Mikes Kampourakis v DCT (NT) Pty Ltd [2013] NTSC 76

PARTIES:	Mikes Kampourakis v DCT (NT) Pty Ltd
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21035186
DELIVERED:	14 NOVEMBER 2013
HEARING DATES:	26-30 November; 3-4 December 2012; 20-21; 25-28 February 2013; 1, 6 and 7 March 2013
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

NEGLIGENCE – Duty of Care – Contractor akin to Employee - Injury not caused by breach of duty on the part of the employer – No failure to provide or enforce safe system of work.

DAMAGES – Assessment of Quantum – *Personal Injuries (Liabilities and Damages) Act* – Determination as to whole person impairment – Most current AMA Guides preferred – Reliance on previous Guides does not invalidate assessment – 6% whole person impairment appropriate in the circumstances – contributory negligence included in assessment – *Personal Injuries (Liabilities and Damages) Act* s 18.

Martin v Moore [1999] NTSC 34; *McLean v Tedman* (1984) 155 CLR 306, cited

Leighton Contractors v Fox (2009) 240 CLR; *Martin v Moore* [1999] NTSC 34; *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215:3.9; Words and Phrases Legally Defined (Fourth Edition), referred

REPRESENTATION:

Counsel:

Plaintiff:	Mr O'Loughlin
Defendant:	Mr Clift

Solicitors:

Plaintiff:	Priestleys Lawyers
Defendant:	MSP Legal

Judgment category classification:	C
Judgment ID Number:	BLO 1318
Number of pages:	52

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mikes Kampourakis v DCT (NT) Pty Ltd [2013] NTSC 76
No. 21035186

BETWEEN:

Mikes Kampourakis
Plaintiff

AND:

DCT (NT) Pty Ltd
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 14 November 2013)

Introduction

[1] This is an action in negligence brought by Mr Mikes Kampourakis (the plaintiff), against DCT (NT) Pty Ltd (the defendant). The material facts forming the basis of the claim are alleged to have taken place on 11 July 2009 when the plaintiff was working as a labourer for the defendant.[1]

[2] It is common ground that the plaintiff had previously notified the defendant of his ABN number, hence at the material time, the plaintiff was not by definition a "worker" under the *Workers Rehabilitation and Compensation*

[1] Third amended statement of Claim, 30 April 2012.

Act (NT), in the terms of the Act at that time. He may be regarded akin to an employee for the purposes of these proceedings.[2]

[3] The plaintiff alleges that as a result of the defendant's negligence in failing to establish, maintain and enforce a safe system of work, he has suffered injuries and loss. The plaintiff alleges that on 11 July 2009 he lifted approximately 20 concrete slew valve caps, and placed them over stabilised sand to complete a job on a work site managed by the defendant. The site was in the vicinity of Mel Road and Willes Road, Berrimah. It is claimed that the action of lifting and manoeuvring the slew valve caps caused his injuries. The injuries alleged are: aggravation of pre-existing degenerative changes in the lower lumbar region; back pain; sciatica; leg pain and psychiatric injury. As a result the plaintiff claims loss of wages, medical, physiotherapy and pharmaceutical expenses and damages associated with loss of capacity for employment on an ongoing basis.

[4] The plaintiff's claim fails at virtually every point. Having reviewed the evidence I have concluded it is unlikely that the plaintiff was injured in the manner he claims; it is unlikely that as from 11 July 2009 he was substantially incapacitated for work as a result of any such injury, and it is unlikely that he did not receive safety instruction or did not understand safety training in terms of lifting heavy weights. It is accepted the defendant was under a duty of care to provide, maintain and enforce a safe

[2] A similar set of circumstances are evident in *Martin v Moore* [1999] NTSC 34; (as per Riley J as he then was).

system of work but that duty was discharged. The plaintiff bears the onus of proof on the balance on probabilities to establish negligence, causation and damages.

[5] Although it is not in any way the sole reason for dismissing the plaintiff's claim, in this particular case, the surveillance images taken of the plaintiff on behalf of the defendant and tendered in evidence, lead to the conclusion that the extent of any injury suffered by the plaintiff and the extent of any incapacity has been exaggerated by him. The surveillance footage was extensive. The mechanism causing injury as described by the plaintiff, in my opinion is improbable. This, and other factors summarised below inform to some degree, my view of the plaintiff's overall credibility and reliability. This in turn has led me to the conclusion that the plaintiff's claim cannot stand.

The Plaintiff's Background

[6] The plaintiff gave evidence with the assistance of an interpreter. This assisted the smooth running of the trial and therefore the administration of justice. It is clear the plaintiff's English is not of a standard that would enable him to give evidence without being at a significant disadvantage. The plaintiff's daughter informed the Court that the plaintiff's level of not only English, but also of the Greek language is not advanced.[3] His formal education level is low. He is illiterate, in both English and Greek. Where

[3] Evidence of Eleftheria Kambouraki, T at 28.

possible, I have made allowance for these factors when assessing his evidence.

[7] The plaintiff moved from Greece to Australia in 1997 and stayed until 2000 to 2001, living in Sydney. He then returned to Greece. He returned to Australia in 2006, working in Sydney until he moved to Darwin in January 2007. After the alleged injury occurred in 2009, he travelled to Greece again, returning to Australia seven months later. He lived in Darwin for a short period and then moved to Sydney in January 2012.

The Alleged Mechanism Causing Injury on 11 July 2009

[8] The plaintiff says that he was recruited by his first cousin Nicholas Kambourakis, to work for the defendant company. Nicholas Kambourakis is a director of the defendant company. The plaintiff states he was recruited because Nicholas Kambourakis knew of his capabilities as a labourer. I can readily find the plaintiff is an experienced labourer, given his previous experience labouring in Sydney and with the defendant. Since the alleged incident, he has also worked repairing a boat in Greece. Much of his earlier employment history is as a fisherman. Nicholas Kambourakis employed the plaintiff to install stormwater drains, pits and sewers at various sites where the defendant had development contracts. The plaintiff started working for the defendant in July 2007 and worked exclusively for the defendant company.

[9] The plaintiff worked on the Willes Road subdivision for the defendant from 2008 until 2009. During this time he returned to Greece for three and a half to four months. Upon his return he recommenced working at the same subdivision.

[10] The plaintiff says that on Saturday 11 July 2009 he and Michael Billis were working together at the Berrimah (Willes Road) site. He tells the Court that on Saturdays he would normally work until 1:00pm. It seems he was content to finish work at 5:30pm that day, whereas, he says, Michael Billis did not want to work that late.[4] He explained that on that day, the developer had a lot of machinery on site; grinders, rollers and excavators. There was also a backhoe on site, owned by the developer; but on the plaintiff's case, no machine was able to be accessed that day to assist with fitting the slew valve caps.[5] The plaintiff said Michael Billis went looking for keys to access the equipment; the plaintiff believed Michael Billis called Nicholas Kambourakis in order to facilitate access of the equipment. It may also be noted here that Nicholas Kambourakis confirmed Michael Billis's evidence to the effect that he always had access to the developer's machinery and still retained the keys at the time of the hearing of this matter. There was no other evidence supporting the plaintiff's assertion that the relevant machinery was inaccessible on 11 July 2009.

[4] T at 41.
[5] T at 39.

