SUPREME COURT OF QUEENSLAND

CITATION:	*Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329
PARTIES:	**SCOTT GREGORY WALKER** (plaintiff) **v** **GREENMOUNTAIN FOOD PROCESSING PTY LTD** ACN 123 040 424 (defendant)
FILE NO:	BS 398 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 2020
DELIVERED AT:	Brisbane
HEARING DATES:	24 – 28 August 2020
JUDGE:	Applegarth J
ORDER:	**Judgment for the plaintiff against the defendant in the amount of $967,383.39**
CATCHWORDS:	TORTS – NEGLIGENCE – GENERALLY – where the plaintiff was employed by the defendant as a maintenance manager at the defendant's meatworks – where the plaintiff investigated a steam leak at the meatworks outside usual operating hours, at dusk – where the plaintiff fell through an alsynite panel on the roof of a shed while investigating the source of the leak – where the plaintiff suffered multiple injuries attributable to the fall – where the defendant did not direct employees to not go onto the roof without a safety harness – whether the defendant is liable in negligence – whether the plaintiff was contributorily negligent DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – RE-EMPLOYMENT OF WORKER – where the plaintiff continues to work for the defendant as a maintenance manager but cannot undertake work in his trade due to his injuries – where the plaintiff has some residual capacity for work but is at a significant disadvantage in the open labour market – where there are various contingencies affecting the chance that the plaintiff will lose his current job with the defendant – what measure of damages for future economic loss is appropriate in the circumstances

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305C, s 305D, s 305E, s 306F
Workers' Compensation and Rehabilitation Regulation 2014 (Qld), s 3, s 4, s 6, s 9

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, applied
Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301; [1986] HCA 20, cited
Coca Cola Amatil (NSW) Pty Ltd v Pareezer (2008) Aust Torts Reports 81-834; [2006] NSWCA 45, cited
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183, applied
Czatyrko v Edith Cowan University (2005) 214 ALR 349; [2005] HCA 14, cited
Dance v Jemeas Pty Ltd (No 2) [2019] QSC 303, cited
Endeavour Foundation v Weaver [2013] QCA 371, cited
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270, cited
Inghams Enterprises Pty Ltd v Kim Yen Tat [2018] QCA 182, cited
McLean v Tedman (1984) 155 CLR 306; [1984] HCA 60, cited
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319; [2012] QCA 315, cited
Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65, applied
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALR 529; [1985] HCA 34, cited
Pollard v Trude [2008] QSC 119, cited
Seage v State of New South Wales [2008] NSWCA 328, distinguished
Stokes v House With No Steps [2016] QSC 79, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, cited

COUNSEL: C Newton for the plaintiff
B F Charrington for the defendant

SOLICITORS: Hall Payne Lawyers for the plaintiff
BT Lawyers for the defendant

[1] At around 5pm on Friday, 12 June 2015 the plaintiff, Mr Walker, was driving home past his workplace, a meat processing plant. He was the Maintenance Manager. He noticed large plumes of steam venting from a malfunctioning relief valve. The whole plant depended on the boiler working.

[2] If the steam continued to escape there would be problems. If the boiler literally ran out of steam, then the precise source of the leak may not be found and the defect fixed on the weekend so as to allow production at the meatworks to recommence on Monday morning.

[3] Mr Walker went to investigate which of the three parallel pipes was leaking so that he could have a contractor fix the problem that weekend. The pipes were just outside the rendering shed between it and some large tanks. He walked away from the building to try to see which pipe was venting, but could not tell. There was a platform near the top of the tanks. It made sense to go there to see which of the relief valves was leaking.

[4] Mr Walker climbed the stairs to the platform. During this time he was on his mobile phone to the contractor, Mr Butler, who told Mr Walker that he needed to know which relief valve was leaking so Mr Butler's company "could try and fix it over the weekend". By now darkness was approaching and there was little time to spare.

[5] Mr Walker still could not see the source of the leak from his position on the platform because the three pipes were in line. There was a gap in the railing next to the roof. First he leaned out through it, but he still could not tell through the cloud of steam which valve was leaking. He then stepped through the gap and onto the roof surface so that he could get a better angle to view the problem.

[6] Mr Walker knew that many years earlier, and contrary to his advice, the Rendering Manager had arranged for some alsynite sheeting to be installed where a leaking pipe had rusted a hole in the metal roof of the rendering shed. The idea was to stop the rust from getting worse. Alsynite is a polycarbonate product that can be used as a roofing product.

[7] On this night Mr Walker did not appreciate that he was walking in the vicinity of the alsynite. Although he knew there was some alsynite on the roof, on this evening he "didn't think it was where it was".

[8] His attention was on trying to work out from which of the three pipes the steam was leaking. In the fading light, the area of the roof where there was alsynite was not apparent to Mr Walker. It looked the same to him as the metal surface.

[9] He stepped onto the alsynite and it gave way. He crashed and fell more than 7 metres to the concrete floor of the rendering shed. He was badly injured. Fortunately, he was not killed. He fractured his skull and suffered a moderate brain injury. He sustained multiple injuries to his spine, knees and wrist. He was knocked unconscious and lay on the floor of the deserted shed. Eventually he regained consciousness and managed to drag himself outdoors. He was then found by a truck driver delivering stock to the meatworks.

[10] Mr Walker was taken by ambulance to hospital and had a slow recovery. His brain injury has diminished his acuity. He forgets things and is slower in processing matters. His permanent orthopaedic injuries mean that he cannot return to the tools of his trade as an electrician or do manual work that requires him to crouch. Despite these problems, he was been able to return to his job as Maintenance Manager where he supervises a team.

[11] Due to his permanent injuries he is at a significant disadvantage in the labour market. He fears that he may be sacked after this case. However, if this does not happen, and he loses his job for another reason, such as a closure of the meatworks or its takeover by a less understanding employer, he will struggle to find a similar

job in another meatworks. He cannot work as a tradesman or do manual work. Due to his injuries, he cannot even mow his own lawn.

[12] Mr Walker sues his employer for negligence. His claim is governed by the common law, as modified by the provisions of Chapter 5, Part 8 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

Liability issues

[13] Mr Walker was required as part of his job to go to the plant on occasions at nights and on weekends to fix problems. His written duty statement required him to do many things. They included diagnosing breakdown problems, making repairs in the most efficient way and maintaining "all facility and manufacturing assets" so as to maintain and increase productivity.

[14] There is no dispute that the defendant owed Mr Walker a duty of care on the night in question when he was doing his job in trying to locate the source of the leak from the boiler.

[15] The issues on liability concern breach and causation. In general terms they are:

1. Was the risk of injury:

    (a) foreseeable, that is a risk which the defendant knew or ought reasonably to have known (s 305B(1)(a)); and
    (b) not insignificant? (s 305B(1)(b));

2. Would a reasonable person in the position of the defendant have taken one or more of the alleged precautions in the circumstances? (s 305B(1)(c) and s 305B(2)); and

3. Factual causation: would the precautions probably have prevented Mr Walker from suffering his injuries? (s 305D(1)(a)).

[16] If Mr Walker establishes liability, then issues of contributory negligence will arise for consideration.

Quantum issues

[17] The principal quantum issue is the impairment of his future earning capacity and the risk that loss of his current employment will result in substantial future economic loss because of his acknowledged disadvantage on the open labour market.

Additional facts relevant to liability issues

The plant and the plaintiff's duties

[18] The defendant's beef processing plant at Coominya is on a 1,000 acre site which includes a farm. The plant has a kill floor, a boning room and areas where meat is processed and stored.

[19] This case involves a relatively small part of the processing plant, namely the rendering shed. In this section leftover parts are processed into meat meal and tallow (beef fat).

[20] The defendant is a privately owned company. Like other meat processing plants, its activities are subject to government regulation, including Department of Agriculture requirements.

[21] The provision of hot water above a certain temperature is essential. Two boilers were situated in a boiler house. However, at the time of the incident only one was in operation. The gas boiler had been decommissioned. As a result, the plant relied upon the oil-powered boiler. It was serviced regularly by a contractor, PBQ Technologies, which was based in Toowoomba. Mr Tony Butler was its lead technician for steam issues and any issues in relation to pipes. The defendant employed boiler operators to monitor the operation of the boiler during shifts. The plant had a normal day shift, and so most activity was concentrated between 5.30 am and 2.30 pm.

[22] Tallow from the rendering process was stored in two large tallow tanks close to the rendering shed. A very large hot water tank stood beside them. The hot water was needed to heat the tallow to enable it to be transferred to trucks. Workers in this part of the business would climb stairs to a maintenance platform situated between the tanks and the rendering plant. They would open steam relief valves. The steam pipes and the relief valves in this vicinity are central to the case.

[23] In June 2015 the management structure of the business consisted of a Managing Director and his son, the Operations Manager. There was a General Manager (Mr Giddins), a Quality Assurance Manager, a Risk and Compliance Manager, and a Maintenance Manager.

[24] Mr Giddins commenced with Greenmountain Food Processing at its inception in early 2007. Initially he was the Quality Assurance Manager and oversaw production. He moved into the General Manager's role in late 2010. I found Mr Giddins to be an honest and generally reliable witness. There were some relatively minor aspects of his evidence about the operation of the plant which were not so reliable, compared to the evidence of others such as Mr Walker who were more familiar with those aspects. That is not surprising since Mr Giddins has a demanding job managing a very large operation. He impressed me as a thoughtful, intelligent individual.

[25] Mr Walker also impressed me as a thoughtful, intelligent and honest witness. Like Mr Giddins, Mr Walker rose through the ranks, based upon his performance. He was only 32 years old at the time of the accident.

[26] Mr Walker is married with two children aged eight and seven. He was born on 19 December 1982 and went to Kempsey High School until the start of Year 12 in 2000 when he obtained an apprenticeship. He completed a four year apprenticeship with the local council in order to become an electrician. He later did a Certificate III Industrial Electronics Certificate. He started, but did not complete, a Certificate IV in Advanced Electrotechnology. He holds qualifications as an electrician and other certificates such as a forklift licence. He also holds a contractor's work licence. Before joining the defendant he worked for different companies in areas such as air conditioning and performed electrical work at the Lucas Heights nuclear facility.

[27] He started work at Greenmountain Food Processing in December 2008 as an electrician. Later, he became a leading hand, working under the then Maintenance

Manager. He impressed Mr Giddins and others. As Mr Giddins explained, Mr Walker was considered to be the most suitable person to be appointed as Maintenance Manager. He was reasonably intelligent and understood the responsibilities of a management position. Mr Giddins stated of Mr Walker:

> "He is able to follow structures; set routines. He had an understanding of the food safety principles and the other safety principles. Scott, being an electrician, was seen to be someone who had a high regard for high levels of work and integrity. It was a natural fit for Scott to be able to, sort of, progress into these higher roles."

[28] Before he sustained severe injuries on 12 June 2015, Mr Walker was physically fit and capable of performing work as an electrician and other manual work. For reasons to be addressed in relation to quantum issues, his injuries make him incapable of crouching or doing other work "on the tools". In June 2015 Mr Walker had a general understanding of the operation of the boilers. He had helped install the switchboard on one of the boilers. However, unlike the boiler operators, he was not trained to operate the boilers.

[29] More generally, Mr Walker's duties as Maintenance Manager required him to manage a team of employees, delegate tasks and "make repairs and upgrades in the most efficient and cost-effective way". A key responsibility was to maintain all facility and manufacturing assets. Another was to diagnose breakdown problems. He had to plan and ensure repair and installation activities. His duties were formalised in a duty statement. There is some contest about whether Mr Walker in fact was required to perform or in fact performed some of the duties. It is unnecessary to resolve that matter. It is sufficient to mention the duties which I have already stated and the first dot point on that long list:

> "Increase the productivity of the business, ensuring that all machinery, maintenance scheduling and budgeting are in place."

Mr Walker reported to the General Manager and to the Operations Manager.

[30] Mr Walker was remunerated with an annual package totalling $120,000 plus a car. For this reward he was required to work extended hours and to be on call at nights and on weekends. Systems existed described as the Scada alarm whereby he would receive messages when alarms were triggered or other action was required. Some of these matters would be able to be attended to remotely. Some problems would require his attendance at the plant, so he would travel there from his home outside normal work hours.

[31] Some servicing of equipment was undertaken by outside contractors. Mr Walker would deal with those contractors.

[32] Mr Walker's duty statement required him to focus on preventative and predictive maintenance and, as a result, he would have to make decisions about many aspects of maintenance and repair across a large and complex plant. He had the primary responsibility to decide whether required work was done by an employee or by a contractor. He would not have to revert to the General Manager or the Operations Manager in order to make these decisions. As Mr Giddins explained, Mr Walker had the ability to make "a discretionary call" if he was called out in relation to a

problem. It was Mr Walker who had the discretion to decide whether he attended to a task himself, called in an employee such as an electrician or a refrigeration mechanic or contacted an outside consultant. Mr Walker confirmed this, saying that whether or not a contractor was brought in depended on what the work was.

[33] The following was put to him in cross-examination:

> "If, before your accident, something had been required to be done on the roof of the rendering shed, you would have raised that with Mr Giddins or organised for a contractor to be engaged, wouldn't you?--
> -I probably wouldn't have raised it with Mr Giddins. No, I didn't – he employed me to take care of these things."

I accept Mr Walker's evidence. It is consistent with Mr Giddins' evidence about Mr Walker's discretion in relation to tasks being done and Mr Walker's responsibility to decide by whom and when they were done.

Access to the roof

[34] Before the events of 12 June 2015, Mr Walker had been on the platform which sits between the roof of the rendering shed and the hot water and tallow tanks. However, he could not recall being on the roof. The roof of the rendering shed was not a place where most workers would ever be required to go in the course of their employment. However, on occasions workers went there in order to perform tasks. For example, Mr Johnston, who has worked as an electrician at the plant since October 2008, was required to go onto the roof of the rendering plant in order to install an antenna which sent information to computers to enable staff to monitor the running of the boilers. This work was undertaken under the direction of the previous Maintenance Manager.

