $21,242.98. it relates to Panadol, Panadol Osteo, Voltaren Rapid/Diclofenac and Voltaren Emulgel. Mrs Nkamba gave evidence of using each of these; but not the rate at which she uses them.

[472] The defendant contends that the claim for future pharmaceutical expenses should be limited to Panadol at a cost of $3.00 per week which would equate to $2,183.00 using a multiplier of 856.

[473] It is difficult to assess what should be allowed on the evidence. I would accept that Mrs Nkamba uses more than Panadol, but cannot find support for the rate at which she claims for various items. The Plaintiff's claim, which is based on a multiplier of 866, equates to a weekly claim of $24.53 without discount.

[474] In my view, doing the best I can on the evidence, I would allow $10 per week without discount. Applying a multiplier of 866, that would be an award of $8,660.

[475] There is a claim for future physiotherapy and/or hydrotherapy. The Updated Statement of Loss and Damage claims that such treatment will be required. There is no evidence to support that it will be required. The Plaintiff, both in its submissions, and in cross-examining Dr King, accepted that it would not bring an improvement, at least after a time, to her injury. Dr King gave a limited concession that it might be helpful in helping to deal with a pain problem; but did not consider it would thereby help with employability.

[476] There is no explanation as to how the figure of $3,000 is reached.

[477] I would allow the modest sum of $1,000.

[478] There is a claim for future vocational rehabilitation in the amount of $1,320 for which there is no evidence in support. I would make no allowance for it.

[479] There is an agreed future travel expenses claim of $1,000.

[480] There is a claim for $2,500 for future counselling and psychological management. Such a claim finds support in the evidence of Dr Storor. The amount claimed seems modest. I would allow it.

[481] The total award would be $15,654.

Summary of damages assessed

Head of damage	
General damages	$15,650
Past Economic Loss	$116,288
Interest on past Economic Loss	$1,878
Past Loss of Superannuation	$7,512
Future Economic Loss	$49,148
Loss of Future Superannuation	$5,568
Fox v Wood	$3,098
Special Damages	$12,490.82
Future Damages	$15,654
Subtotal	$227,286.82
Less refund to WorkCover	$30,272.84
Total	$197,013.98

Orders

[482] There will be judgment for the plaintiff in the sum of $197,013.98

[483] The parties are to file submissions on costs, limited to 4 pages, by 31 January 2023 or alternatively a proposed draft order if the parties are agreed, will be filed by 31 January 2023.