[11] The plaintiff describes a phone call taken by Michael Billis on 11 July 2009; and that after this phone call, Michael Billis said words to the effect of: "the concrete is coming Mikes, we're going to put the lids on". The plaintiff states that the concrete arrived between 10:30 and 11:00 that morning. When asked about the process employed to embed the slew valve caps on that day, the plaintiff states that they, (he and Michael Billis), started from the bottom side of the development site. When the concrete arrived, the plaintiff's version is that he said to Michael Billis, "I'll form the concrete as best as I can and then you continue".[6] He said that Michael was finalising and levelling the areas and that he (the plaintiff) was continuing. He said that when he got to the end at the top, Michael was halfway; and he said "Michael, I'll put them on and then you level them".[7]

[12] The plaintiff says that he would 'form' the concrete with a shovel when it was poured. He states he did this for 19-20 of the 'pits' for the 'lids'; he says he was dealing with the smaller lids on that day – these were lids that measured 60 x 60 centimetres. As part of his evidence, he physically demonstrated the way he said he lifted the lids into place, describing that he would first use the tip of his steel-capped boots to create a gap between the ground and the lid and then use this space, his shoes and his hands to manoeuvre the lid into place. He demonstrated that he would lift the lid by bending his knees and tilting his torso forward at an approximate 20 degree

[6] T at 41.
[7] ibid.

angle. He said Michael would then use a crowbar to level the lids.[8] When asked whether the lids felt heavy, the plaintiff said that he knew how many kilos a lid would weigh because he had lifted many before. He states it "didn't scare" him because he would lift 50 kilograms up on his shoulders without thinking much of it. He states he would do this constantly, although not referring to the Willes Road site; but he referred to his past experience to explain the tolerance or training he had acquired through constant heavy lifting.

[13] The plaintiff's version is that at about the 16th or 17th lid, (that he was lifting alone), he felt pain down his left side and fell down onto his knees on the concrete. Thereafter, he and Michael Billis lifted and placed the remaining two or three slew valve caps together. He pointed to the area where he felt pain, indicating a point above the left buttocks in the lower back.[9] After he felt this pain, he said "Michael my back". He says Michael responded "it's probably a nerve." The plaintiff said "it's not a nerve, it's here down the sides of my back." The plaintiff says that when he felt the pain he fell down to his knees. He says that at the end of the day, when he and Michael Billis were getting into the car to leave the site, he said to Michael Billis "Michael, I can't get in the car", and that Michael Billis responded "don't worry, you'll be ok tomorrow." According to the plaintiff, Michael Billis had to help him into the car. He needed to physically hold on to Michael Billis as he could not lift his legs to get into

[8] T at 46-47.
[9] T at 48.

the car.[10] Mr Billis, (whose evidence is discussed further below), told the Court he has never helped the plaintiff get into or out of his car on any occasion when he took him to or from work.

[14] It is convenient to note here that Michael Billis, who the plaintiff says was working with him on the day of the injury, explained in detail how slew valve caps were installed at a number of the defendant's subdivision sites.[11] The method of installation at each site was the same. A sheet of fibro cement is placed over the slew valve; the PVC pipe is cut to a precise length and placed onto the fibro sheet over the slew valve; once the length of the PVC pipe is determined it is temporarily covered; the square area around the slew valve is "boned out" by shovel and/or machine. Gravel is then placed into the "boxed out" area to the height of the PVC pipe. The stabilised sand forms a pad upon which the slew valve can sit. The slew valve cap is then placed onto the pad and lifted mechanically with chains into place. The chains are attached to metal pins in two opposite sides of the slew valve cap. After the slew valve cap is placed onto the pad, it is moved into the correct position over the slew valve, using a crow bar if necessary. Mr Billis says he would try to ensure the slew valve cap is placed on the pad before the stabilized sand had "gone off", meaning that the stabilized sand had set. The stabilized sand had generally "gone off" after about 40 minutes.

[10] T at 50.
[11] Affidavit, Michael Billis, sworn 23 February 2013.

[15] At the development sites operated by the defendant, Mr Billis states a driver would drive a backhoe or mini excavator to the lot where materials were stored. Both persons would attach a chain to the slew valve cap and then the driver would drive it to where the slew valve was. Mr Billis recalled occasions when the plaintiff, using this method, would guide slew valve caps into place, manoeuvring the chains at the various sites and using a crow bar to square them off.

[16] Mr Billis states he has never heard of anyone being asked to lift the slew valve caps by hand. He states he has never seen the plaintiff or anyone else try to lift the slew valve caps by hand alone. He believed the slew valve caps weighed about 90 kilograms, and that a maximum of six or seven slew valve caps per day were installed at the various developments. He states there was always machinery available to install the slew valves; for example, DCT's backhoe, mini excavator or loader. If DCT's machinery was not available, those working would use "Blake's" machinery, (located on a site at Berrimah owned by Geoff Blake), to collect and install the slew caps.

[17] Mr Billis states that because the plaintiff did not have a driver's licence, he would often pick him up and take him to the Berrimah site. He recalled the plaintiff complaining about his back many times before the Berrimah site project was finalised. According to Mr Billis the plaintiff would often not come to work because his back was sore; sometimes he did not come

because he had been drinking. He says the plaintiff has never told him that he had hurt his back lifting a slew valve cap.

[18] Mr Billis agrees that the content of Exhibit D 15, (a video tendered to show how slew valve caps were installed), was a correct representation of the procedure of the installation of slew valve caps utilized at the site. It may be noted, amongst other manoeuvres, this depicts the caps being lifted using chains and machinery to guide them into place.

[19] Around late July 2009 was one of the occasions when Mr Billis says he went to pick up the plaintiff, but he was drunk, so he left; he told Nick Kambourakis he was not prepared to pick the plaintiff up anymore.

[20] In cross-examination, it was clear Mr Billis could not remember the particular day, (11 July 2009), when the plaintiff alleges the event causing injury took place, but he remembered their usual working practice for fitting slew valve caps. He did not remember anything about relevant machines being locked away and not being available around the day of the alleged incident. It may also be noted he was firmly of the view there would be no more than six or seven slew valve caps fitted on any given day. I see no reason to reject Mr Billis's evidence about this.

[21] Mr Billis disagrees with propositions put to him that on this particular Saturday there were no machines available; and that he had made some calls to Nicholas Kambourakis. He also disagrees with the proposition that he was "grumpy" that the concrete was coming at eleven o'clock and that

he wanted to finish at 1:00pm. It was put to him that on the day, they were to fit 19 caps: "never", was his answer. He disagrees that the plaintiff said words to the effect of "we're never going to make it, I will put the lids on myself". He says the caps were too heavy and that there was always a machine available for this work. He denied the plaintiff lifted and put the slew valve caps onto pads that he had formed up. He disagreed the incident described by the plaintiff took place at all and as already noted above, disagreed he had to help the plaintiff into the car.[12] In my view, although he did not remember the particular date; if such an incident, (that required him to assist the injured plaintiff), had occurred, Mr Billis would have recalled it. It would have been an unusual incident. He also disagreed he rang the plaintiff on 13 July 2009 to find out where he was or why the plaintiff didn't come to work on the next four working days.

[22] In cross-examination the plaintiff was asked about his instructions to his original solicitor that had resulted in the initial Statement of Claim[13] and an Amended Statement of Claim.[14] The date of injury was first alleged to be on 28 July 2009. Mr Clift asked the plaintiff whether he had told the two previous solicitors he had seen in relation to this matter that his back injury occurred after he lifted approximately 16 slew valve caps in one day. The plaintiff agreed he had said that, however, this is not reflected in the original pleadings. He disagreed with the proposition that what he now

[12] T at 196-197.
[13] 19 October 2010.
[14] 20 April 2011.

claims occurred is not what he told his previous solicitor; he disagreed that he told his previous solicitor that he had lifted 70 slabs or caps. It may be noted the Further Amended Statement of Claim[15] alleges the date of injury as 13 July 2009[16]. The plaintiff disagrees that he told his previous solicitor that the date of the injury was 13 July 2009. The plaintiff states that: she, (his previous solicitor), knew very well that on the 11th he had the accident, on the 13th he went to the hospital and on the 15th he went back to work again up until August. He states that he stopped work in August; he could not continue.[17]

[23] The Reply filed on behalf of the plaintiff[18] states "on many occasions prior to 11 July 2009, the plaintiff had lifted the caps by hand as no lifting equipment was made available by the defendant". The plaintiff's evidence was, however, that the first time he lifted a slew valve cap by hand was on 11 July 2009.[19]

[24] While a change in particulars in terms of the details of an incident is not at all determinative, it gives no confidence that the plaintiff has been accurate or consistent when recalling the events he says occurred. The disparity in the series of amendments in the pleadings cannot be explained satisfactorily through the plaintiff's language difficulties. The plaintiff

[15] 18 November 2011.
[16] Exhibit D28.
[17] T at 235.
[18] Exhibit 28 at 1.4.
[19] T at 294.

gave instructions to at least one solicitor through an interpreter.[20] The plaintiff says there were misunderstandings.[21] No previous solicitor engaged by him has been called to clarify this. Further, the plaintiff's claim for household gratuitous services that was previously pursued was abandoned towards the end of the trial. The plaintiff's evidence could not have supported this part of the claim that in turn contradicted statements made by the plaintiff on Centrelink claim forms.[22] These factors diminish the reliability of the plaintiff's evidence.