[35] Before that installation Mr Johnston had not received any training from his employer about working at heights. He has not received any such training since then. Instead, there has been a direction from the HR department since Mr Walker's accident to not go on the roof.

[36] Another occasion when employees of the defendant accessed the roof and did work there was when the then Rendering Manager was concerned about leaking from cooker vents which had rusted a hole in the roof and caused constant leaking. The Rendering Manager at the time wanted alsynite installed to stop the leaking since the rust was getting worse. Mr Walker told him that he should fix the pipe instead of just "Band Aiding it with alsynite". Mr Walker's evidence was:

> "… the next thing I remember is the alsynite was there. I'm not exactly sure who installed it, whether it was him or someone else, but I knew it had been installed."

Incidentally, someone who was inside the rendering plant could see daylight through the translucent alsynite. However, one could not see the tallow tanks through the alsynite from inside the shed.

[37] Mr Walker could not remember seeing any employees on the roof of the rendering shed. His evidence was:

> "We do have equipment on the roof, so that would require people to get up there from time to time."

He clarified that the equipment was the outlets for cookers. The vents go through the roof then across it and then down to a non-condensable tank. Mr Walker said that the vents used to "leak out a seal all the time".

[38] The evidence leads me to conclude that on fairly rare occasions an employee could be required to go onto the roof of the rendering shed in order to install something, as occurred with the installation of the antenna or the installation of the alsynite. They might also be required to go onto the roof in order to detect a problem, for example, the ingress of water, or to repair something, for example, if the antenna needed to be replaced or stabilised. While it may have been the practice to engage outside contractors to undertake substantial work such as re-roofing an entire shed, it was foreseeable that there would be occasions when an employee, such as the Maintenance Manager or someone on his team, would be required to go onto the roof. They might be required to do so in order to:

(a) identify the source of a problem or something needing repair;

(b) temporarily make something safe or secure, for example, if part of a roof panel had lifted in high winds; or

(c) do some simple repair or installation that did not require an outside contractor, as occurred with the alsynite installation.

These kinds of tasks, whilst rare, were the responsibility of the Maintenance Manager to undertake personally or direct an employee or an outside contractor to perform.

[39] Neither Mr Walker nor other employees were ever instructed to not go on the roof. There was no general instruction to employees in this regard. There was no sign at the point of entry incorporating that instruction.

[40] Mr Giddins' evidence was that he was not surprised that employees had never received any instructions not to go onto the roof prior to this accident. His evidence was that "The company assumed that there was a bollard or a – or a maintenance handrail there". However, the basis for the company making any such assumption was unstated by him and, if any such assumption was made, there was no basis for it. There was no bollard, handrail or other barrier preventing access from the platform onto the roof. Workers had in fact accessed the roof. No evidence was given by any relevant Risk and Compliance Manager that the company made such an assumption. If any Risk and Copliance Manager had made such an assumption, it was an assumption that would have been falsified by a simple inspection and risk management assessment.

Workplace health and safety instructions

[41] A search on the defendant's computer system for documents relating to working at heights revealed a working at heights handout and a working at heights toolbox information session document. These documents deal with a variety of matters including using ladders, scaffolding and working from elevated work platforms. They refer to fall arrest equipment. However, there is no evidence that these documents were given to Mr Walker. He could not recall being given them. Mr Johnston was not asked if he had ever seen or received these documents and one might have expected him to be asked about that if the defendant intended to prove that these documents were provided to employees either at their induction or at in-service training. There was no evidence from a Risk and Compliance Manager, past or present, about what use was made of the documents. Mr Giddins could only give evidence that these documents were on the computer system and that he found

them as a result of a search for documents relating to working at heights. The evidence therefore does not allow me to conclude that these documents were given to Mr Walker. The evidence tends to suggest that they were not.

[42] In any case, the documents relate to working at heights inside buildings, not outside them. This was a point which Mr Giddins accepted in an interview.

[43] There was no policy, let alone a safe work method statement, for working at heights outside or on the roofs of buildings. The defendant did not have any such instruction preventing access to the roof of the rendering shed without a safety harness.

[44] Mr Walker had been trained and was appropriately qualified in relation to the use of a scissor lift. It was used to reach heights inside buildings. However, it would not have been effective on the night in question to enable Mr Walker to reach the heights he was required to locate the source of the steam leak. In any case, he would have required a reasonable amount of time to locate the scissor lift and drive it to the scene.

The events of 12 June 2015

[45] The critical events have been described in the introduction. Some additional matters are relevant to the allegations of negligence and contributory negligence.

[46] PBQ were the defendant's "boiling contractors" at the time. They would be on site every few weeks and a scheduled maintenance visit had been organised for Saturday, 13 June 2015. It is important to distinguish the subject of that planned maintenance and the fault which became apparent to Mr Walker and which he addressed at around 5 pm on Friday, 12 June 2015. They concern different parts of the boiling system and were in different locations. The planned maintenance was to repair a condensate leak on pipework inside the plant. It was in a different location to the defective relief valve that was leaking steam.

[47] Mr Walker left work at around 3.30 pm on the Friday afternoon. He travelled the short distance to the hotel at Coominya where he met his workmate, Chris Johnston. Mr Walker and Mr Johnston bought one round each, so they both consumed two schooners (285 ml) of Hahn 3.5. They left the hotel at around 5 pm in their own vehicles. Mr Johnston needed to head home to look after his children because his wife was going out. Mr Walker was intending to go home to his family and his route home took him back past the meatworks. I accept the evidence of Mr Walker and
Mr Johnston that they paced themselves and had only two beers. Mr Johnston was definite in his evidence that they only had two beers. There is no sound reason to disbelieve his evidence which was convincing in this and in other respects. Each man depended upon his licence to get to work. Mr Walker lived on acreage with his family and the loss of his licence would have been devastating. The evidence indicates that it was simply a case of two workmates and friends sharing two beers at the end of the working week before heading home at 5 pm. There is nothing improbable about that evidence.

[48] In his interview with Workplace Health and Safety Queensland on 6 July 2015, Mr Walker simply mentioned seeing a fellow-employee who was an electrician in Coominya after he had left work. He did not disclose that he had two beers with

this person. Mr Walker's evidence was that he could not remember what he said during the interview about his movements after work. That is not improbable given his mental state at the time and the evidence of his wife about his condition at the time of the interview. Therefore Mr Walker could not say why he did not make any reference in the interview to having had anything to drink. I do not consider that this omission discredits him. It may be that at the time of the interview he felt that disclosing the fact that he had been to the hotel would open him to unfair or unfounded allegations of being intoxicated at the time of the accident. This in fact has occurred with pleaded allegations that he was under the influence of or affected by alcohol. The defendant has failed to establish this allegation. Consuming two mid-strength beers over a period of about an hour and a half would not have rendered Mr Walker under the influence of alcohol or affected him to any material extent. Some of the alcohol which he consumed shortly after 3.30 pm would have been processed by 5 pm. The small amount of alcohol which remained in his system by the time of the accident (approximately 5.18 pm) would not have placed him in breach of the company's policy in relation to alcohol, being a policy which, incidentally, was not brought to his attention.

[49] As he was driving down Coominya Connection Road on his way home, Mr Walker noticed a large body of steam emitting from the plant. Initially he thought it was on fire. When he realised it was steam venting from the boiler he called Tony Butler at PBQ to tell him that he would have to fix it the next day. It is probable that this message was left on Mr Butler's answering service. In any case, Mr Butler had occasion to telephone Mr Walker in relation to his plans to do work the next day and also to speak to him about this new problem.

[50] Mr Walker correctly perceived that the problem with the steam venting from the boiler was an important and urgent issue. As he said "it would cause a bigger issue on Monday if the boiler continued to vent on Monday". The boiler is a pressure vessel and needs to be sealed to maintain its pressure. If it vents steam unnecessarily it will not run at its capacity. The other boiler inside the shed seemingly had been decommissioned at the time. The workforce were not allowed to use it. Mr Walker thought it was condemned at the time, and Mr Butler confirmed that it was not in use. The whole plant depended upon this single boiler working. As Mr Walker said in his evidence:

> "If it doesn't run, the plant doesn't run either."

[51] The problem appeared to be with a safety valve in one of the three pipes coming out of the boiler. The boiler required all three pipes to be working at the time.

[52] When Mr Walker spoke to Mr Butler, Mr Butler asked him which pipe was leaking. Mr Walker could not tell from where he was standing. He walked away from the building to see if he could tell, but the pipes were only out of the roof a fairly short distance and so he could not tell. Therefore, he went up the steep metal stairs to the top of the hot water tank to get a better view.

[53] Mr Butler's evidence confirms that he told Mr Walker that Mr Butler needed to know which one of the relief valves was leaking so they could try and fix it over the weekend. As a result, Mr Walker said he would go to try and find out which one it was. Mr Butler's evidence was that it made sense to walk up to the platform

because "you've got to go above the boiler to see where the leak is", but that Mr Walker could not see it from the top when he finally got to the platform.

[54] Mr Walker explained in his evidence that he could not see which of the three pipes was leaking because all of them were in line. The steam was "fairly volatile" and came out in a big cloud. He saw that there was an opening or a gap in the railing on the platform right next to the roof. He believes he initially tried to lean out with one foot to see. Mr Walker told Workplace Health and Safety that he initially had one hand on the rail that was attached to the platform and was leaning out or stepping out to get onto the roof, with his other hand holding the telephone. However, he still could not tell which pipe was leaking. As a result, he stepped over onto the roof surface to see if he could "get another angle". He began to walk away on a diagonal, and the roof gave way.

[55] A contentious issue is Mr Walker's awareness or lack of awareness of the presence of alsynite in the vicinity of that part of the roof on which he was walking.

[56] As previously noted, Mr Walker had become aware of the alsynite when it had been installed, contrary to his advice, at the instance of the Rendering Manager some years earlier. It is necessary to clarify that the alsynite was installed at the instigation of the Rendering Manager because he thought it was the solution to prevent rust from getting worse and causing leaks near cooking vents. The alsynite was not installed in order to better illuminate the interior of the rendering shed. It had ample illumination without the alsynite from large doors which opened into it. If one was inside the rendering plant one could see daylight through the alsynite panels. However, one could not see the tallow tanks from inside the rendering shed, and thereby correlate where the alsynite was on the roof in relation to the tallow tanks.

[57] In summary, Mr Walker knew there was some alsynite somewhere on the roof. However, when he stepped onto the roof the presence of alsynite was not in his thoughts. His evidence, which I accept, is that he did not think about the alsynite. He stated "I didn't think it was where it was".

[58] At this stage he could still see the roof. Because there were no lights on inside the rendering shed, no light shone up through the alsynite. There was nothing to indicate to Mr Walker that any part of the roof was different to any other part in the area on which he was standing.

[59] Incidentally, Mr Walker's evidence that the presence of alsynite on the roof did not enter his thought processes at the time, because he did not think it was where it was, is not contradicted by a short and somewhat jumbled account given in the course of an interview with Workplace Health and Safety officers on 6 July 2015. His passing statement "I knew the alsynite was there" should be understood in the light of the fuller account he gave in his evidence. Mr Walker told the investigators that he was trying to stand on the beams and added that "you can walk on the tin generally, it's stable enough to hold a person."

[60] Mr Walker's evidence, which I accept, is not that he was trying to walk on beams to avoid the alsynite panels. Instead, he did not know where the alsynite panels were, was trying to stand on the beams, and understood that if he did not stand on the beams he would be walking on tin.

[61] These events were occurring at about 5.18 pm in fading Winter light.

[62] Mr Walker's evidence was that he could still see the roof of the shed since there was "still light enough outside". However, he accepted in cross-examination that it was dusk and that his visibility was limited. Although the alsynite panels may have had a slightly different colour to the metal panels surrounding them, that difference was not able to be seen by Mr Walker at that time of night.

[63] I find that the state of the light at the time was not such as to allow Mr Walker to notice any difference between the alsynite panel and the surrounding metal panels. I also find that although Mr Walker had known that alsynite panels had been installed on the roof, he did not appreciate that they were located in the vicinity he was contemplating standing upon. Their presence did not enter his thinking on the night. He did not think they were where they were.

[64] Another issue is whether Mr Walker was distracted by being on the telephone with Mr Butler. As noted, when he leant out from the platform with one hand on the rail, he had his mobile phone in his other hand. Under cross-examination Mr Walker accepted that he was on the telephone at the time he was walking on the roof. He was still on the phone when he stepped onto the roof. At the time he did not think he was distracted, although in hindsight he accepts that he probably was. He did not think he was taking a risk.

[65] Mr Walker may not have been actually talking to Mr Butler when he was standing on the roof and at the precise time he stepped and fell through the alsynite. However, the phone was in operation and in Mr Walker's hand so that he could report what he saw to Mr Butler. Mr Walker's recollection of his last conversation with Mr Butler was telling him that he was on the water tank and could not tell which hot water pipe was leaking. Mr Butler's recollection was similar, with Mr Walker reporting to him that he still could not see where the leak was coming from when he got to the platform. The last thing Mr Butler recalls Mr Walker saying is "I'll have a look. I'll have a bit further of a look over". In the circumstances, I think it likely that Mr Walker stopped talking to Mr Butler just before he stepped off the platform onto the roof. It is probable that he kept the telephone to his ear so that he could report anything he saw about the source of the leak. That did not occur because he stepped onto the alsynite panel and fell through it.