[25] While it is the case that there is a level of detail given by the plaintiff in evidence about how he was injured, when asked in cross-examination about the incident, the plaintiff was unable to say how or who placed the lids next to the slew valve.[23] He demonstrated with a cardboard cut-out the way in which he lifted the slew valve caps.[24] The agreed description of his demonstration was that he raised the concrete cap (represented in Court by the cardboard) from the tops of his shoes to a position just below the groin at the top of the thighs; he then turned and moved to the right or the left carrying the cap at that level and then placed it on the ground by putting it forward on his knees and bending his knees to a squatting position, placing it on the floor.[25] The plaintiff states each slew valve cap would take three to six minutes to lift and it was after having lifted 16 or 17 of the caps he

[20] T at 110.
[21] T at 234-235; 365.
[22] Exhibit D7, D8.
[23] T at 256.
[24] T at 267.
[25] T at 268.

felt the pain in his back and fell down on to the concrete. The plaintiff says that he would immediately move onto the next slew valve cap after having manoeuvred the previous one into position.[26]

[26] The plaintiff disagrees with the proposition that the slew valve caps could never have been put into place in the way he suggested. It was put to the plaintiff that this process was not possible because there were other contractors on the site during that week, and the caps and PVC pipe would not have been left sitting where he says they were. He disagrees with the proposition that Nicholas Kambourakis was on the worksite on the date of the alleged accident and he disagrees with the suggestion the incident could not have occurred in the way he described because before a slew valve lid is placed, gravel must be placed around the slew valve itself. He did agree however, that gravel was needed.

[27] It was put to the plaintiff that the concrete that was poured into the box shape must be poured at a precise level. He agrees with this statement but states Michael Billis was doing that. It was put that normally a backhoe or other machine with chains attached would be used to lift the slew valve caps into position. He agrees that normally that would be the process but says it did not happen on this occasion.[27] It was put to him that the lids weighed 91 kilograms. He states that he did not think that the lids weighed more than 60-70 kilos. It was suggested to him that the lids were not lifted

[26] T at 269.
[27] T at 278.

by hand because of their weight. He disagrees. It was put to him that it was not possible for one person to place one of those lids over a slew valve by themselves because in order to do so they would need to step up onto the concrete that had already been laid around the slew valve. The plaintiff gave an answer that was not particularly responsive, asking the cross examining counsel to speak to Michael Billis about that.

[28] It was suggested the placement of the slew valve caps could not have happened in the way the plaintiff asserted because the stabilised sand that was used would have "gone off" and it would have dried within 30 - 40 minutes of it being poured. The plaintiff gave a non-responsive answer to this suggestion.

[29] The evidence of Michael Billis that he had never worked alone with the plaintiff at the Willes Road subdivision is supported, at least in respect of the day in question, by the following business records: first, the time sheet for 11 July 2009[28] reads 'Nick Mikes Michael' under the heading 'work done on' and second, the invoice derived from the timesheets,[29] noting the labour for each at 5.5 hours and costed. The business records are not precise in terms of detail about what each worker did, however, for the purposes of determining who was working, they have probative value. Nicholas Kambourakis explains that the timesheets[30] record not only who has worked but also the machinery if used, so that both can be charged to

[28] Exhibit P3, at 169.
[29] Exhibit D32.
[30] Before the Court in exhibit P3.

the client. Nicholas Kambourakis is the author of the timesheets. Some timesheets indicate 'back hoe', 'excavator' and other equipment as the case may be. I accept the records are genuine records of the matters recorded in them. It was suggested in cross-examination to the plaintiff that on 11 July 2009, Nicholas Kambourakis was on the site. The plaintiff disagrees, stating "if he was there, I would not have had the accident".[31] The records indicate, however, that Nicholas Kambourakis was present.

[30] Although in cross-examination Nicholas Kambourakis admitted a number of errors in unsigned timesheets and admitted that they were often completed after the event,[32] when cross-referenced with the invoices, I am satisfied the timesheets are substantially correct. Nicholas Kambourakis was open about telling the Court that in some instances the timesheets were created the day after the work was done after discussion with the relevant workers to ensure correct billing of the client, in that instance, Better Homes Pty Ltd. Mr Kambourakis was obviously concerned that there be no suggestion of overcharging and hence there was an incentive to keep accurate records.

[31] The records indicate there were two deliveries of stabilised sand to the Willes Road subdivision on 11 July 2009;[33] both deliveries were by truck. The plaintiff's evidence-in-chief suggests one delivery of concrete that

[31] T at 278.
[32] T at 163-167.
[33] Exhibit D33; Boral Records, at 4.

day;[34] the plaintiff appears to refer to a single truck delivery during cross-examination.[35] On behalf of the plaintiff it is pointed out that if 19 lids were to be fitted that day, the amount of concrete required would be approximately 2.4 cubic metres; 2.8 cubic metres was delivered on that day. Without further reliable evidence as to the work actually done on that day, this fact provides only an inference of most marginal weight favouring the plaintiff and does not assist to overcome the real problems of reliability and credibility in the plaintiff's case.

[32] It is highly unlikely, if not impossible that the plaintiff lifted and manoeuvred 16-17 slew valve caps by himself. It is agreed between the parties that the slew valve cap exhibited and displayed in Court weighs 91 kilograms. Dr Richardson, the forensic engineer initially calculated this type of slew valve cap to weigh 86.4 kilograms, but ultimately nothing turns on this.[36] The engineering evidence, in my opinion well favours the conclusion that the plaintiff could not have lifted and moved the slew valve caps into position as he described.

[33] Dr Richardson wrote two reports in this matter on the question of the capacity of the plaintiff to lift the slew valve caps.[37] In the first report,[38] Dr Richardson completed initial calculations on the instructions given, that the plaintiff had lifted 20 concrete caps, weighing approximately 50

[34] T at 41.
[35] T at 256-258.
[36] Exhibit P25 at 17 .
[37] Exhibit P25.
[38] Exhibit P25; 20 July 2012.

kilograms,[39] although as noted, Dr Richardson estimates the weight at significantly more, namely 86.4 kilograms.[40] That the estimated weight of some of the slew valve caps varied, (from approximately 87-91 kilograms), did not cause either of the engineering experts called to alter their opinions. Dr Richardson's second report involves a consideration of a report by Dr Thomas Gibson[41] tendered on behalf of the defendant that concluded that the lifting and other actions described by the plaintiff were not physically possible for him to perform.

[34] Dr Richardson disagrees with certain findings made by Dr Gibson as to the ultimate compressive strength of a male labourer between 40 and 49 years of age, primarily because he says the values used by Dr Gibson represent averages only and in his opinion Dr Gibson did not properly consider standard deviations, but rather based his opinion on averages. Dr Gibson assessed the circumstances of the plaintiff according to the average spine tolerance for a man of the plaintiff's age and whether he alone could have lifted the 16-17 slew valve caps.

[35] Dr Gibson's report concludes as follows:

> "Mr Kampourakis, the plaintiff, claims to have lifted 16-17 stop valve caps, each weighing 91 kilograms, from the ground, to hip height, rotated and then accurately lowered the caps into place. At this point he was forced to stop as a result of the onset of acute back pain.

[39] Exhibit P25; 20 July 2012 at 5, 17.
[40] Exhibit P5; 20 July at 17.
[41] Exhibit D40.

> The load on the spine of Mr Kampourakis in performing one lift of such a stop valve cap greatly exceeds the tolerance of the spine of a man of his age (4718-8043 N according to Genaidy et al. 1993).
>
> Further, the tolerance of the spine of Mr Kampourakis would have been decreased by the repetitive loading, by the need to turn with the load and the necessity of slowly lowering the valve cap to accurately place it in position. Therefore it is not possible that Mr Kampourakis alone was able to lift 16-17 of these stop valve caps in the manner he describes prior to being injured".[42]

[36] Dr Richardson's opinion is that these conclusions were in error for failing to analyse the issue using standard deviations. He points out this is an approved method in the study relied on by Dr Gibson.[43] Dr Richardson's opinion is that because the plaintiff was a labourer who performed manual handling throughout his working life, he would have a capability that is more than the average male of the same age. Dr Richardson says it was reasonable to place the plaintiff in the 99.7th percentile of the population of his age in terms of lifting capacity. That is equal to the Mean plus 3 Standard Deviations. This places the plaintiff as one in 333 of similarly aged men who have the capacity to lift the caps. Dr Richardson did not agree that all labourers fall into the 99.7th percentile. His second report concludes "the author has demonstrated that if Mr Kampourakis was one in 333 he could have a spinal capacity to lift the mass as detailed by Dr Gibson". Dr Richardson agrees that if the spine of the individual has deteriorated, their capacity to lift is restricted. Dr Richardson was asked what an individual in the 99th percentile would be able to lift if there was a

[42] Exhibit D40 at 14.
[43] Genaidy et al, (1993): Spinal compression tolerance limits for the design of manual material handling operations in the workplace, Ergonomics, 36:4, 414-434.

degenerative spinal condition, and he explains that lifting a mass of that size will cause injury. Dr Richardson states that if there are pre-existing injuries, the lifting described would exacerbate the injuries further.[44]

[37] On behalf of the plaintiff it is submitted that both Dr Richardson and Dr Gibson support his case because both acknowledge that an injury will be caused or exacerbated by the lifting; and further, that it is possible for the plaintiff to lift the caps but that when he did, he was injured. Dr Richardson was asked[45] "ultimately have you any doubt, if so how much doubt about the accuracy of applying three standard deviations (inaudible) the man with the spinal degenerative changes that I've indicated?" Dr Richardson answers:

> "Again, I think we're conflating issues. So it is physically possible for someone to lift these types of things and not be injured, I think that's the one level that – the fact – if he has lifted these things in the way that's been described, and sustained the injury, that does not surprise me in terms of the capacities or the loads that are there. I don't know that I've answered your question……."

[38] Dr Richardson agrees that the further a weight is held away from the body, the more effort is required to lift it or to hold it and that the object will feel heavier. Dr Richardson was asked about body mass. It was put to him that the best predictor of ultimate compressive strength of the spine is the weight or mass of the subject. To this, Dr Richardson states that he does not think body mass is the only indicator of compressive strength. He used

[44] T at 57-58.
[45] T at 66.

the example of "someone who does martial arts – their ability to hit an object and have it break is a function of their experience of building up capacity of their fist. The body mass index is not in itself going to be a clear indicator of whether they're going to be able to carry a load".[46] Ultimately, however, Dr Richardson's answer to the following propositions was telling: he was asked whether he would agree that it is more probable than not that if indeed the plaintiff lifted the 16 or 17 slew valve caps, such that they were placed on concrete pads, with an offset of somewhere between 40 and 50 degrees, placed on the ground horizontally, and that the placement was undertaken at three minute intervals and the plaintiff has a degenerative spinal injury, that the ultimate strength of his spine would have been exceeded. Dr Richardson agreed with that conclusion from that set of propositions.[47]

[39] I conclude Dr Richardson was describing an extremely rare individual who would have the capacity to complete the task the plaintiff says he did. Given the condition of the plaintiff, notwithstanding he was an experienced labourer, he was not someone who was engaged in weight training or otherwise of the health status that would mean he had the capacity to lift the slew valve caps and manoeuvre them in the manner he described. It was not just one lift that was being considered; it was repetitive lifting in short cycles, with little recovery time, holding the weight away from the body. While it may have been possible for some rare well trained

[46] T at 63.
[47] T at 67.

individual to achieve the lifts and manoeuvres as described; it was not possible for the plaintiff; and it was certainly not probable. On the expert evidence I have heard on the matter, I conclude it was highly unlikely the plaintiff could have lifted and put in place the slew valve caps. I prefer the opinion of Dr Gibson on the point.

[40] I am not persuaded on the balance that the plaintiff was injured in the way he has described in evidence. It is unlikely the plaintiff lifted and placed 16 to 17 slew valve caps without assistance. I have viewed the DVD (Exhibit D 15) illustrating the procedure that both Mr Billis and other witnesses agree is the correct procedure adopted by the defendant to fit slew valve caps. I note the plaintiff gave evidence that in previous employment in Sydney he was shown how to lift heavy weights using a crane. His description of how he lifted the slew valve caps is fundamentally different from how he had been taught to lift heavy objects.

[41] It was submitted that the level of detail of the plaintiff's own description assists his credibility. While a level of particularity in some instances may be of assistance in assessing reliability, in the circumstances of this case, a level of detail does not assist in transforming the inherently improbable into proven facts.

[42] The inherent improbability of the plaintiff's case arises not only when his evidence is compared with Mr Billis's and Mr Kambourakis's evidence, but the circumstances that follow the alleged incident are not supportive of his

case: for example, the plaintiff's evidence about being visited in hospital by Mr Kambourakis and Mr Koukouvas is contradicted by them; and there are proven examples of exaggeration about his described level of disability.

[43] Michael Billis, in my opinion was a straightforward witness. Although he could not, as a matter of recollection refer to any alleged incident on a particular date, he had clear and unequivocal recollections about the work he and the plaintiff generally completed together and about various minor events; (e.g. transport to work, and the plaintiff's drinking). In submissions there was a faint suggestion Mr Billis may have been influenced by being an employee of the defendant, or that he had been worried about not having enforced safety standards, but those possibilities are remote and some were not put squarely to Mr Billis. Mr Kambourakis agreed he had once reprimanded Mr Billis for lifting a heavy object without a backhoe in the relevant period, but I do not think a motive to tailor evidence has been shown. Nor do I think the suggestion that there was pressure to complete the alleged works on the day has any basis.

[44] Other evidence that might have been potentially supportive of the plaintiff's case is shrouded in imprecision and does not support his evidence in a substantial way to cure the credibility and reliability problems already identified. The hospital records are neutral at best as to the mechanism of injury; other potentially supportive evidence is well negated by contrary testimony or records. I reject the plaintiff's evidence about how he was injured on or about 11 July 2009.

The aftermath of the 'Injury'

[45] The plaintiff states that on the day following the alleged incident he could not get out of bed due to the pain he was in; he could not move or turn his body. He did not want to sneeze for the pain it would cause his body.[48]

[46] As already noted, the plaintiff says he was assisted by Mr Billis on the day of the injury, 11 July 2009. Mr Billis denies anything like this has ever occurred. The plaintiff says Nicholas Kambourakis called him on Monday 13 July and asked him why he was not at work; the plaintiff says he explained that he had hurt his back and that he would contact Minas Phillippou to take him to the hospital. Nicholas Kambourakis denies he was told by the plaintiff on 13 July 2009 that he had sustained a back injury.

[47] The plaintiff did not go to work on Monday 13th of July 2009. After the alleged phone conversation with Nicholas Kambourakis, (which is denied by Mr Kambourakis), Minas Phillipou did pick up the plaintiff and take him to the hospital; Minas Phillipou brought his son also. Upon arriving at the hospital Minas Phillipou found a wheelchair and took the plaintiff from the car into the hospital. The plaintiff stated that they arrived at the hospital at 1:00pm.