[66] Mr Walker's actions were motivated by a sense of duty. He sought advice from Mr Butler who impressed upon him that Mr Butler needed to know which valve was leaking so they could try to fix it over the weekend. This sense of urgency was not unreasonable. The leak did not present a danger. However, if the source of the leak was not identified on the Friday evening then there would have been substantial delays on the Saturday in locating it. If the source of the leak had not been identified on the Friday evening, there was a high chance that the boiler would be empty and not leaking steam the next morning. Mr Butler, an expert in the field, said that it would have been empty as it is always empty in the morning. If he had arrived the next morning he would have had to have run the boiler up to pressure which can take about four hours. The boiler pipes must then be cooled before the repair process can start, which could take up to six hours. As matters transpired, it took the whole weekend for Mr Butler to make a temporary repair with a blanking plate to isolate the area before taking the valve out to replace it. After the blanking plate was installed it could take up to four hours to steam up the boiler.

[67] In summary, the problem having been identified, there was a risk that on Monday the only boiler that was essential to the plant would not be able to produce enough pressure to allow the plant to run, including providing hot water at the high temperature required by the authorities for sterilisation purposes. It was important to locate the source of the leak. Mr Butler's advice to Mr Walker was that he needed to get up to where he could see the source of the leak. Mr Walker followed this advice.

[68] Mr Butler rejected the suggestion put to him in evidence that instead of doing this, Mr Walker should have gone into the boiler room and felt which was the hotter pipe or which was vibrating the most. Mr Butler's evidence is that touching the pipe would have been a health and safety risk because the steam in it is about 134 degrees.
Mr Butler did not regard that as an option. Mr Butler's evidence is that Mr Walker did what Mr Butler would have done in the circumstances, namely climbed up to ascertain the source of the leak.

[69] When cross-examined about his conduct in walking on the roof in near darkness, Mr Walker explained that he was trying to make sure the plant was running for Monday and that "preventative maintenance is a big part of my role". The following passage of cross-examination is instructive:

> "And that it wasn't part of your job to be on the roof?---It's part of my job to fix an issue, and that's what I was doing.
>
> Yeah. But Mr Walker, it wasn't part of your job to be on that roof, was it?---If it was required to go on the roof, I'd go on the roof. I – I was fixing a problem that would be a potential problem to the Monday's production."

[70] Mr Walker perceived that the problem was urgent. He explained his mental process that by the next morning Mr Butler would not be able to see the source of the leak because there would be no steam left in the boiler. It would take hours to run the boiler up to operating pressure to see the same leak and then time would be spent relieving the pressure again and allowing the pipes to cool so that the valve could be replaced. Mr Walker explained:

> "If he didn't replace the valve I think we would have struggled to get running on Monday because there wouldn't have been enough pressure to make the hot water let alone get the whole plant to run.
>
> And if the main steam boiler that you were dealing with, the oil boiler, wasn't working on Monday what would that mean for production?---It'd stop. It wouldn't – there'd be no production."

[71] I find that Mr Walker's actions were undertaken in the performance of an important duty. He sought and obtained advice from an expert independent contractor about how to find the source of the leak. He was specifically asked by Mr Butler to see if he could tell from which safety valve the steam was escaping. Mr Butler needed to know which one it was so he could try and fix it over the weekend.

[72] In going onto the roof when he did at around 5.18 pm in fading light to try to find the source of the leak, Mr Walker was doing something which was inherently risky.

Being on any roof without a harness is risky. His attention was primarily directed to where the steam was escaping rather than the surface upon which he was walking.

[73] Although Mr Walker was taking a risk, he did not appreciate the extent of risk he was taking. It was not a case of appreciating that he was engaging in risky activity, including walking in the vicinity of alsynite panels. He engaged in objectively risky activity in discharging his duty as a Maintenance Manager in a circumstance of perceived urgency. He was concerned that unless the location of the defect could be ascertained, production of the entire plant might have to stop on Monday.

[74] Nothing caused him to stop and think about the potential danger to his own safety. Nothing told him that he should not go on the roof at all, or at least not go on the roof without a safety harness. No barrier or gate stopped or impeded his access to the roof. There was no barrier around the alsynite panel which would warn him of its presence and stop him from stepping onto it.

Statutory provisions relevant to liability issues

[75] I will defer consideration of provisions of the Act in relation to contributory negligence. The relevant provisions of the Act in relation to the liability issues are contained in Divisions 2 and 3 of Part 8 of Chapter 5 of the Act. They provide:

> "**Division 2 General standard of care**
>
> **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.
>
> **305C Other principles**
>
> In a proceeding relating to liability for a breach of duty –

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.

Division 3 Causation

305D General principles

(1) A decision that a breach of duty caused particular injury comprises the following elements –

(a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty – being a breach of duty that is established but which can not be established as satisfying subsection (1)(a) – should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

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

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

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

> (4) For the purpose of deciding the scope of the liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.
>
> **305E Onus of proof**
>
> In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[76] The interpretation and application of these provisions is guided by authority in relation to the Act and also authorities in relation to the comparable provisions of the *Civil Liability Act* 2003 (Qld) and its interstate analogues.

Foreseeability – s 305B(1)(a) and (b)

Identification of the risk of injury

[77] 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.[1] 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.[2] 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.[3] Necessarily, the risk must be defined taking into account the particular harm that materialised and the circumstances in which that harm occurred.[4] As Leeming and Payne JJA stated in *Coles Supermarkets Australia Pty Ltd v Bridge*:[5]

> "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." (references omitted)

[78] The following three propositions are derived from the same judgment.[6] They were recently adopted by the New South Wales Court of Appeal in *Menz v Wagga Wagga Show Society Inc*:[7]

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1 *Coles Supermarkets Australia Pty Ltd v Bridge* [2018] NSWCA 183 at [22] in relation to the provisions of the *Civil Liability Act* 2002 (NSW).
2 *Erickson v Bagley* [2015] VSCA 220 at [33].
3 Ibid.
4 Ibid, cited with approval in *Coles Supermarkets Australia Pty Ltd v Bridge* [2018] NSWCA 183 at [22].
5 [2018] NSWCA 183 at [22].
6 Ibid at [22].
7 [2020] NSWCA 65 at [52].

> "(1) the formulation of risk of harm should identify the 'true source of potential injury' (*Roads and Traffic Authority of NSW v Dederer* at [60]) and the 'general causal mechanism of the injury sustained' (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98];
>
> (2) 'the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred'; *Erickson v Bagley* [2015] VSCA 220 at [33]; *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55];
>
> (3) '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 (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).'"

[79] These authorities explain that it is possible to formulate the "risk of injury" in different ways. The state of affairs to which the legal rule applies may be described more or less generally or specifically without undue artificiality.[8] Both unduly narrow and unduly broad formulations should be avoided.

[80] Applying the guidance offered by these cases, I conclude that it would be too narrow to define the risk of injury in this case by reference to the risk of being injured when investigating the source of a steam leak upon dusk in a manner which required the worker to stand upon the roof in order to detect the source of the leak.

[81] It would be too broad to formulate the risk of injury as the risk of encountering hazards in the workplace when carrying out duties as a Maintenance Manager.

[82] Having regard to the risk which is claimed to have materialised and caused the injury of which the plaintiff complains, it is appropriate to identify "the risk of injury" for the purposes of s 305B(1) as the risk of suffering personal injuries when investigating a maintenance problem or undertaking a repair or installation that required the worker to go onto the roof of the rendering shed. The particular risk is the risk of falling off or through the roof.

[83] The relevant risk of injury is probably not confined to the risk of injury to the Maintenance Manager. Arguably, the relevant risk is to him or any worker to whom he entrusted the task of investigation, installation or repair. However, I shall concentrate on the risk to the Maintenance Manager because the circumstances in which the harm occurred involved him undertaking an investigation rather than entrusting that task to another employee.

Was the risk of injury foreseeable?

[84] The defendant submits that a reasonable person in its position could not have foreseen that one of its senior employees, holding a management position, would access the roof of the rendering shed in failing light after consuming two alcoholic beverages, while talking on a mobile phone, in circumstances in which he knew the

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8 *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65 at [48].

roof contained alsynite panels, but was not able to see those panels. This submission tends to formulate the risk too narrowly and by reference to the particular circumstances in which the plaintiff was injured. It relies upon the fact that Mr Walker had earlier consumed two beers when their consumption played no role in the events and, in any case, was not something which Mr Walker was prohibited from doing. The relevant policy was that an employee who attended the workplace under the effects or influence of alcohol or an illicit drug would not be permitted to commence or continue work. Mr Walker was not so affected when he began his investigations.

[85] The defendant's ultimate submission about foreseeability also relied upon the fact that the incident happened after business hours without Mr Walker informing anyone from the defendant of his intention to access the roof of the rendering shed. The submission also relies upon the contention that the incident happened in circumstances where Mr Walker's actions did not form part of his duties, but was a chance event when he noticed steam when driving by the plant after hours. These foundations of the defendant's argument are not established. While the incident happened after a normal shift, Mr Walker's duties were not confined to those hours. He was required to be on call at night or on weekends. I do not accept the submission that the incident happened in circumstances where Mr Walker's actions did not form part of his duties. Part of his duties was to investigate and remedy problems with the plant. This was not a minor or incidental part of his duties. He noticed something wrong when driving by the plant after normal hours. This timing does not detract, however, from the fact that the same requirement to respond would have arisen had he been on site at that time for some other reason or had been notified by someone of the leaking steam, which appeared initially to be smoke.

[86] In my view, a number of matters made the relevant risk of injury foreseeable, namely a risk of which the defendant ought reasonably to have known.

[87] There was no prohibition on staff and maintenance workers such as Mr Walker from going onto the roof.

[88] There was no requirement to wear a safety harness when doing so. Mr Walker and other maintenance workers, such as Mr Johnston, received no training about working on roofs.

[89] There was no barrier to impede access by a maintenance worker to the roof.

[90] The roof consisted of an alsynite area which was not designed to support the weight of a person standing on it.

[91] There was an absence of webbing below the alsynite, metal roofing panels above it or a barrier around it to secure it from someone walking on it. There were no signs warning of the presence of the alsynite panels.

[92] Although employees did not routinely or frequently access the roof of the rendering shed, they had done so on occasions. Workers including Mr Johnston accessed the roof of the rendering shed to install an antenna some years earlier. Other employees, apparently under the direction of the Rendering Manager, accessed the roof to install the alsynite panelling.

[93] That the Maintenance Manager (or another worker at his direction) might be required to go on the roof to investigate a problem or undertake a repair or installation was reasonably foreseeable.

[94] The need to do so might arise in circumstances of urgency, such as the lifting of a roofing panel during high winds or to effect temporary repairs to prevent the ingress of water and contaminants into the rendering shed and its production processes. The need to investigate a problem or undertake urgent repairs may occur outside the normal shift hours. In that event one would expect the Maintenance Manager to be on site or be called to the site.

[95] The risk of falling off or through the roof, particularly through the alsynite, was a risk of which the defendant ought to have known. In particular, it ought to have been known by the defendant's Occupational Health and Safety Manager undertaking a risk analysis of the site. The fact that maintenance workers had been required to go on the roof in order to install an antenna raised the possibility that they would be required to go there on another occasion to remove or repair it, if, for example, its footings rusted or became unstable.

[96] The defendant relies upon *Seage v State of New South Wales*[9] in which a detective sergeant of police, of his own volition, attempted to move a heavy item of furniture by himself in order to redesign a "strike force room" in circumstances where co-workers were available to assist him with that task. The New South Wales Court of Appeal upheld the trial judge's finding that the plaintiff's injury in that case was not foreseeable. The plaintiff's superior "had no reason to expect, or indeed suspect, that [the plaintiff] would himself be engaged in moving furniture and in particular be so engaged without the assistance of any of the 27 subordinate detectives who were to use the room".[10] The circumstances of that case are factually distinguishable from the present. It was no part of the detective sergeant's duties to move heavy furniture on his own. In this case, investigating and rectifying problems so as to maintain production was what Mr Walker as Maintenance Manager was required to do. That duty was not confined to any particular part of the site. It was a duty he was required to undertake on his own, as circumstances dictated, outside normal business hours.

[97] I conclude that the relevant risk of injury was foreseeable in terms of s 305B(1)(a) in that it was a risk of which the defendant ought reasonably to have known.

[98] For completeness, I should add that if the relevant risk was to be defined more narrowly by reference to the particular circumstances, namely an investigation of steam leaking from malfunctioning valves above the tallow tanks, then I would conclude that the relevant risk of injury was foreseeable because it would be reasonably foreseeable that the worker would need to go above the source of the leak and onto the roof in order to locate it.

[99] Finally, in connection with the issue of foreseeability and more generally in the context of liability for breach of duty, I do not rely in reaching the above conclusions on the subsequent action taken by the defendant, including instructing workers not to go on the roof and fencing off the gap through which Mr Walker

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9 [2008] NSWCA 328.

10 At [41].

entered the roof from the platform, as affecting the question of liability in relation to risk or of itself constituting an admission of liability in connection with the risk.[11]

Was the risk "not insignificant"?

[100] This statutory test effected a slight increase in the necessary degree of probability over the common law formulation of "not far fetched or fanciful".[12] The double negative formulation of "not insignificant" is deliberate, and was not intended to be a synonym for significant. The word "significant" would be apt to indicate a higher degree of probability than was intended.[13]

[101] The fact that the probability of the occurrence is low does not mean that it is insignificant. The probability of a worker such as Mr Walker suffering injuries from working on the roof of the rendering shed, investigating a maintenance problem or undertaking a repair or installation, was not high because of the infrequency that the Maintenance Manager or other workers might be expected to have occasion to go onto the roof. Still, the risk of injury was real because of the probability of a serious injury in the event of a fall.

[102] The low frequency of persons going onto the roof did not make the risk that injury may materialise insignificant. The risk of injury being sustained by untrained or unharnessed persons going onto any roof is real. That is so in a domestic setting by a homeowner who goes unharnessed onto the roof of a dwelling once a year to perform some task. It is equally real in this industrial setting of a very high roof.

[103] I conclude that the relevant risk of injury being occasioned from falling off or through the roof was "not insignificant".

Would a reasonable person in the position of the defendant have taken one or more of the alleged precautions in the circumstances? – s 305B(1)(c) and (2)

[104] The probability that the injury would occur if care were not taken was substantial. A critical feature is the height of the roof, and that any fall from or through it would be more than seven metres onto a hard surface. There was no guard rail or net to prevent the fall. The worker would not be restrained by a safety harness. Any injury would likely be very serious.

[105] The burden of taking precautions to avoid the risk of injury was not great.

[106] An obvious, simple and inexpensive precaution was to have a policy and a safe work method statement for working at heights which either prevented workers from accessing the roof or prevented them from accessing the roof without use of a safety harness. That policy would be implemented by instruction and a simple, obvious sign at the point of entry onto the roof such as "Danger: No access to roof without safety harness".

[107] The duty of care owed by the defendant to its employee, Mr Walker, obliged it to instruct him and others not to go onto the roof without a harness. In addition, s 300 of the *Work Health and Safety Regulation* 2011 (Qld) obliged it to put in place

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11 The Act, s 305C(c).

12 *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at 333 [26]; *Stokes v House With No Steps* [2016] QSC 79 at [66].

13 *Pollard v Trude* [2008] QSC 119 at [39].

arrangements for ensuring the relevant work was carried out in accordance with a safe work method statement. One such arrangement was a simple and obvious warning sign at the point of access to the roof.

[108] The implementation and maintenance of a safe system of work would require training about the use of safety harnesses in accordance with a safe work method statement.

[109] Discharge of the duty of care, including the duty to take reasonable care to avoid exposing employees to unnecessary risks of injury, and to take reasonable steps to provide a safe place of work and a safe system of work, is pleaded by Mr Walker to have required the defendant to have a safe work method statement preventing access to the roof without a safety harness. It is pleaded to have required certain physical precautions. One was to fence off access from the platform to the roof. Another was to secure the alsynite panel. Another additional or alternative precaution was to place signs warning of the presence of the alsynite panel.

[110] Mr Walker also pleaded as a particular of negligence a failure to train him in the availability of an alternative method of identifying which of the three pipes may be releasing steam. In essence, the case is that Mr Walker should have been given training of the kind he eventually received which would have told him about a manner of testing the heat of the pipes and thereby identifying which of them was releasing steam.

[111] The various precautions relied upon by Mr Walker in his pleading must be shown by him to be precautions that a reasonable person in the position of the defendant would have taken in the circumstances. In deciding that question, regard is had to the matters which I have already addressed arising under s 305B(2), namely the probability that the injury would occur if care were not taken, the likely seriousness of the injury and the burden of taking precautions to avoid the risk of injury. The requirement imposed by s 305B(1)(c), having regard to the matters in s 305B(2), is a statutory element which a plaintiff must prove. This element overlays general law principles about determining breach of duty. The inquiry into breach of duty is prospective.[14] As Mason P stated in *Coca Cola Amatil (NSW) Pty Ltd v Pareezer*:[15]

> "A breach inquiry is not satisfied merely by positing, with the benefit of hindsight, that something more might have been done."

The inquiry about breach must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered.[16] That inquiry must attempt, after the event, to judge what the reasonable person would have done to avoid what is now known to have occurred. Issues of breach, like issues of causation, require a court to avoid hindsight bias.[17] I adopt the approach in *Adeels Palace Pty Ltd v Moubarak*[18] which discussed the comparable provisions of the *Civil Liability Act* 2002 (NSW). It was followed in *Stokes v House With No Steps*.[19]

[112] In my view, a reasonable person's response to the foreseeable risk of injury would have been to take one or more of the precautions pleaded in subparagraphs 5(a), (b), (c), (e) and (g) of Mr Walker's pleading. If care was not taken to avoid the risk of a worker such as Mr Walker falling off or through the roof of the rendering shed in the course of undertaking duties in that location, then there was a probability that injury would occur. The injury would be very serious. The burden of taking each of the precautions was moderate.

[113] As noted, I do not take into account the defendant's subsequent action in instructing workers not to go on the roof, installing a fence and replacing the alsynite with tin. This does not, however, alter the fact that each of those precautions was a precaution that, viewed prospectively, would reduce or avoid the risk of serious injury. None of them was burdensome or expensive when regard was had to the risk of serious injury to a worker from a fall off or through the roof.

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14 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461 [124] ("*Vairy*").
15 (2006) Aust Torts Reports 81-834; [2006] NSWCA 45 at [3].
16 *Vairy* at 461 [126].
17 *Vairy* at 461 [124] – 462 [128]; *Rosenberg v Percival* (2001) 205 CLR 434 at 441-2.
18 (2009) 239 CLR 420 at 437 [27] – [28].
19 [2016] QSC 79.

[114] I conclude that a reasonable person in the position of the defendant would have taken one or more of those five precautions in the circumstances.

Factual causation

[115] Section 305D(1)(a) is the element of factual causation. A plaintiff must establish that, but for the alleged breaches of duty, the event giving rise to the injury probably would not have occurred.[20]

[116] As to the precaution by which the defendant would have directed Mr Walker and other employees that they should not access the roof without a safety harness, counsel for Mr Walker submits that this would have prevented the injury, there being no suggestion that Mr Walker was other than a dutiful and compliant employee. Counsel for the defendant submits that it is unlikely that such a direction, reflected in a safe work method statement, would have prevented Mr Walker from going onto the roof and being injured. He argues that any safe work method statement prohibiting him from accessing the roof without a safety harness probably would have been given to Mr Walker at the time of his induction and, in any event, was unlikely to have had any impact on his decision to access the roof on 12 June 2015. Reference is made to induction documents about which Mr Walker's recollection was poor. However, the fact that Mr Walker's recollection of induction documents was poor is understandable. There was no satisfactory evidence about the induction documents he was given. There certainly was no evidence that Mr Walker or co-workers such as Mr Johnston were given documents about working at heights and, as noted, the documents on the defendant's computer system which became Exhibits 12 and 13 were not shown to have been given to Mr Walker or other maintenance workers. In any case, the documents related to working at heights indoors rather than working at heights externally and on roofs. None of them prohibited Mr Walker from ascending the steps as he did, and stepping through the gap onto the roof.

[117] The defendant's submissions also tend to assume that it was sufficient to bring the contents of the policy and safe work method statement to an employee's attention in a form at the time of initial induction, rather than them being reminded of it by regular training and by a sign at the critical place where the instruction counted.

[118] Taking reasonable care to avoid exposing employees to the risk of injury required the direction to be given to an employee as part of their induction and training and also at the place it counted the most: the access point to the roof.

[119] Mr Walker was a well-regarded employee. He was promoted to a responsible position as maintenance manager because of his ability to follow rules and systems. His training and work as an electrician were apt to make him safety-conscious. If he had been directed that he and the workforce which he supervised were not to access the roof of the shed without a safety harness then I think it likely that he would have observed this instruction. In reaching this conclusion I take into account the urgency of the task he perceived at the time and his desire to find the source of the leak so as to ensure that the problem was rectified and to allow the plant to operate on the Monday.

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20 *Inghams Enterprises Pty Ltd v Kim Yen Tat* [2018] QCA 182 at [50], [75].

[120] Those motivations explain why he went onto the roof when he did. However, Mr Walker's preparedness to do so in the course of doing his duty does not mean that he would have done the same thing had he been instructed to not do that very thing. The whole purpose of such an instruction would be to stop a worker such as Mr Walker from placing himself in a dangerous situation on the roof. Someone in Mr Walker's management role, and of his intelligence and demeanour, would be likely to follow instructions to not go on the roof without a harness. Any initial instruction would have been supplemented with training about where a safety harness was to be found and how it was to be used.

[121] An instruction to not access the roof without a safety harness would probably have caused Mr Walker to stop and think before stepping off the platform and onto the roof. If he had stopped and thought about the matter then he would have realised the danger. He may also have given some thought to the presence of the alsynite on the roof. It is more probable than not that the instruction would have prompted him to obtain a safety harness and use it. If a safety harness could not have been found then it is unlikely that he would have gone onto the roof without one in disobedience of a clear safety instruction. That was the point of the instruction. I consider it more likely than not that Mr Walker would have observed the instruction.

[122] If the alsynite panel had been secured by having non-corrosive steel or some other metal placed above it so as to strengthen it, then Mr Walker probably would not have fallen through it. The evidence is unclear as to whether having mesh placed below it would have been sufficient to prevent the fall. If the alsynite panel had been secured by a barrier around it then this probably would have prevented Mr Walker from stepping onto the alsynite and falling through it.

[123] Such a barrier probably would have made the erection of signs warning of the presence of the alsynite panel unnecessary. However, this particular raises the question of whether Mr Walker would have heeded such a sign. The defendant submits that since he knew of the presence of the alsynite panel, a warning sign would have been redundant. However, the evidence is that Mr Walker knew that there was an alsynite panel somewhere on the roof but did not know or appreciate that it was present at the part of the roof upon which he was about to stand and upon which he did in fact stand. A warning sign probably would have alerted him to the presence of the alsynite. However, a barrier around the alsynite would have been more effective.

[124] As to the precaution of fencing off the gap through which Mr Walker entered onto the roof, a fence or barricade would have been effective. The fence that was erected after the event included a locked gate which enabled individuals with a key to the gate to access the roof. If such a fence with a gate had been erected and this was the only relevant precaution taken, then it is not clear whether this would have been effective to keep Mr Walker off the roof. He did not give evidence that he would not have used the gate if one had been installed in the fence. His evidence is that he did not know whether he would have used a gate. On balance, if there had been no instruction to not go on the roof without a harness and no other physical impediment such as a barrier around the alsynite, and if the only precaution taken was to install a fence with a gate, then the presence of the fence and gate probably would have made Mr Walker at least think why the fence and gate was there and to be alert that he was entering a potentially dangerous area. However, assuming the absence of any instruction that he was to not go on the roof without a harness, I am inclined to

conclude that Mr Walker probably would have used the key which would have been made available to him to go through the gate. Therefore, if the gap had been simply fenced off it would have been effective. If it had been fenced off but with a locked gate in the fence, I am not persuaded that this precaution on its own would have prevented the event and the injuries.

[125] This conclusion does not, however, detract from my earlier conclusions that the precautions identified in subparagraphs 5(b), (c), (e) and (g) probably would have been effective to prevent Mr Walker from falling through the alsynite panel and sustaining severe injuries.

[126] It is appropriate, for completeness, to address the precaution identified in subparagraph 5(d) which relates to training Mr Walker in the availability of an alternative method of identifying which of the three boilers may be releasing steam. His case in this regard is that if the defendant had trained him in the operation of the boiler in question, he would have been aware that he could have ascertained which pipe had the defective valve by undertaking a heat test on each pipe inside the shed, and not being required to go upstairs and view matters from the top of the boiler or on the roof. I accept that if Mr Walker had been trained in this regard, then he would have followed that instruction. The issue, however, is whether he should have been trained in that regard. As Mr Giddins explained, training was made available to boiler technicians and maintenance workers such as Mr Johnston. Mr Walker was only given this training after the event when a vacancy became available on a training course. One can understand why it might be helpful for a Maintenance Manager who was required to "troubleshoot" problems and diagnose faults outside normal hours to have a better understanding than Mr Walker did of how to operate the boilers. However, I am not persuaded that the defendant's duty of care to him required this.

[127] If I was to assume in Mr Walker's favour that training in the operation of the boiler should have been given in order to enable him to safely undertake maintenance work, including diagnosing problems with the boilers which may have become apparent outside ordinary hours, then in the circumstances which prevailed on the evening of 12 June 2015, Mr Walker would have spoken to Mr Butler in any event. He probably would have been guided by Mr Butler's advice about what to do to detect the source of the leak. Mr Butler seemingly would have advised against touching the pipes so as to ascertain their heat. Mr Butler's evidence was that it made sense for Mr Walker to do what he did in going up to the platform and to try to get above the tanks to see where the leak was coming from. I think it likely that Mr Walker would have followed Mr Butler's advice. Therefore, training Mr Walker in the availability of an alternative method of identifying which of the three pipes had the faulty valve was unlikely to have made a difference.

[128] I conclude that one or more of the precautions nominated by Mr Walker probably would have prevented him from suffering his injuries.

Conclusion on liability

[129] I conclude that Mr Walker has proven that the defendant's negligence caused him to suffer loss and damage.

Contributory negligence

[130] The defendant did not press a pleaded defence of voluntary assumption of risk. Instead, it relies on aspects of Mr Walker's conduct as constituting contributory negligence.

Relevant statutory provisions

[131] Reference is made by the defendant to the following provisions of the Act:

> "**305F Standard of care in relation to contributory negligence**
>
> (1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the worker who sustained an injury has been guilty of contributory negligence in failing to take precautions against the risk of that injury.
>
> (2) For that purpose –
>
> (a) the standard of care required of the person who sustained an injury is that of a reasonable person in the position of that person; and
>
> (b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.
>
> …
>
> **305H Contributory negligence**
>
> (1) A court may make a finding of contributory negligence if the worker relevantly –
>
> (a) failed to comply, so far as was practicable, with instructions given by the worker's employer for the health and safety of the worker or other persons; or
>
> (b) failed at the material time to use, so far as was practicable, protective clothing and equipment provided, or provided for, by the worker's employer, in a way in which the worker had been properly instructed to use them; or
>
> (c) failed at the material time to use, so far as was practicable, anything provided that was designed to reduce the worker's exposure to risk of injury; or
>
> (d) inappropriately interfered with or misused something provided that was designed to reduce the worker's exposure to risk of injury; or
>
> (e) was adversely affected by the intentional consumption of a substance that induces impairment; or
>
> (f) undertook an activity involving obvious risk or failed, at the material time, so far as was practicable, to take account of obvious risk; or

(g) failed, without reasonable excuse, to attend safety training organised by the worker's employer that was conducted during normal working hours at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event resulting in the worker's injury.