[48] At the hospital the plaintiff said he was given 'some tablets'; the records show this was Panadeine Forte and Ibuprofen. The plaintiff claims he was

[48] T at 50.

at the hospital for approximately four hours before he was attended to and given the pain relieving medication.[49] It was at this point, the plaintiff claims that Nicholas Kambourakis and Michael Koukouvas came to the hospital to see him as Minas Phillipou needed to go home to be with his children. The plaintiff alleges there was a conversation that took place at the hospital between himself and Nicholas Kambourakis in which the plaintiff said to Nicholas Kambourakis "you knew I put the lids on" and that Nicholas Kambourakis did not respond.[50]

[49] The plaintiff claims they took to him to the house of the sister of Michael Koukouvas where the sister made coffee for them. He could not say where her house was or how long he spent there. He said they went straight there from the hospital.[51] Nicholas Kambourakis's evidence was that he has never been to Royal Darwin Hospital (RDH) to see the plaintiff; and that he has never travelled in the same car with the plaintiff and Michael Koukouvas together.

[50] Mr Koukouvas gave evidence saying he has never travelled in a car with both the plaintiff and Nicholas Kambourakis.[52] Mr Koukouvas denied ever attending the Royal Darwin Hospital to see the plaintiff.[53]

[51] The plaintiff says Minas Phillipou knew what was wrong with him; he could not remember whether he told Minas what had happened to him; but

[49] T at 51.
[50] T at 52.
[51] T at 214.
[52] T at 210.
[53] T at 240.

he told him he needed to go to the hospital.[54] Minas Phillipou agrees he took the plaintiff to hospital; and that the plaintiff looked like he was in pain, and that the pain was in his back. He agrees the plaintiff could not walk without assistance, however, he gave no evidence about being told of the cause of any injury. Although not overly significant, some reference or discussion about the likely cause of symptoms might be expected.

[52] The plaintiff relies on the evidence of Minas Phillipou to establish that Nicholas Kambourakis was at the hospital. In my view Minas Phillipou's evidence cannot be relied on in this regard; I prefer the evidence of Nicholas Kambourakis supported as it is by Mr Koukouvas. Minas Phillipou had not met Mr Nicholas Kambourakis in 2009, that is, prior to the suggested meeting at the hospital. He said he did meet him in 2010 but that is post-dating the event by some time. A photo was produced to him during his evidence[55] and he identified the single person in the photo as Nicholas Kambourakis. All of this is very weak identification evidence even though his evidence is that he "now knows" Mr Kambourakis; it does not stand against the weight of the denial by Mr Kambourakis and Mr Koukouvas. There was also an inconsistency in the evidence between the plaintiff and Mr Phillipou; Mr Phillipou saying he took the plaintiff from his home at Trower Road Wagaman to take him to the hospital; the plaintiff suggesting that at the time he lived near Moil supermarket.

[54] T at 217.
[55] Exhibit P24.

[53] At first blush the hospital records lend some support to the plaintiff's claim; however, when considered in the light of the other evidence, they show no more than the plaintiff had back pain or an injury from lifting a box and he was treated with medication; and that he needed assistance. The hospital notes of 13 July 2009 state "Pain-Back. Very poor English-states lifting up box, then pain to back, OE ABC intact, ambulant with assistance".[56] The attendance time is noted as 17:43. At 18:15 he was given Panadeine Forte and Ibuprofen. The clinical progress notes also record that at both 19:30 and 21:30 the plaintiff was called and was not in the waiting room. The term "lifting up box", in the context can only be regarded as a neutral expression. The plaintiff may have been referring to a box that was not a slew valve cap, or it is possible he may have been referring to a slew valve cap. The language issue is relevant here. Mr Phillipou's son may have been interpreting but the record is not positively supportive of the plaintiff's case. It is neutral. It certainly does not contain anything like the detail of the event as narrated by the plaintiff. It is consistent with a back injury or back pain being suffered by the plaintiff. It is not in dispute the plaintiff has a degenerative spinal condition.

[54] The discharge status notes "left before being seen by doc". It may be noted the plaintiff's evidence was that he was taken at around 1:00pm to the hospital and stayed for four hours.[57] That represents a significant disparity with the hospital records. Minas Phillipou said the plaintiff called him at

[56] Exhibit P1 at 23.
[57] T at 50; 209-2011.

5:30pm and said he had pain and needed to go to hospital. On the hospital records, it is unlikely the plaintiff remained at the hospital after 7:30pm; it is unlikely he stayed there for four hours as suggested by him.

[55] The plaintiff's evidence was that after the medication prescribed at the hospital was taken he felt better and went home; (although he was unsure about how he got home), maintaining Nicholas Kambourakis and Michael Koukouvas took him to Aggelliko Koukouvas' house. Michael Koukouvas is the cousin of both the plaintiff and Nicholas Kambourakis. It might be thought that he would remember such a visit. Nicholas Kambourakis gave evidence of the one sole occasion he and Mr Koukouvas attended the hospital together; that was a visit totally unrelated to the plaintiff. I accept Nicholas Kambourakis and Mr Koukouvas did not see the plaintiff at the hospital.

[56] The plaintiff's evidence in relation to 13 July was that Nicholas Kambourakis called him to find out why he wasn't at work and the plaintiff said "Nicholas I can't get out of bed".[58] It may also be noted the plaintiff's bank records indicate he attended the Airport Hotel and Moil Supermarket twice on that day to make purchases,[59] tending to counter his assertions that he was confined to bed.

[57] On Tuesday 14th of July the plaintiff returned to work but said he was in extreme pain; he was not working at the Willes Road site but did some

[58] T at 50.
[59] Exhibit D13, Bank Records, 13 July 2009.

concreting at Nicholas Kambourakis's house. He said Nicholas Kambourakis could see the pain that he was in. He also said "if I remember…" that he went to see his GP Dr Glynatsis on 27 July 2009. Dr Glynatsis records the date of the attendance when the history of back pain was given as 8 August 2009.[60] That record notes pain to the lower back as one month. It may be that it relates to the month previously, however, the date of any alleged incident is not clearly recorded. Working backwards it would be early July.

[58] Dr Glynatsis says he recalled the plaintiff stating that there was an injury that he had sustained at work. Dr Glynatsis did not make a note to that effect at the time. He tells the Court he believed there would not be a worker's compensation claim and that the plaintiff did not have private insurance. Dr Glynatsis says that if he thought there was going to be a worker's compensation claim, it is likely he would have taken more comprehensive notes in relation to the type of injury, such as where it occurred and other details.

[59] On 27 August 2009 Dr Glynatsis referred the plaintiff to Mr Ba Nuyent for opinion and management regarding what he noted as ongoing lower back pain and bilateral sciatica affecting his ability to continue working as a cement worker. There is no reference in the notes or referral to the alleged incident at work. Dr Glynatsis notes the CT scan which shows "L5S1 disc

[60] Exhibit D11.

lesion and bilateral L5 pars defects and laso (sic) L4-5/L3-4 disc lesions".[61] A further referral was made on 12 July 2011 in relation to management of his ongoing back pain and bilateral sciatica/spinal canal stenosis. In evidence Dr Glynatsis was referred to a medical certificate provided to Centrelink dated 4 September 2009. The diagnosis read "severe low back pain with bilateral sciatica"; he agrees this meant referred pain down both legs. The date of onset was noted as 8 August 2009, however, Dr Glynatsis said that his understanding was that the injury pre-dated the reported onset by one month. Although there is general consensus that the plaintiff has spinal degeneration and associated conditions; the level and source of the mechanism for any further injury or aggravation of his condition is not made out in the medical material.

[60] Nicholas Kambourakis's response to the plaintiff's absence from work was described by counsel for the plaintiff as "very odd" because he did not make enquiries after the plaintiff did not come to work for four days; (13, 14, 15, 16 July 2009). The basis for suggesting this was "very odd" was that it was said the plaintiff had worked for two years continuously with only short breaks. From the available records[62] there are a number of periods throughout 2008 and 2009 when the plaintiff did not work for the defendant. It could not fairly be said to be unusual that he did not attend work for periods of three to four days. Nicholas Kambourakis also referred to other occasions when the plaintiff had said he could not come to work

[61] Exhibit D11, letter of 27 August 2009.
[62] Exhibit P3.

because of a bad back. Nicholas Kambourakis believed that this was an excuse because the plaintiff was too drunk to come to work.[63]

[61] In my view the fact of the plaintiff being absent for around four days is not so out of the ordinary that it would be expected that Nicholas Kambourakis would make enquiries. Nicholas Kambourakis's evidence is also criticised because when asked about when the plaintiff mentioned he had a sore back, Mr Kambourakis answered "I would say at least a couple of weeks after he stopped working for us".[64] He was asked if that was the first he had heard of it. He agreed with that. In my opinion he was clearly making an approximation, and this does not lead me to doubt the honesty of his testimony. The issues around not coming to work on occasion due to drinking did not appear to be brought up in the evidence in an exaggerated way; both Nicholas Kambourakis and Michael Billis made references to this as a matter of fact. I accept their evidence on this point.