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

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

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

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

[132] The defendant did not rely upon s 305H(1)(f) and the meaning of "obvious risk" in s 305I. If, however, I had been invited to conclude that the relevant risk, in the circumstances, was one that would have been obvious to a reasonable person in the position of Mr Walker, then this simply would have been a basis to engage s 305H(1)(f).

Defendant's submissions

[133] The defendant's primary submission is that by accessing a roof which he knew to have alsynite panels, in failing dusk light such that he could not see those panels, and while engaged in a mobile phone conversation, Mr Walker failed to meet the relevant standard of care for his own safety. This contention is said to be not diminished by the fact that his motivation was conscientious, namely ensuring that the boiler would continue to operate and provide heating for the proper operation of the plant. This conscientious motivation is submitted to not render sensible his decision to undertake a dangerous task without obtaining advice as to the best means of establishing which valve was leaking.

[134] The consumption of even a modest amount of alcohol is submitted to add to the equation of Mr Walker's lack of regard for his own safety in accessing a roof in inadequate light.

[135] Reliance is placed upon the fact that Mr Walker was a manager with trade qualifications attending to a task outside of his regular duties and that his duties included workplace safety in relation to employees he was required to supervise. Reference is made to part of Mr Walker's evidence under cross-examination in which he acknowledged that he would not have been likely to have put one of those employees in the same position as he placed himself on 12 June 2015.

[136] The lack of care for his own safety was not "borne out of inattention or inadvertence in the context of familiarity with a repetitive task". Instead, Mr Walker is said to have elected "without providing the defendant with any opportunity to intervene" to undertake the dangerous act of walking on a roof known to have alsynite panels in limited light.

[137] The defendant submits that the apportionment of liability should be relatively equal and that the appropriate finding in relation to contributory negligence should be 50 per cent.

Plaintiff's submissions

[138] Mr Walker submits that the injury occurred in the course of performing his duties and that he was not adversely affected by alcohol at the time. I accept those submissions. I also accept the submission that his conduct in stepping onto the roof was not done in breach of any instruction to not access the roof.

[139] As to the defendant's submission that there was no need to undertake the task without obtaining advice as to the best means of establishing which valve was leaking,
Mr Walker was not aware that there was any alternative means of ascertaining which valve was leaking. As Mr Walker's submissions point out, he had not been trained at the time. I also find that he was not required to seek advice from Mr Giddins or anyone else at the defendant about what to do. This is because he sought and obtained advice from a boiler expert, Mr Butler.

[140] I accept Mr Walker's submission that he had not confronted this problem before and that Mr Butler, the only boiler expert called in the case, would have done the same thing as Mr Walker in trying to ascertain the source of the leak, namely go to an elevated position. Mr Walker was not contributorily negligent in not going into the boiler shed and trying to ascertain from there which of the three pipes was leaking steam. Because Mr Walker took his guidance from Mr Butler and Mr Butler's evidence was that it made sense to go up the stairs to the platform in order to find the leak, it is unnecessary for me to rely on the additional evidence of Mr Johnston, who said that he would have accessed the roof in the same manner that he did with the antenna, because it would be "the best vantage point for those particular pipes". He added that this was the best place to view the fault and the quickest way to "fault-finding".

[141] Mr Walker submits that unfortunately, when he got to the platform, because the pipes were all in line, he could not tell which was the faulty valve and "in the heat of the moment" he stepped onto the roof. This is submitted to be "a classic case of momentary inadvertence".

[142] The allegations of contributory negligence fall to be judged "in the context of a finding that the employer had failed to use reasonable care to provide a safe system of work, thereby exposing him to unnecessary risks".[21] The question is said to be whether his conduct amounted to "mere inadvertence, inattention or misjudgement" rather than negligence, rendering him responsible in part for the damage.[22] Reliance is placed upon the observations of Crow J in *Dance v Jemeas Pty Ltd (No 2)*[23] that

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21 *Bankstown Foundry Ptd Ltd v Braistina* (1986) 160 CLR 301 at 310.
22 Ibid.
23 [2019] QSC 303 at [29].

"Contributory negligence, like negligence, ought to be judged with foresight and not with the benefit of hindsight".

[143] Mr Walker is submitted to have not taken into account a risk that was not apparent to him in circumstances of urgency.

Did Mr Walker fail to take precautions against the risk of injury that a reasonable person in his position would have taken?

[144] The standard of care required of Mr Walker is to be decided on the basis of what he knew or ought reasonably to have known at the time.[24] The relevant standard of care in deciding whether he failed to take precautions against the risk of injury that he sustained is what a reasonable person in his position would have done.

[145] The task that he was required to undertake was outside the usual duties he was called upon to perform. It was not a task that he had been trained to perform. It was an unexpected task in which he was guided by an expert on steam boilers, who wanted Mr Walker to find the source of the leak and agreed that he should go to an elevated place in order to do so.

[146] Mr Walker's concession under cross-examination that he would not have required an employee to do what he did was given with the benefit of hindsight, knowing the injuries which he had sustained and not wishing to have placed any employee under his control in that situation. The defendant's argument tends to assume that another employee would have been there at that time of day on his own when, in fact, it was Mr Walker who was on the scene after hours performing the role of diagnosing the source of the fault. Nevertheless, Mr Walker's after the fact concession shows some recognition of the danger in which he placed himself, assessed objectively, and in which he would not have wished to have placed another employee. However, at the time he did not appreciate that stepping onto the roof was as risky as it in fact was. The issue remains what a reasonable person in his position would have done, knowing what he did at the time or what he ought reasonably to have known at the time.

[147] An important circumstance is that Mr Walker acted as he did in poor light. Another factor is that he had prior knowledge that there was alsynite on the roof. However, this fact did not enter into his thinking because he did not think it was where it was. Therefore, Mr Walker's is not to be judged on the basis of actual knowledge of the presence of an alsynite panel in that vicinity. Instead, his conduct is to be judged by the fact that he did not have a good appreciation of the nature of the surface upon which he was about to step. This should have made him think about the surface upon which he intended to step and obtain a torch to illuminate where he might walk. It may have been possible for him to use a light on his mobile phone to illuminate the surface. However, that possibility was not raised in the evidence. It seems improbable that a torch could not be obtained either from his car or from somewhere in the plant.

[148] I turn to the issue of Mr Walker's use of his mobile telephone at the time. It seems that he stepped onto the roof after telling Mr Butler that he intended to do so and that he was not actually talking when he stepped onto the alsynite panel. He probably had his mobile phone to his ear whilst looking in the direction of the leak

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24 Section 305F(2)(b).

so that he could report what he saw about its source. In hindsight, Mr Walker should have terminated the call and told Mr Butler that he would call him back and then put the phone in his pocket. Even without the benefit of hindsight, this would have been a prudent thing to do. However, I am not persuaded that it was necessarily careless in circumstances in which it was important to report to Mr Butler what he could see. In any event, holding the phone to his ear was not a major source of distraction. It is not said that having a free hand instead of holding the phone would have allowed him to save himself from falling, for instance, by grabbing onto a rail with both hands. Nevertheless, holding the phone to his ear without speaking and preparing to report to Mr Butler what he could see from his improved vantage point added marginally to his distraction in not looking closely at the surface upon which he was standing or proposing to walk.

[149] Any small level of alcohol in his system did not add much to the equation. I decline to find that proceeding to investigate the fault whilst having such a small amount of alcohol in his system was negligent.

[150] The case for a finding of contributory negligence turns on a combination of factors:

(1) The poor light in which Mr Walker was unable to distinguish between the alsynite surface and the metal surface of the roof.

(2) Not reflecting on the possible presence of alsynite.

(3) Looking up and in the direction of the leak, rather than carefully inspecting the surface upon which he was walking.

The issue is whether these matters, in combination, mean that Mr Walker did not observe the standard of care which would be required of a reasonable person in his position in the circumstances.

[151] This is not a case of momentary inadvertence from a routine task. It does, however, have the quality of inadvertence, inattention or misjudgement, rather than deliberately courting a known risk. Depending on the circumstances, inattention or misjudgement may not fall below the standard expected of a reasonable person who is required to protect their own interests. In other circumstances the inattention or misjudgement may be one showing a lack of care that will constitute contributory negligence in all of the circumstances.

[152] The issue must be judged in the context of the employer's failure to use reasonable care so as to place the employee in a position of peril. In this case the context also includes a sense of urgency which was not unreasonable in the light of Mr Butler's request and Mr Walker's understandable desire to fix a serious problem before it became worse. Another important context is that Mr Walker was not doing something about which he had been warned. He was doing something that he had not been specifically trained to do. He was following instructions from an expert in the field and using his telephone in order to provide reports to that expert and receiving information from him about what should be done. This makes his holding of the phone understandable and not unreasonable in all the circumstances.

[153] These factors distinguish Mr Walker's conduct from the kind of reckless act contended for by the defendant.

[154] My view for a substantial time was that, despite these matters in his favour, Mr Walker's conduct in stepping onto the roof in fading light without properly inspecting that surface and its quality involved a departure from the standard of care required of a reasonable person in his position.

[155] Having reflected on the matter further, I have concluded that what I regarded as negligence on his part was influenced by hindsight, and that this is a case of momentary inadvertence, inattention and misjudgement.

[156] Mr Walker is not to be judged as if he knew that there was alsynite in the vicinity. He did not think that there was. The presence of the alsynite did not enter his thinking and even if it had, he may not have thought that it was in that location. Instead, he should have thought about the risk of stepping onto a roof, the quality and strength of which he was unable to properly assess because of the fading light.

[157] It is well-established that an employer must bring into account, in formulating a safe system of work, the possible distraction of an employee preoccupied with the task in hand.[25] An employee who has not been adequately protected by an employer should not be found to have been guilty of contributory negligence simply because he was engrossed in his task. In this case, Mr Walker was preoccupied, for understandable reasons, in finding the source of the leaking steam. On one view, stepping onto the roof in fading light without giving proper attention to the nature and quality of that surface, for instance, by using a torch to illuminate it, did not comply with the standard of care of a reasonable person in the position of Mr Walker at that time. However, the better view is that this is a case of a worker who did not disobey a direction, and who was acting under pressure. The circumstances presented "a fertile field for inadvertence".[26] On reflection, I conclude that the defendant has failed to discharge the onus of proving that Mr Walker's stepping onto the roof was the product of more than "mere inadvertence, inattention or misjudgement".[27]

[158] His actions were not in disregard of a direction. It is to be recalled that Mr Walker did not climb the steps to the platform intending to walk onto the roof. His decision to step onto the roof when he could not see what he expected to see from the platform was a spur of the moment misjudgement. It was a misjudgement with serious consequences. However, it was an inadvertent error of judgment made under pressure. It falls short of contributory negligence.

Apportionment

[159] If I had concluded that this was a case of contributory negligence, rather than inadvertence and misjudgement on the spur of the moment, then I would have been required to consider apportionment.

[160] Apportionment due to contributory negligence involves a comparison both of culpability, namely the degree of departure from the standard of care and of the relative importance of the acts of the parties in causing the damage.[28] An

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25 *McLean v Tedman* (1984) 155 CLR 306 at 311-313, 315; *Czatyrko v Edith Cowan University* (2005) 214 ALR 349 at 353 [12]; [2005] HCA 14 at [12].

26 *Czatyrko* at 354 [18].

27 Ibid.

28 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at 532.

apportionment involves a reduction to the extent that the court thinks just and equitable, having regard to the plaintiff's share in the responsibility for the damage.

[161] In applying these principles, I would have had regard to the matters just addressed in relation to Mr Walker's conduct. His was not a significant degree of departure from the standard of care of a reasonable person in the circumstances. He was conscientiously engaged in an important task in circumstances of urgency. He was distracted because he was engrossed in that task. He was not distracted by some extraneous matter such as sending a text message. He was not engaged in a sustained course of dangerous conduct. He made an unfortunate, but serious misjudgement in deciding to step onto the roof in order to obtain a better view of the source of the leak. It was something done on the spur of the moment.

[162] As to the causative potency of his alleged contributory negligence, it is not certain that greater attention to the roof surface would have avoided the injury. It is possible that closer attention still would not have enabled him to detect the presence of the alsynite panel. However, I think it likely that greater attention and use of a light would have done so. In the circumstances, his conduct contributed to his injuries.

[163] By comparison, the defendant's negligence involved a substantial departure from the standard required of an employer toward an employee. Simple and inexpensive precautions on its part probably would have prevented Mr Walker from going onto the roof or prompted him to use a safety harness if he did so. In the circumstances, had I been required to apportion liability, it would have been substantially in favour of Mr Walker. His damages would have been reduced by no more than 20 per cent on account of his contributory negligence. I would have apportioned 90:10 in his favour.

Quantum

[164] There is no real dispute about the nature and extent of Mr Walker's physical injuries. This makes it unnecessary to recount the evidence of the various expert witnesses who provided reports or gave oral evidence.

[165] The principal issues in relation to quantum are:

1. the appropriate ISV for assessing general damages to take account of his multiple injuries;

2. the prospect of any significant improvement in his psychological condition as a result of future treatment;

3. the extent of any pre-existing asymptomatic changes in his right knee and their likely course in the absence of the accident, and the risk that the accident and subsequent surgery predispose him to degenerative change and the need for a total knee replacement; and

4. the impairment of his future earning capacity and the risk that loss of his current employment will result in substantial future economic loss because of his acknowledged disadvantage on the open labour market.

Of these issues, the last is most significant in financial terms.

General damages - approach

[166] The assessment of general damages requires the relevant injuries to be categorized within Schedule 9 of the *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld) ("WCRR").

[167] Section 3 of Schedule 8 to the WCRR provides, in relation to multiple injuries:

> "**3 Multiple injuries**
>
> (1) Subject to section 9, in assessing the ISV for multiple injuries, a court must consider the range of ISVs for the dominant injury of the multiple injuries.
>
> (2) To reflect the level of adverse impact of multiple injuries on an injured worker, a court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only
>
> *Note –*
>
> This section acknowledges that –
>
> - the effects of multiple injuries commonly overlap, with each injury contributing to the overall level of adverse impact on the injured worker; and
> - if each of the multiple injuries were assigned an individual ISV and these ISVs were added together, the total ISV would generally be too high."

[168] Section 4 of Schedule 8 provides:

> "**4 Multiple injuries and maximum dominant ISV inadequate**
>
> (1) This section applies if a court considers the level of adverse impact of multiple injuries on an injured worker is so severe that the maximum dominant ISV is inadequate to reflect the level of impact.
>
> (2) To reflect the level of impact, the court may make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV.
>
> (3) However, the ISV for the multiple injuries –
>
> (a) must not be more than 100; and
>
> *Note –*
>
> Under section 306O(1)(a) of the Act, an ISV is assessed on a scale running from 0 to 100.
>
> (b) should rarely be more than 25% higher than the maximum dominant ISV.

(4) If the increase is more than 25% of the maximum dominant ISV, the court must give detailed written reasons for the increase.

(5) In this section –

maximum dominant ISV, in relation to multiple injuries, means the maximum ISV in the range for the dominant injury of the multiple injuries."

[169] In relation to psychiatric injury, described as mental disorders, s 6 of Schedule 8 provides:

"**6 Mental disorder**

(1) This section applies if –

(a) a court is assessing an ISV; and

(b) a PIRS rating for a mental disorder of an injured worker is relevant under schedule 9.

(2) The PIRS rating for the mental disorder of the injured worker is the PIRS accepted by the court.

(3) A PIRS rating is capable of being accepted by the court only if it is –

(a) assessed by a medical expert as required under schedules 10 and 11; and

(b) provided to the court in a PIRS report as required under schedule 10, section 12."

[170] Section 9 of Schedule 8 to the WCRR provides:

"**9 Court may have regard to other matters**

In assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case.

Examples of other matters –

- the injured worker's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life
- the effects of a pre-existing condition of the injured worker
- difficulties in life likely to have emerged for the injured worker whether or not the injury happened
- in assessing an ISV for multiple injuries, the range for, and other provisions of schedule 9 in relation to, an injury other than the dominant injury of the multiple injuries."

General damages – summary

[171] Mr Walker's multiple injuries may be shortly summarised as:

(a) a brain injury;

(b) a psychological injury;

(c) a cervical spine injury;

(d) a wrist injury;

(e) a thumb injury; and

(f) right and left knee injuries.

A fuller description with the relevant item number from the WCRR, a summary of the medical assessment, the relevant ISV range and the ISV submitted for by the parties may be set out in a table.

Item	Description	Particulars	ISV Range	Plaintiff ISV	Defendant ISV
7	Moderate Brain Injury including Right Occipital Fracture	Agreed 10% WPI	21-55	30	21
12	Moderate Mental Disorder	7% (Ms Anderson) or 5% (Dr Lockwood) PIRS – adjustment disorder with anxiety and depressed mood	2-10	6	6
86	Moderate Cervical Spine Injury with Right C6 Fracture and Nerve Compression	Agreed 7% WPI for DRE II	5-15	12	7
107	Minor Right Wrist Injury – United Fracture	Agreed 0% impairment	0-5	2	1
115.4	Injury to Thumb – Rolland's Fracture and First Metacarpal – Bennett's Fracture	1% (Dr Gillett and Dr Halliday) 0% WPI (Dr Boys)	0-5	4	1
138	Moderate Right Knee Injury – Soft Tissue and Fractured Fibula	Dr Gillett – 3% WPI – 15% if total knee replacement Dr Halliday and Dr Boys – 3% WPI	6-10	7	6
138	Moderate Left Knee Injury – Fractured Patella	Dr Gillett – 4% WPI – 15% if total	6-10	6	6

		knee replacement Dr Halliday and Dr Boys – 2% WPI			
Total				67	48

[172] The plaintiff submits that an appropriate figure ISV for Mr Walker's multiple injuries is 55 (the top of the range for his dominant injury), while the defendant submits that an appropriate ISV for his multiple injuries is 40. An ISV of 55 yields a figure of $146,850 in accordance with Schedule 12 for an injury sustained at the relevant date, whereas an ISV of 40 yields a figure of $92,750.

Brain injury and psychological injury

[173] Dr Cameron and Dr Baker agree that there is a 10 per cent whole person impairment ("WPI") due to brain injury. The parties agree that the brain injury should therefore be assessed as Item 7 (Moderate brain injury) which has an ISV range of 21-55. Mr Walker submits that the ISV should be 30, whereas the defendant suggests that it should be 21, this being just above the border with Item 8 (Minor brain injury).

[174] As appears above, it is agreed that the plaintiff also has a psychological injury, being an adjustment disorder with anxiety and depressed mood. The parties agree that it should be assessed within Item 12 (Moderate mental disorder) which has an ISV range of 2-10 and that the appropriate ISV is 6.

[175] Because of the consensus of medical opinion, it is unnecessary to detail the evidence given by neurosurgeons, neuropsychologists, psychiatrists and occupational physicians.

[176] It is accepted that most of Mr Walker's cognitive deficits are referable to his brain injury, rather than his psychological condition. There is, however, a complex relationship between his brain injury and his psychological functioning.

[177] There is no prospect of any improvement in his cognitive and memory disturbances which are the result of his "diffuse brain injury". Most of the recovery of brain function occurs within two years of the injury. No further improvement can be expected but there is unlikely to be further deterioration. His symptoms have been consistent over time.

[178] His adjustment disorder with anxiety and depressed mood means that he has problems socialising and with complex social interactions. In recent times he has received counselling for his psychological condition so as to reduce his anxiety and to improve his mood. According to the evidence, it is difficult to predict whether there will be any significant improvement from ongoing treatment. It may provide him with some skills to assist in dealing with the pain he experiences. The evidence does not suggest a high prospect of a significant, long-term improvement in his psychological condition. Ms Anderson's evidence was that "Some people respond well to treatment, some people don't; some people improve for a little while and then revert". There may be some further improvement to Mr Walker's psychological state from further treatment. Of course, if Mr Walker loses his employment and is unable to obtain suitable alternative employment due to his injuries, his psychological condition may become more severe.

[179] In due course in arriving at an overall ISV, I should have regard to areas of overlap between his brain injury and his psychological injury, which arise from poor memory, difficulties with concentration and the like.

[180] As for the Item 7 "Moderate brain injury", a factor in assessing the appropriate ISV in the range of between 21-55 is Mr Walker's long life expectancy and his insight into his cognitive limitations. As against that, he is presently able to work with difficulty in his former position. An ISV of between 21 and 25 is appropriate because of his cognitive impairment, reduced concentration and memory, reduced capacity for employment and noticeable interference with lifestyle and leisure. I assess an ISV of 24.

Psychological injury

[181] The parties agree that this injury constitutes a "moderate mental disorder". Ms Anderson, a neuropsychologist, assessed a Psychiatric Impairment Rating Scale rating of 7%, whereas Dr Lockwood assessed 5%. The parties agree that an appropriate ISV is 6. I agree with this assessment, having regard to the PIRS rating.

Cervical spine

[182] Mr Walker sustained a right C6 fracture and nerve compression. The defendant submits that it was an uncomplicated fracture without neurological impairment that should be assessed towards the bottom of the range. The ISV range is between 5 and 15. Mr Walker submits that the ISV should be assessed at 12.

[183] Initial radiation of pain to Mr Walker's upper limbs subsided but he was left with interscapular pain. Mr Walker's evidence was of considerable pain in his neck that is occasioned from ordinary movements or looking up.

[184] Having regard to the symptoms of ongoing pain, I consider that an appropriate ISV is 10.

Wrist injury

[185] Mr Walker suffered a wrist injury where the fracture has united. The ISV range is 0-5 and an appropriate ISV is 2.

Thumb injury

[186] Dr Gillett and Dr Halliday agree that the thumb injury represents a 1% WPI. Dr Boys assessed it at 0%. Mr Walker has a limited range of motion in relation to opposition and abduction. Pinching and gripping cause discomfort. Having regard to the limits on the full function of this important digit, I assess an ISV of 3 for Item 115.4.

Knees

[187] As a result of falling more than seven metres onto a concrete surface, Mr Walker sustained traumatic injury to both knees. He fractured the inferior pole of his left patella and suffered soft tissue injury to his left knee. He also fractured his right fibula and sustained soft tissue injury to his right knee.

[188] On 7 October 2015, Mr Walker underwent an operation in the form of a right knee arthroscopy which found numerous large chondral loose bodies which were

removed from his right knee. A full thickness chondral defect over the patella with bone on view was seen. Dr Brazel's contemporaneous records describe this as a very significant lesion. There was also a partial injury to the anterior cruciate ligament and a medial meniscal tear which was debrided.

[189] Almost a year later Mr Walker underwent further surgery by Dr Brazel. Each knee was operated upon. Investigation showed "gross chondral damage" and a meniscal tear to the left knee was resected. The right knee was then addressed and it had more significant changes. A chondroplasty and lateral release was performed on each knee.

[190] Chondral changes of the kind observed by the operating surgeon, Dr Brazel, can be the result of trauma. The evidence convincingly establishes that the chondral changes to each of Mr Walker's knees were due to the high force of the trauma his knees sustained in the accident, rather than a pre-existing condition. According to Dr Brazel, Mr Walker's injuries, including the meniscal changes, indicated a high force trauma, and it would be very unusual for someone of Mr Walker's age and size to have chondral changes purely as a result of degeneration. Dr Gillett gave persuasive evidence of a direct link between the traumatic event and the development of chondral changes in both knees. The mechanism of the fall explained how the forces applied could precipitate chondral changes. Although it is possible that Mr Walker had pre-existing changes to the chondral surfaces of his knees, there was no evidence to support that, such as previous injuries or symptomology. Dr Boys also agreed that the chondroplasty condition was more likely initiated or aggravated by the traumatic episode rather than being the result of natural degenerative change. Dr Halliday agreed that the damage to the back of the left kneecap was due to direct trauma, being the trauma which fractured the kneecap. He also agreed that the meniscal damage was more likely than not explicable by the fall. Dr Brazel gave evidence that meniscal damage can cause damage to the cartilage surface, particularly out of the medial femoral condyle.

[191] In summary, the medical evidence strongly supports the conclusion which I reach that the chondral surface damage and cartilage loss experienced by Mr Walker and observed by Dr Brazel is more likely to be the result of the trauma of the accident than other possible causes.

[192] The injuries sustained to Mr Walker's knees place him at a risk of developing premature degenerative osteoarthritis in both knees. This may require a total knee replacement. In his report dated 12 December 2019, Dr Gillett opined that the risk of Mr Walker requiring a total knee replacement was around 50 per cent to 60 per cent and that there were strategies to avoid the progression of arthritis. Dr Gillett adhered to this view in a pre-trial conference on 12 August 2020 and in his evidence. His assessment was based upon the damage that had been observed by Dr Brazel and the fact that the meniscal tears have been resected. One of the outcomes of such a procedure is an increasing risk of degeneration.

[193] Dr Halliday emphasised in a pre-trial conference on 4 August 2020 that the weight bearing part of Mr Walker's knee did not have any damage. He thought that the chance of knee replacement surgery being required was much lower than as opined by Dr Gillett. Dr Haliday thought that the risk of knee replacement surgery would have doubled as a result of the accident from the normal lifetime risk of 5 per cent to 10 per cent. The surgery would take place after Mr Walker was 60 years old. In his oral evidence, Dr Halliday also emphasised that not all arthroscopies increase

the risk of knee replacement. Only a meniscectomy does. Studies showed that it doubles or triples the risk in an older patient over 55. That said, Dr Halliday agreed with the underlying premise that Mr Walker would develop arthritis at a greater rate than he would have otherwise. His disagreement was with the estimate of a 50 to 60 per cent chance of a total knee replacement being necessary. He noted that the studies of people in their 50s and 60s were in relation to degenerative meniscal tears.

[194] Dr Boys thought that the risk of a total right knee replacement was low, being less than five per cent, whereas the risk of a total left knee replacement was higher, being in the order of 10 per cent within Mr Walker's "working life", namely in the next 25 to 30 years. Dr Boys thought that Mr Walker's left knee patella fracture certainly predisposed him to osteoarthritis and a possible total knee replacement. He accepted that the assessment of risk and when such surgery may be required was a very imprecise estimate.

[195] Dr Brazel was of the opinion that Mr Walker "would certainly not have required any ongoing knee replacement in the future if he hadn't had the injury". In Dr Brazel's opinion, the chance of Mr Walker needing surgery to his left knee as a result of the injury was 50 to 60 per cent. The situation in relation to the right knee was a little different because there may have been some pre-existing degeneration that did not show up on any scans and was asymptomatic. However, even assuming its presence, Dr Brazel did not think that such a condition would have necessarily required a knee replacement. Dr Brazel had regard to Dr Halliday's opinion about the chance of Mr Walker requiring surgery, but preferred the view of Dr Gillett that the chance of Mr Walker needing surgery as a result of the injury, particularly in relation to his left knee, was 50 to 60 per cent.