The Plaintiff's Level of Pain and Disability

[62] I accept that it is difficult for people to accurately describe their experience of pain over a period of time. More so for the plaintiff who has some level of communication barriers through language. The plaintiff told the Court of the difficulty describing pain referable to a period.[65] His evidence about pain and associated disability is, however, exaggerated. He

[63] T at 179.
[64] T at 178.
[65] T at 100.

gave evidence of experiencing serious pain since the alleged incident. There were minor qualifications to his descriptions of his experience of pain or its characterisation, but most of his evidence was directed to giving an impression of significant disability due to pain sourced in the alleged incident. As well as the pain experienced in his mid-back in 2009, the plaintiff also pointed to the left side of the back and to the back of the left knee. He also states he suffered the sensation of "needles" in his legs during 2009. He indicated this was to the sole of his left foot and that his two front toes did not touch the ground very well as they were numb and his foot was tilting.[66] He states that he had burning sensations in his legs, more specifically at the back of his heel going up to the calf to about mid-point in the knee. The numbness in his left leg, he says he could feel like "electricity". He states the pain experienced in 2009 was "unbearable pain" and on a scale of one to ten it would have measured one hundred, stating that it would get worse when he worked.[67] He states that in 2009 his only movement was that he could walk to do shopping; he had difficulty going to the toilet because of back pain and he could not bend or turn to facilitate this.[68]

[63] In 2009 he says if he tried to move his upper body from right to left or left to right he would suffer unbearable pain in his left hip and left leg. This pain was consistent until the end of December 2009. He said the pain

[66] T at 96.
[67] T at 97.
[68] T at 198.

affected his balance and sometimes prevented him from walking fast and in the first few months he would have to stop regularly. In 2010 the sensation of "needles" was the same as 2009 and this continued and ultimately prompted his return to Greece. More particularly, he says in March 2010 he left to go to Greece because he was not well.[69] He says that the pain in his back was unpredictable and when he would sneeze the pain was unbearable. He states that in 2012 he was in a lot of pain when moving from a seated position to a standing position and his balance was a major problem as well. He said that by March 2012 his back had improved and he could walk. He also states that in a week he "might not be in pain at all".[70] He said that in 2012 he would walk the distance between his home and his boat which was about one kilometre and it would take him 25 minutes. He said if he runs he needs to put his hands at the back of his waist. In relation to numbness in his groin area, he says that this started before he went to Sydney and that he had told doctors of this.

[64] The plaintiff agrees he worked on a site in Sydney between 5 August and 18 October 2012; he could not recall whether he had done work at 13 Canberra Road in Canterbury Sydney. He was asked about undeclared sums in relation to his Centrelink forms for a disability pension and generally he answered that Centrelink had told him he did not need to declare sums of money under $5,000. The plaintiff concedes he did not tell Centrelink about the fact he had been working post injury because "I was

[69] T at 103.
[70] ibid.

under the impression that I had to accumulate $5,000. If I work and earn more than $5,000 that's when I declare it".[71]

[65] The plaintiff was asked extensively about his fishing and associated activities in Sydney. He agreed he would lift a boat motor and admitted to carrying the motor a significant distance between the boat and a trolley that he used. He agrees he always carried a five litre container of petrol with him when he went to go to his boat for fishing. The plaintiff also gave evidence that daily domestic chores were uncomfortable for him and if he had the money he would pay someone to do that work. He said that the pain in his back was constant, regardless of whether or not he was lifting his boat engine or putting a chicken in the oven.[72] Generally his answers about levels of pain when completing household tasks or when fishing were to the effect that the character of the pain would not change. As noted above, there were minor qualifications.

[66] Footage of the plaintiff travelling by bus, train and walking on 24th and 25th of January 2012 was shown to the Court. There did not appear to be any visible disability. That is perhaps not conclusive by itself, but combined with other surveillance footage of other activities the surveillance material indicates the plaintiff functions normally.

[71] T at 123.
[72] T at 157.

[67] What follows are brief descriptions of DVDs (1-17) played and continued in Exhibit D17; where relevant, a notation as to evidence or an accepted description is noted.[73]

DISC 1: • The plaintiff identifies himself at the offices of a doctor Surgery 29 Gross Street, Parramatta. The date of the footage here being 28 June 2012. • When asked whether he was in pain on this morning, the plaintiff stated that the pain is constant. • Counsel then continues the footage and notes the posture of the plaintiff stating "he seems to be standing erect and walking in the same posture".
DISC 2: • Shows the plaintiff walking around the area where he lived in June 2012, in Brighton Le Sands. The Court is asked to note the plaintiff's gait and his posture. • The footage then depicts the plaintiff entering the TAB. • **30 June 2012**: Depicts the plaintiff holding on to a rope attached to a boat with another man (Mr. Gatsis). This was so that they could launch the boat to go fishing. The Court is asked to note that the plaintiff appears to be standing in the boat twisting to the right. • Counsel then skips to 11 minutes on the DVD, asking the Court to note the bent posture adopted by the plaintiff when pulling-in the boat.
DISC 3: • Includes further footage of the plaintiff returning a boat to the ramp. Counsel asks the Court to note the plaintiff standing and leaning on the front counter of the cabin of the boat.
DISC 4: • This footage depicts the plaintiff on 30 June 2013 at the TAB. The Court is asked to note a particular action of the plaintiff while sitting at a table watching a screen and taking notes, such as twisting and being involved in removing himself from a stool and the action of almost running. • The Court is asked to note the way in which the plaintiff got off of another stool and the speed with which he went to a window.
DISC 5: • Is a duplicate of disc 4.
DISC 6 (3 files on disc): • Depicts the plaintiff at his regular coffee shop having coffee. The Court is asked to note the posture adopted by the plaintiff which remains the same. Particularly the angle of the plaintiff's shoulders. • The disk is forwarded **to 8 minutes (file 2)** the Court is asked to note the action of the plaintiff in turning from his position to the right by twisting his torso. This action is repeated. • The disc is forwarded to **33 minutes**. The plaintiff's movement is noted. • On **file 3 of disc 6**, the plaintiff's gait and posture is noted.

[73] The counter at times refers to the counter on the screen as recorded by the video camera, and at other times the counter on the DVD player.

DISC 8 (1 file):

- At 34 seconds into the clip the Court is asked to note the twisting movement of the plaintiff. "The plaintiff appears to be twisting to his right, looking over his right shoulder."
- The Court was asked to note the movement made at **1 hour and 13 minutes** – when the plaintiff again turns to his right and holds that position.

DISC 7 (1 file):

- This footage depicts the plaintiff on his first boat. It shows the plaintiff baiting a hook bending forward, straight-legged, head down. This posture is maintained for some 6 minutes.
- At **8.11.30** on the counter, the Court is asked to note the posture of the plaintiff. He is also bending over at this point.
- At 31 minutes on the DVD player counter and at 8.23.48 on the video camera timer. The Court is asked to note the action of the plaintiff. Here he completely bends down, bending his knees and back completely. He does this repeatedly.
- The Court is asked to note that 1 hour and 20 minutes elapses between the plaintiff starting to bait the hooks and the completion of the baiting process.
- The Court is asked to note the various points throughout the footage when the plaintiff is rowing his boat around the canal.
- At **46 minutes**, the plaintiff is shown to be bending over again.
- At **52 minutes** he is again shown to be bending over, apparently wrapping fishing line around something, he then bends down and repeated this bending motion. He appeared to be bailing water out of the boat. He bent over repeatedly at this point. He then climbed up and over his boat and off onto the shore.
- At **54.03** the plaintiff repeatedly bent over from a standing position to adjust his shoe.
- At **1 hour and 12 minutes** on the DVD player timer, the plaintiff is seen to be rowing his boat. This continues for some time. The Court is asked to note that he is rowing against both the tide and the wind, and that increased effort would be required to row the boat in those circumstances.
- At **1 hour and 35 minutes**, the plaintiff, with effort, pulls his boat toward the shore so that he can board it.