[196] Dr Cunneen, an occupational and environmental physician, expressed some opinions about Mr Walker's knees and drew attention to the presence of marginal osteophytes which were observed on x-rays to the right knee in September 2015 and on further x-rays in 2019. He thought that their presence was a possible indicator of the development of osteoarthritis. He accepted, however, that before the accident these changes were asymptomatic. In his oral evidence, Dr Cuneen thought that there were several processes at play with Mr Walker's knees, including osteoarthritic changes that were asymptomatic. He noted that multiple factors exposed Mr Walker to faster than usual degenerative processes, and these included weight gained as a result of inactivity. Mr Walker's knees had become symptomatic for a variety of reasons and a significant reason was the fall.

[197] I note that the specialist orthopaedic experts did not place any significance upon the presence of these marginal osteophytes. The possible presence of pre-existing degeneration was noted by them. However, as Dr Halliday reported on 26 July 2018, there was no evidence of any pre-existing condition, and all of Mr Walker's ongoing symptoms related to his 12 June 2015 injury. The position was conveniently summarised by Dr Boys in his re-examination that although it is possible that the chondroplasty might have been caused by natural degenerative change, given the known history, it is more likely that the traumatic episode initiated or aggravated the chondroplasty.

[198] For the purpose of assessing an ISV, there is little difference between the assessments of Dr Gillett, Dr Halliday and Dr Boys concerning a whole person

impairment. Nor is there much difference in the ISV contended for by each party. It falls in the ISV range of between 6 and 10. Mr Walker contends for assessments of 7 and 6, while the defendant submits that a figure of 6 is appropriate for each knee.

[199] It is accepted that the condition of each of Mr Walker's knees is likely to deteriorate and that there is a risk that his knee problems, his pain and the restrictions on his life will necessitate total knee replacement surgery. He will probably be advised to defer such surgery for as long as possible. I will return to this topic in relation to future special damages. There is a degree of imprecision about the risk of total knee replacement. I place considerable reliance on Dr Brazel's opinion since he has had the advantage of observing the condition of the knees and treating Mr Walker. The risk of a total knee replacement to the left knee is probably higher than that to the right knee. Still, there is a risk of total knee replacement to both knees.

[200] An ISV of at least 6 for each knee is appropriate.

Overall ISV

[201] The dominant injury is the moderate brain injury which has an upper ISV of 55. To reflect the level of adverse impact of Mr Walker's multiple injuries, it is appropriate to assess an ISV as being higher in the range of ISVs for the dominant injury. I have regard to the respects in which the various injuries overlap. As noted, the brain injury and the psychological injury have some common consequences for his mental state. However, each of those injuries has its separate and different adverse effects. His various other injuries accumulate in their effects. If I was to add together each separate ISV then this would result in a figure above 55 and that total ISV (57) would be too high to reflect the adverse impact of his multiple injuries. I consider that an appropriate ISV is 50. Schedule 12 produces a figure of $128,050.

Past economic loss

[202] The agreed starting point is that Mr Walker is entitled to the amount of the weekly WorkCover benefits, less the *Fox v Wood* component of $11,089, and this yields a figure of $39,784.25.

[203] Mr Walker submits that there should be a "global allowance" over and above this figure for past loss over five years because:

(a) he received no increase in his pay over a period of almost seven years;

(b) he has been unable to progress his studies to improve his employability and potentially increase his value as an employee, whether with the defendant or another employer, and

(c) because he is "locked into trying to hold this job" because he will not be able to replace it on the open labour market, much less obtain a promotion.

[204] As to the first matter, Mr Walker recognises that these are low inflationary times, but argues that there would be only a few workers who have not received a pay increase for seven years. However, there is no evidence that comparable managers in the defendant's employment, or comparable maintenance managers at other meatworks or similar facilities, have received a pay rise. The defendant's general manager was not cross-examined about the probability that Mr Walker would have received a pay rise had he not been injured. In difficult times for the industry, there

may have been no pay rise at all, with management finding it difficult to justify why Mr Walker's package should have been improved when other employees' pay was not similarly increased. In the circumstances, any pay rise for Mr Walker probably would have been small.

[205] As to the second matter, there was some discussion between Mr Walker and Mr Giddins when Mr Walker took on the role in early 2013 about the defendant supporting Mr Walker to undertake courses. However, unlike other managers, Mr Walker did not progress that matter, to which Mr Giddins was quite open. In the circumstances, it is not evident that Mr Walker would have obtained a formal qualification to improve his employability and his likely income.

[206] Overall, and in relation to the third matter, absent the accident it is likely that Mr Walker would have remained as maintenance manager for the defendant, and possibly undertaken some courses with the defendant's support. As against the contingency of a slight increase in his remuneration package as a maintenance manage are adverse contingencies. Whilst adverse contingencies such as serious injuries should not be overstated, overall I consider that the base sum of $39,784.25 is an appropriate measure of his past economic loss. Therefore, I will award a global amount of $40,000 for past economic loss.

Past superannuation

[207] I will award past superannuation at 9.5 per cent, being a figure of $3,800.

Fox v Wood

[208] The parties agree that an amount of $11,089 should be awarded.

Past special damages

[209] Past special damages are agreed (Exhibit 2) at $20,687.34. A few additional receipts increased this to $20,948.84. To these figures should be added the amounts paid by WorkCover for refundable expenses, namely $62,729.86 and a Medibank refund of $559.95. Interest on the agreed sum of $20,948.84 at .466 per cent per annum for 5.22 years is $510.45. The total past special damages therefore are $84,749.10.

Future special damages

[210] Mr Walker claims future special damages in accordance with Exhibit 15 under seven items.

[211] Item 1 relates to future medical treatment expenses and seeks $36,000 on the basis of a 50 to 60 per cent chance of a total knee replacement in respect of both knees, making a total claim of 60 per cent of $60,000, namely $36,000. Having regard to the varying opinions of the doctors about the probability of such surgery and that such surgery may be deferred for many years, possibly 20 or 30 years from now, I consider that this item should be assessed on the basis of a 50 per cent chance of surgery occurring in about 20 years' time. An appropriate global allowance is $8,000 to reflect the present value of that future expenditure.

[212] Item 2 relates to future psychological treatment on the basis of 50 sessions at a cost of about $250 per session. However, the evidence of Dr Lockwood supported

treatment for two years. On the basis of 24 monthly sessions this would produce an expense of $6,000. There is a distinct possibility that Mr Walker's psychological condition may require additional treatment at various times in the future. An appropriate award to reflect the present value of future sessions, most of which will cluster in the next few years, is $9,000.

[213] Item 3 concerns future vocational counselling costs. The evidence justifies an award of $550 rather than the $2,000 figure claimed by the plaintiff for future vocational counselling.

[214] Item 4 concerns future exercise physiological expenses and is agreed at $720.

[215] Item 5 is a claim for future pharmaceutical expenses on the basis of $15 per week for 50 years on the five per cent tables (multiplier 976), being a claim of $14,640. The defendant says that this figure should be discounted for the prospect of improvement. As against that, there is the prospect of Mr Walker requiring additional medication for pain and psychological conditions. The sum claimed is appropriate.

[216] Item 6 claims future travel expenses in a global amount of $10,000. Apart from the cost of attending for psychological treatment, for future medical assessment of his orthopaedic conditions and for surgery on his knees, there is little to justify the figure of $10,000. An award of $5,000 is appropriate in the light of Mr Walker's place of residence and the reasonable costs of transport.

[217] The final and contentious item is future services and assistance. This is based upon an average hourly rate for domestic housekeeping of $65 for two hours and $23 per hour thereafter. Reference is also made to the cost of a gardening service of $45 per hour. A claim for heavy domestic assistance is made on the basis of $65 per week. However, any such claim is subject to the provisions of s 306F of the WCRA. A similarly worded section was discussed in *Endeavour Foundation v Weaver*.[29] The effect of s 306F is to generally restrict any such award to services of a kind that are usually paid for. This means that the claim is limited to cleaning services because Mr Walker was fortunate to have his father-in-law perform gardening and lawn mowing on a gratuitous basis.

[218] As for cleaning, there was an informal arrangement involving a one-off payment some years ago to a family member in circumstances in which Mr Walker's wife was not able to undertake this work at the time. There was another eight hours of cleaning from someone found via Facebook. I am not persuaded that there is a sound evidentiary basis to suppose that there will be similar future contracted services in the coming years. Therefore, I decline to award any amount under this head.

[219] As a result, the award for future special damages will be $37,910.

Future economic loss

[220] As a result of his multiple injuries and permanent impairments, Mr Walker is at a significant disadvantage on the open labour market. The defendant does not contend otherwise.

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29 [2013] QCA 371.

[221] Mr Gordon Siebel, an Occupational Therapist, provided an informative report and gave evidence. I accept his evidence about Mr Walker's occupational outlook. Mr Walker's physical injuries preclude him from working on a reasonably efficient and long-lasting basis in occupations that involve materials handling, or even as a maintenance manager in roles that require dynamic balance, repetitive climbing, crouching, lunging and kneeling. All of these things are beyond his functional capacity. He does not have the functional capacity to work as an electrician or as a kitchen hand.

[222] According to Mr Siebel's evidence, which I accept, Mr Walker's cognitive state appears to preclude him from working as a maintenance manager without the regular support which he enjoys from his general manager and senior tradesmen colleagues at his present place of employment. This opinion is based upon the neuropsychological assessment which identifies "significant relative weakness in attention and concentration on both auditory verbal and non-verbal materials and significant symptoms of anxiety and negative mood." These cognitive and psychological conditions exclude him from many occupations. Mr Walker's problems with concentration and memory are likely to make him anxious in any employment context, including when being interviewed for a job.

[223] Mr Siebel accepts that factors in Mr Walker's favour are his good general health and resilience, along with his solid work ethic. He was motivated to return to work, but is "fortunate to be employed within a large organisation where resources have so far been available to accommodate his functional restrictions and cognitive state."

[224] The impediments to his future employment include his chronic pain and headaches. Mr Walker gave evidence of experiencing headaches of two different kinds. His pain and headaches, together with his cognitive state, affect his ability to concentrate, remember things and process information and data quickly. In his present employment he is not paid by the hour and therefore can take longer than he once did to complete written and other tasks. Mr Siebel reports what is perhaps obvious, namely that Mr Walker's employment would be in jeopardy if and when his ability to fully perform his job is appraised by a less compassionate employer. His ability to work in other occupations in which he has skill and experience are reduced as a consequence of his residual functional capacity and cognitive state. His problems with attention, concentration, anxiety and negative mood are likely to preclude him from completing academic study in areas such as engineering.

[225] The chances of Mr Walker obtaining future employment as a maintenance manager if and when he loses his present job are more theoretical than real. Mr Siebel recognises that Mr Walker can potentially sustain full-time hours in suitable jobs as a maintenance manager or planner, provided he has an empathetic employer and where the duties and physical demands are within the limited functional capacities noted at paragraphs 39 and 40 of Mr Siebel's report. They are that Mr Walker can only occasionally lift items that weigh less than eight kilograms, cannot undertake tasks requiring high levels of dynamic balance, must limit repetitive climbing of stairs and ladders and has a reduced ability to undertake activities that require crouching, lunching and kneeling to handle items. He also has a reduced ability to undertake activities that require repetitive or sustained reaching forward or to overhead height.

[226] Therefore, Mr Siebel concludes that Mr Walker will realistically and practically find it very challenging to source another appropriate job in the future. Mr Siebel reports:

> "From my experience in occupational rehabilitation since 1993 most injured persons, particularly persons who have a workers' compensation history, find it very difficult to return to work. There are often multiple applicants and job seeking can be competitive. Many applicants secure jobs through 'insider knowledge' or local contacts. Applicants cannot easily pick and choose jobs that are less physically demanding and such jobs are generally more difficult to secure. A lot of employers utilise a range of strategies to manage injury risk, such as pre-employment medicals, pre-employment functional capacity evaluations, and obtaining applicants workers' compensation claim histories. Most employers discriminate against persons with an injury history, as they consider that they will be less efficient and productive, that the person with an impairment will be at an increased likelihood to be injured (or reinjured), and that the consequences (i.e. lost time injury statistics and financial and non-financial costs) of same would be greater."

[227] The assessment of compensation for the significant impairment of Mr Walker's future earning capacity depends upon assessing the chances of a variety of contingencies in accordance with the principle in *Malec v JC Hutton Pty Ltd*.[30] First and foremost is the chance that he will lose his present employment. It is not contended that his earning capacity has been completely destroyed and the fact that he has been able to work in a demanding role in recent years is evidence of a residual capacity. If, however, he loses his present employment, there are a limited number of occupations which are open to him. Therefore, I must assess the chance that he will find paid work in the event he loses his current job and thereby assess the value of his residual earning capacity.

[228] As for the chance that he will lose his current job, there are a range of contingencies. These include:

(a) that he loses his job in the near future because problems in that industry or the general economy force the closure of the plant. In that regard, the defendant recently had to apply for Jobkeeper in an environment in which there is a reduced demand for meat, reduced exports and an economic recession of unpredictable duration;

(b) that Mr Walker loses his job at some not too distant time in the future for similar reasons or because the business is acquired by a different operator which is less understanding than his current employer towards his limitations, and which wishes to employ a maintenance manager who is physically able to undertake work on equipment and apply his trade skills in doing "hands on" work;

(c) that Mr Walker maintains his employment as a maintenance manager for a very substantial time despite his limitations; and

(d) that he progresses into a different role with his employer.

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30 (1990) 169 CLR 638.

As to the last of these contingencies, because of his cognitive impairment it seems unlikely that Mr Walker has the aptitude to progress into a management role such as the general manager. It is also unlikely that he would be able to cope with managing maintenance at a number of plants which were owned by the same employer.

[229] Another contingency featured in some of the evidence and the cross-examination of Mr Giddins. It is the contingency that Mr Walker will have his employment terminated shortly after the case is concluded and that his job as maintenance manager will be taken over by Mr Vero, an individual who Mr Giddins recently recruited for another job. I accept that Mr Walker is understandably fearful of such an outcome. That fear may be based, in part, upon his not confiding in Mr Giddins or senior management the full extent of his physical and other impairments. As against that, Mr Giddins must be reasonably familiar with those impairments by reason of his involvement in the litigation and day to day dealings with Mr Walker.

[230] Counsel for Mr Walker points to the job description document (Exhibit 9) which includes a number of tasks which Mr Walker is not qualified or able to perform. The concern is that his employer is entitled to say that he is not capable of performing all the requirements contained in that job description document. Some of the evidence from the occupational therapist and other expert witnesses would support that conclusion. I consider that this aspect is adequately addressed in the evidence concerning the generation of the document and Mr Giddins' knowledge of the extent to which Mr Walker has ever been able to attend to matters such as budgets and financial plans or "design complex projects". The evidence is that the defendant does not contend that Mr Walker is unable to perform the duties expected of him (whether contained in Exhibit 9 or otherwise). Therefore, it will encounter difficulties in terminating his employment on the grounds that he is not presently capable of performing his job.

[231] Mr Giddins gave evidence about the circumstances in which Mr Vero was recruited to work under the maintenance department in an area of production processing packaging machines. The position was a newly-created one. Mr Giddins denied that there was any plan to terminate Mr Walker's employment. I am inclined to accept his evidence. If there was such a plan, then Mr Giddins would have given false and misleading evidence.

[232] Mr Giddins was subjected to an unnecessarily hostile cross-examination by counsel for the plaintiff and the submissions made by counsel about Mr Giddins and his evidence must have done little to engender goodwill on the part of Mr Giddins and the defendant towards Mr Walker. The written submissions by Mr Walker's counsel record, "One wonders what effect the cross-examination of Mr Giddins might have on [Mr Walker's] job security which is unfortunate." If that is the case then it will be unfortunate, indeed, for Mr Walker. I trust that Mr Giddins and the defendant will understand that Mr Walker is not entirely responsible for the poor forensic choices of his counsel in his approach to Mr Giddins and submissions about Mr Giddins, and that they will continue to regard Mr Walker as a valuable employee in whose career the defendant has invested.

[233] Therefore, I do not find that there is a plan on the part of the defendant to replace Mr Walker in the immediate future. Also, I do not find that there is a high chance that his employment will be terminated in the near future because of the way in which Mr Walker's case was conducted by counsel at trial.

[234] There is, however, a reasonably significant risk that Mr Walker will lose his employment, either in the near or not too distant future. These contingencies do not arise simply from the risk that the meatworks itself will close. Mr Walker is vulnerable to loss of his present employment if his present employer has a change of heart. If, for example, Mr Giddins is replaced by a different general manager who considers that the maintenance manager should be able to perform physical tasks which Mr Walker is unable to perform, or becomes impatient with aspects of Mr Walker's performance which result from his brain injury, then he may lose his job. There are other contingencies such as the acquisition of the business by a different owner which have already been noted.

[235] Whilst the defendant, a privately owned company, has made a success of the meatworks and invested in the business and its improvement, the future of the meat industry is uncertain and it is a highly competitive industry. Notably, the five previous owners of the works each went "broke".

[236] Therefore, the contingency that Mr Walker will not be able to keep his job if either a new general manager or a new employer is not prepared to accept his limitations, or if the plant closes, is a significant one.

[237] The evidence establishes that Mr Walker cannot undertake work in his trade as an electrician. Because of his physical limitations he cannot work "on the tools" or even undertake work that requires any significant exertion. It is to be recalled that he cannot even mow his own lawn and has difficulties walking up and down stairs.

[238] Mr Walker has acquired some management skills by virtue of his present position. However, he does not have qualifications in management. His formal education, coupled with the difficulties which he has in reading, concentrating and remembering, make it unlikely that he will acquire the qualifications or possess the skills required to gain employment in a management role. If he loses his present employment his learning difficulties severely constrain the kind of alternative employment which he might seek. His physical restrictions are unlikely to improve and the condition of his knees may deteriorate.

[239] The defendant's submissions recognise that factors that favour a substantial award for loss of future earning capacity include:

(a) his employment by a private company in an industry which is subject to changes in ownership, management and the financial viability of his employer;

(b) Mr Walker's neck injury and bilateral knee conditions impede him from performing his trade as an electrician;

(c) Mr Walker's cognitive deficits render him at a disadvantage on the open labour market in a role as a manager; and

(d) the expansion of his role into new areas is "contra-indicated having regard to his cognitive deficits".

[240] The factors to which the defendant points in moderating an award for loss of future earning capacity include:

(a) Mr Walker's demonstrated skills, qualities and performance;

(b) the good opinion in which he is held by his general manager;

(c) the ability of the defendant to successfully operate businesses in Kyogle and Coominya, including the Coominya plant that had a history of failure; and

(d) Mr Walker's demonstrated capacity since his return to work to perform the requirements of his job.

[241] The defendant's submissions also note that Mr Walker's earning capacity "is far from totally destroyed", as illustrated by his ability to perform a demanding role in the last five years.

[242] In addition to the range of contingencies which I have already discussed in relation to Mr Walker's future employment are contingencies as to what his future employment would have been had the accident not occurred and he had remained fully fit. They include some of the contingencies previously discussed of possible closure of the plant due to difficulties in the industry. No-one can predict the plant's future. The possibilities range from closure if the demand for meat and exports collapse, to a bright future when the economy and exports improve, based upon the apparent management skills of the defendant in being able to make a success of this works when others had failed.

[243] If Mr Walker had not been badly injured in the accident, then in the event his employment with the defendant came to an end, he would have been able to seek similar employment elsewhere. He also would have been able to fall back upon his trade qualifications and experience and any additional technical or other qualifications that he gained from further study. I think it unlikely that Mr Walker would have progressed his qualifications so far as to obtain an engineering degree. That possibility is not fanciful. However, his previous education makes it unlikely that he would have undertaken the long course of gaining entry to an engineering degree and completed such a degree. His intelligence and aptitude do make it, however, likely that, absent his injuries, he would have qualified himself with additional vocational qualifications and improved his management skills.

[244] I find that absent the accident and his injuries, Mr Walker probably would have maintained stable employment at the Coominya meatworks for a lengthy period, whether it continued to be operated by the defendant or by another owner. If, however, that meatworks was closed or he lost his job, his experience and skills made him employable as a maintenance manager or in a similar role. If such a management role was not immediately available, he had the ability to rely on his trade qualifications and gain employment as a leading hand and gain further promotion, based upon his aptitude, to a similar role as a maintenance manager in time.

[245] Absent the accident and his injuries, Mr Walker probably would have worked for a substantial period as a maintenance manager and had reasonable prospects of transitioning into a different and possibly more senior management role based upon additional qualifications and experience.

[246] I turn to the contingencies which Mr Walker faces if he loses his current job. As noted, he has a residual capacity for work. However, any such work would be of a sedentary kind. Many forms of skilled or semi-skilled employment would be closed to him because of his physical limitations. His cognitive impairments in relation to concentration and memory limit his ability to re-skill and re-train into a white collar job. Therefore, he has the capacity to perform sedentary work within the limits of his cognitive functioning. The reports do not suggest that he is unemployable. However, it is apparent that he is at a significant disadvantage in the open labour market in competing for even light work which is beyond his physical limitations. His prospects of obtaining sedentary work might be improved with some further vocational training.

[247] I conclude that there is a reasonably high chance of Mr Walker not being able to continue to work as a maintenance manager for his employer or in any similar role at a plant for a substantial period. His prospective working life was almost 30

years. He is aged only 37 and might have been expected to work until a normal retirement age of 67.

[248] Whilst he has a residual capacity for work and has shown in his present employment a strong work ethic and a determination to work despite his impairments, his prospects of obtaining full-time work in the event that he loses his current employment are poor. It is more likely that he will have insecure and part-time employment in a highly competitive employment market. Therefore, I do not consider that a high value should be placed upon his residual capacity for work in the event that he loses his present employment.

[249] Mr Walker submits that the starting point for an assessment of future economic loss is his current remuneration of $120,000 plus a car. Tax on $120,000 yields a net income of $88,103 or $1,694.29 per week. The loss of a vehicle is said to have a value well over $10,000 per annum or $200 per week. The present value of a loss of $1,694.29 over 29 years on the five per cent tables is $1,372,374.90 to which Mr Walker submits a further $164,400 should be added on account of the loss of the vehicle.

[250] The defendant accepts that the weekly income after tax would be $1,694.29 over a 29 year period until the normal retirement age with a multiplicand of 810.

[251] The defendant submits that there are too many variables to apply in relation to Mr Walker's future employment, including the range of employment options which are open to him as a result of his residual employment capacity, to adopt a weekly amount to which a multiplicand is applied. Such an approach is said to be artificial. Instead, the defendant contends that a global sum should be awarded and submits that the sum should be $200,000.

[252] I accept that there are too many contingencies to approach an assessment of loss of future earning capacity on the basis of any kind of mathematical precision. At one extreme is the possibility that Mr Walker will lose his current job in the fairly near future and, despite his residual employment capacity, struggle for decades to find more than occasional casual work of a sedentary kind. At another extreme is the contingency that he will continue to work as a maintenance manager for the defendant or another employer, at his present place of employment, with increasing difficulty due to his knee and other problems, for decades to come. These and other more probable contingencies must be taken into account.

[253] If and when Mr Walker loses his current job then his weekly loss is likely to be significant. I do not assume that he would be able to readily obtain full-time employment, or even reliable, consistent part-time employment. Any such work which he might obtain is likely to be insecure. I think it likely that he will experience significant periods of unemployment and that, overall, his average weekly wage will be moderate, probably a fraction of the average weekly wage for men of his age who are able to undertake full-time physical work in jobs like gardening, security work, truck driving or as a storeman. When regard is had to both the loss of his current substantial weekly income and the loss of the value of his vehicle, there is a substantial chance that his loss may be $1,500 per week, if not more.

[254] A difficult task is to assess the likelihood that he will lose his present job in the near future, in five years' time, in 10 years' time or at some other more distant time.

These are all possibilities. The evidence does not permit them to be assessed as competing possibilities with any kind of arithmetic precision. I do conclude, however, that there is not a high probability that Mr Walker will still be working in his present job in 10 years' time. There remains the possibility that he will be. There is a possibility that he will continue to work for the defendant or another employer as a maintenance manager well beyond the 10 year mark. However, I think that possibility is fairly low. There is also the significant possibility, previously noted, that he will lose his employment in the fairly near future or at least within the next five years.

[255] It is useful to consider calculations based on different contingencies before arriving at a global sum based upon the likelihood of each contingency, and other contingencies.

[256] If one was to assume a weekly loss of $1,500 per week commencing in the near future, namely over a 29 year period then, adopting a multiplier of 810, one arrives at a net present value figure of $1,215,000.

[257] If, instead, one was to adopt a weekly loss of $1,500 per week commencing in five years' time, persisting for a further 24 years, then one would arrive at a net present value of $868,500 ($1,500 x 579).

[258] If, however, one was to adopt a weekly loss of $1,500 commencing in 10 years' time, and then continuing for a further 19 years, then one would arrive at a net present value of $595,500 ($1,500 x 397).

[259] If one adopted a net weekly loss of $1,000 rather than $1,500, then the figures would be two thirds of the above. However, to adopt a weekly loss of $1,000 is probably too high an estimate of the value of his residual employability, including the security of any work which he might obtain from time to time. One starts with the prospective loss of a net weekly income of almost $1,700 to which should be added the value of an employer-provided vehicle. The figure of $200 per week for that loss is not unreasonable.

[260] Deducting an amount of $400 per week on average from $1,900 per week on account of residual employability, to arrive at a figure of $1,500 per week, reflects the possibility that some weeks he might net $1,000 for available sedentary work while for many other weeks he may be unemployed or only obtain very limited hours of casual employment.

[261] Applying the various contingencies about when the loss might commence and the average measure of that loss, I adopt a figure of $870,000 before considering general contingencies.

[262] Any figure must take account of contingencies which might have affected Mr Walker's future had he not been injured. Some contingencies are positive, such as the chance of gaining tertiary qualifications and promotions. The adverse contingencies include being injured in other circumstances, loss of employment and other vicissitudes. He was a fit man with a valuable trade qualification, management experience and a strong work ethic. The contingencies of ill-health, injury or long-term employment should be taken into account. A general contingency discount of 12 per cent is appropriate (88 per cent x $870,000 = $765,600).

[263] Overall, I consider that an appropriate global sum for future economic loss is $765,600.

Future superannuation

[264] I adopt a rate of 11.74% for future superannuation, having regard to the approach adopted in *Heywood v Commercial Electrical Pty Ltd*,[31] legislated compulsory employer sponsored superannuation contributions and a "weighted" average percentage for 29 years until retirement. A rate of 11.74% has been calculated for this period.[32]

[265] A rate of 11.74% applied to the $765,600 sum for future economic loss results in an amount for future superannuation of $89,881.

Quantum summary

[266] A summary of the quantum is as follows:

General damages	$ 128,050
Past economic loss	$ 40,000
Past superannuation	$ 3,800
Fox v Wood	$ 11,089
Past special damages	$ 84,749
Future special damages	$ 37,910
Future economic loss	$ 765,600
Future superannuation	$ 89,881
Sub-total	**$ 1,161,079**

Judgment

[267] The refund to WorkCover is $193,695.61, resulting in a judgment sum of $967,383,39.

[268] There will be judgment for the plaintiff against the defendant for that amount.

[269] I will hear the parties, if necessary, on the question of costs. Otherwise the plaintiff should submit a form of judgment which includes an agreed order as to costs.

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31 [2013] QCA 270 at [56]-[57].

32 M J Lee and J Thorburn, *Impacts of superannuation changes on personal injuries damages – 2020 Update* (Vincents, 5 August 2020).