DISC 9:

- The beginning of this footage shows the plaintiff waiting for a bus and then walking down to his boat again, this is during 2012.
- The plaintiff baits hooks for approximately 35 minutes.
- The Court is asked to note the plaintiff's actions at 14 minutes. Here the plaintiff is handling the fishing line, standing up in his boat. Counsel posits that this is a significant posture.
- At **58 minutes 29 seconds**, the plaintiff is seen to be walking somewhere. The plaintiff was not sure whether he was walking to or from his house. It was put to him that the distance between the boat ramp and his house was 3 kilometres. The plaintiff had stated, at the beginning of his cross-examination that the distance between his home in Brighton Le Sands and the shops was 1km. He was not sure of the distance between his home and the boat ramp, but that it was approximately 80 houses between the two points. The footage of the plaintiff walking continues for approximately 13 minutes. It shows an apparently unrestricted gait.
- The Court was asked to note the posture of the plaintiff as he walks at the **1 hour 4 minute** mark. The plaintiff walks with his hands in his pockets, slightly bent

forward. No guarding. He then boards a boat on the water and begins rowing.

- At **1 hour 21 minutes** of the footage the Court is asked to note the action of the plaintiff ascending a set of stairs without the assistance of the railing.
- At **1 hour 22 minutes** of the footage on **disc 9**, a worksite and the laying of concrete is depicted. The plaintiff identifies his friend Spyros in the footage. At **1 hour 27 minutes** the plaintiff can be seen (briefly) moving a wheelbarrow between the back of the concrete truck and into the backyard of the property. Counsel puts to the plaintiff that he stayed at the residence for 4 hours. He gave a non-responsive answer at T 333.
- At **1 hour 33 minutes** the Court is asked to note the plaintiff's walking pace. It is relatively fast, with fluid movement of his limbs and no guarding behaviour.
- At **1 hour 44 minutes**, the footage shows plaintiff standing at a fence leaning with one arm on the fence apparently at an angle. Counsel asks the Court to note this posture.
- At **1 hour 45 minutes,** the plaintiff is shown walking with shopping bags in both hands. The plaintiff agreed that the footage was taken on 5 July 2012.

DISC 10:

- **On file number 1** the beginning of the footage depicts the plaintiff on a construction site moving his arms around. At **2 minutes**, the footage depicts the plaintiff working on the construction site, shovelling concrete into a wheelbarrow.
- At **10 minutes 33** on this file, the plaintiff adopts a posture – leaning against a wall, at an angle.
- **File 2 on disc 10** depicts the same actions that are seen on disc 9, however, from a different angle.
- **File 3 on disc 10 –** The Court is asked to note the plaintiff's posture remains the same for an extended period of time – legs crossed and drinking coffee.

DISC 11:

- **2 minutes** – The plaintiff appears to stand up from the table at the coffee shop unaided whilst holding a cigarette.
- At **9 minutes 13 on Disc 11** the Court is asked to note the speed at which the plaintiff crosses the road.

DISC 12:

- At **21 minutes** the footage shows a long cafe sequence. The Court was asked to note the action of the plaintiff getting up out of his chair. He again does this unaided, and does not exhibit any guarding body language or restricted movements.
- At **24 minutes** the footage depicts the plaintiff pushing a boat motor along on a trolley. This was the motor he bought and the motor he still owns. The footage at 25 minutes shows the plaintiff and two other men placing the motor into the boot of a car. The plaintiff was asked if he lifted the motor out of the boot of the car, and he stated that he did. This is partially depicted at **26 minutes**.
- At **30 minutes on disc 12**, the plaintiff is depicted again sitting at the cafe, he is on the phone and smoking a cigarette. He is sitting side on to the table and leaning on it with his left arm.
- At **33 minutes and 22 seconds**, the plaintiff is shown walking at a swift pace, with a trolley. He is shown at the slope of the wall leading down to his boat. It shows him jumping from the wall onto the boat. He then bends over several times as he manoeuvres the boat. He is then shown moving from the boat and walks up the wall unaided. He then picks up the motor and carries it down the wall unaided. He then proceeds to mount the motor in the relevant position on the back of the boat.

- When asked about these actions the plaintiff stated that he had picked up the motor and taken it down to the boat unaided, because at this time his trolley had been stolen.
- The Court is asked to note the actions of the plaintiff starting the boat.
- It may be noted, Dr Ng discusses his observations of these movements, noting the movements demonstrate a full rotation of the torso.

DISC 13:

- Is the reverse angle of disc 12.

DISC 14:

- Footage taken on 7 July 2012. At **8 minutes 28 seconds** the plaintiff gestures energetically.
- At **32 minutes**, the plaintiff stands up and pushes his chair in. He does this unaided, he then raises his right arm and points in a direction. He then sits back down.
- At **1 hour and 30 minutes and 28 seconds**. The Court is asked to note the actions of alighting the chair and standing up.

DISC 17:

- This is the reverse angle of the footage on DISC 12. The footage shows the plaintiff bending down over a trolley – it may be described as a deep bend.
- **2 minutes:** The plaintiff appears to be at a service station, preparing fuel for the boat. He repeatedly bends over and at one stage while filling the fuel cans with fuel holds the bend position for approximately 15-20 seconds. At 3 minutes it is noted the plaintiff is walking at relatively swift pace, pulling a trolley behind him.
- The footage shows that the plaintiff has walked the fuel cans to where his motor is stored, collected the motor and then walked both the motor and the fuel cans on the trolley to his boat.

DISC 15:

- At **8 minutes and 31 seconds** the plaintiff bends down over his knees from a seated position and then stands to reposition himself.
- At **17 minutes** on this disc, the plaintiff is again depicted at a service station. He appears to be cleaning something, possibly refilling the fuel tanks. It is not entirely clear. The Court is asked to note the bending and associated movements of this activity.
- After this at about **18 minutes**, the footage depicts the plaintiff walking for about 10 minutes. His gait appears fluid in his movements, unrestricted strides and moving relatively swiftly. He manages to carry a fuel can and plastic bag while walking and also smokes a cigarette. He does not seem to be unbalanced and turns his head with apparent ease when crossing the road.
- At **28 minutes**, the plaintiff is depicted boarding his boat. He is, at **29 minutes** shown to be bailing water out of his boat. The actions show the plaintiff holding onto the front screen of the boat and with his other hand using a bucket to repeatedly collect water from the boat and deposit it in the ocean.
- At **47 minutes**, the footage shows the plaintiff fishing. There are various postures adopted. At **56 minutes**: The plaintiff stands up in the boat for an extended period of time and then sits down again and repeats this.
- At approximately **1 hour and 4 minutes** the plaintiff is seen to be operating a motor while returning to shore in his boat. The Court was asked to note that the plaintiff was on the water for approximately 4 hours and 3 minutes.

DISC 16:

- At the beginning of this footage the plaintiff can be seen to be walking with a can of fuel in his hand. He is seen to again be pulling the trolley along with the motor on it. He uses one arm (right) to pull the trolley along and carries the can of fuel in the other.
- At **6 minutes 23** the plaintiff is seen to be lifting his motor off the boat.
- At **12 minutes**, the plaintiff can be seen to be pushing his trolley with the motor on it.
- The rest of the footage on this disc shows the plaintiff walking around his neighbourhood. Apart from his gait and pace in these shots to be noted, he is shown at 21 minutes to be leaning on the fence next to his table at the cafe.

[68] The evidence of the surveillance footage is not consistent with restricted movement or an unbalanced gait. Quite the contrary. From a lay point of view it simply does not look like a person experiencing pain or associated protective behaviours, accepting as I do that pain is a subjective sensation. In the footage, the plaintiff is engaged in strenuous activities, particularly in his boat on the water and preparing for those activities, carrying a 20 kilogram outboard motor and carrying fuel. It is possible there were times when the plaintiff's pain was not as acute as that experienced by him in 2009 and 2010, however, the footage indicates he has very little difficulty whatsoever.

[69] Dr Ng referred extensively to the subjective nature of pain and said the ability of the plaintiff to engage in activities such as fishing as viewed in the footage could be explained by psychological motivation. He said that when patients have chronic pain, it assists to manage their pain if they have motivation for certain enjoyable or leisure activities. Dr Ng indicated engaging in those activities may, for example, strengthen the patient's back

and make it more tolerant to the pain which might be involved in day to day activities. Dr Ng was of the opinion that this psychological motivation was operating in relation to the plaintiff.

[70] The stronger body of medical opinion that I accept, however, indicates that the activities depicted in the footage show that any aggravation or the effect of any aggravation on the plaintiff's pre-existing pathology has obviously gone. This was the opinion expressed by Dr George Kalnins,[74] who, in relation to his examination of the plaintiff in August 2012 noted gross discrepancies between the plaintiff's movements during examination when he could not produce movement and the movements demonstrated in the surveillance video. On viewing the footage he particularly noted it frequently took the plaintiff five to ten pulls to start the outboard motor when he was in a fully flexed position associated with rotation of his lumbosacral spine. He also made note of the plaintiff's ability to dig and use a wheelbarrow. On viewing the video surveillance Dr Kalnins indicated that the plaintiff was fitter than he had suggested to him.

[71] Professor Ryan, an orthopaedic surgeon with particular expertise in the diagnosis and treatment of conditions of the spine, prepared his original report concluding the plaintiff would be unable to undertake a labouring job involving bending, lifting or carrying. He also noted "some irregularity of effort on physical examination which suggested an element of pain behaviour". In evidence Professor Ryan says he had some initial

[74] Exhibit D14.

uncertainty about the assessment, however, after viewing the footage he concluded the plaintiff had no obvious incapacity and could return to work as a manual labourer.[75]

[72] The plaintiff's evidence was that he would take prescription medications to enable him to reduce pain and work. The evidence about this is scant. Professor Ryan speaks of the suggestion of use of Methadone as pain relief and says he does not know if it provides pain relief. He describes Methadone as "one of the most deviant drugs known to man" and not recommended.[76] The plaintiff was seen labouring in some of the footage and seemed untroubled by shovelling materials into a wheelbarrow. This activity would not appear to be explicable on the basis of a leisure activity enabled by motivation for the activity. Much of the footage is indicative of vigorous physical activity requiring rotation of the spine and it is highly doubtful on the preponderance of the medical evidence that the plaintiff is incapacitated to the extent that he claims. The surveillance footage reflects detrimentally on his credit. There was also evidence, largely admitted by the plaintiff of him performing difficult physical labour on a boat he was working on in Greece.

[73] It is possible the plaintiff exacerbated his underlying back condition on or around 13 July 2009, but in my opinion this was not done by lifting slew valve caps.

[75] Exhibit D50; D51, T at 284.
[76] T at 291.

Duty of Care – Safe System of Work

[74] If I am wrong in my conclusions about the mechanism of injury, it is necessary to consider whether the employer had established a safe system of work. It is clear employers have a duty of care to establish a safe system of work and to maintain and enforce such a system.[77] Although for the purpose of the *Workers Rehabilitation and Compensation Act* (NT), the plaintiff was not a "worker", for all intents and purposes, following the usual indicia[78] that are considered when this question arises, clearly the plaintiff is to be regarded as an employee. In any event, it is not disputed that for the purposes of law of tort, there is sufficient proximity between the plaintiff and defendant for a duty to provide and enforce the safe system of work to be imposed on the defendant.[79] This is not a situation where the imposition of a duty to provide a safe method of carrying out the work would be inconsistent with the maintenance of the common law distinction between the obligations of employers to employees as opposed to independent contractors.[80] It is common ground that the defendant owed the same duty of care to the plaintiff as it would to any employee.

---

[77] *McLean v Tedman* (1984) 155 CLR 306 at 313.
[78] *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215:3.9; the "indicia" referred are, eg. the level of control exercised by the employer; whether the employee is "integrated" into the organisation; requirements concerning uniforms; requirements concerning supply and maintenance of tools; whether pay is according to task completion or receiving wages; whether the employee bears any risk of loss or has a chance of making profit; freedom to work for others; ability to subcontract; deduction of taxation; responsibility for insuring against work related injury; whether they are a recipient of holiday or sick leave.
[79] A similar situation arose in *Martin v Moore* [1999] NTSC 34, Riley J (as he then was), had no difficulty accepting an action in negligence could lie where there was sufficient proximity between the employer and employee.
[80] See eg. *Leighton Contractors v Fox* (2009) 240 CLR 1, where the High Court rejected a suggestion that the principal contractor on a building project had a duty to ensure that everyone on site had received appropriate training.

Relevantly the content of the duty to maintain and enforce safety was acknowledged by Jason Brodie, a former supervisor for the defendant[81], whose role he describes as implementing all the safety aspects and to ensure that safety is maintained.[82] Mr Brodie gave detailed evidence of what was undertaken by him in terms of courses and workshops for all who worked on the site.

[75] Nicholas Kambourakis gave evidence that the relevant safety policy for the defendant was adopted from BMD Constructions in 2004.[83] He explained the process for placing slew valve caps, (using machines and chains), was consistent with the safe system of work that was put in place, at an earlier time and, he says continues and remains in place. Michael Billis said that the system was not deviated from, save for one occasion. The plaintiff indicated the system was not deviated from until 11 July 2009.

[76] There was a significant amount of evidence that the plaintiff received initial and ongoing training about the lifting of objects and the use of machines and chains. Jason Brodie's evidence was that he conducted the safety courses about this on site. He explains the industry induction process was that before anyone was permitted to work at the site, they must go through the safety part of the induction process. There is a general industry induction and a site specific induction. The general induction is a forty minute DVD covering a broad range of topics relevant to manual

[81] Although employed by BMD Constructions.
[82] T at 214.
[83] T at 136.

handling and working with the machinery. The site specific induction covered risks relevant to the particular site.[84] Particular tasks are dealt with in a series of 'work method statements'. This includes instructions on correct lifting of heavy objects that are defined as being above thirty kilos. The use of machinery for lifting such objects is also covered.

[77] Attendance at these courses was mandated and these were called "Tool Box meetings". Mr Brodie confirmed the plaintiff was present for a number of Tool Box meetings in 2007 and that Nicholas Kambourakis translated for him. Nicholas Kambourakis's evidence was that the plaintiff attended Tool Box meetings. In my view the mandatory nature of the Tool Box meetings is indicative of the provision, maintenance and enforcement of a safe system of work. The prohibition against working on the site without undertaking the safety training is persuasive. So too is the evidence of an immediate reprimand by Nicholas Kambourakis of the plaintiff and Mr Billis for lifting a thirty kilogram lid at another site. This indicates enforcement.

[78] On behalf of the plaintiff it is argued that when assessing the duty of care it must be remembered the plaintiff is a fisherman, essentially with very little English and is largely illiterate. The plaintiff had some previous training in relation to lifting at Metropolitan Demolitions in Sydney 1997 and with BMD in 2007. It is submitted this is not sufficient to discharge the duty. I do not accept this. The plaintiff was present for a number of

[84] T at 214-219.

the Tool Box meetings. Some of the presentations were visual presentations. On some occasions the instructions were translated. In any event many of the persons involved in the training and co-workers such as Mr Billis and Nicholas Kambourakis speak Greek. That was the language of the work environment. The plaintiff was witness to one reprimand as noted above. I conclude there was a safe system of work in place, that was enforced and that the plaintiff knew of the requirements for using machinery for lifting heavy objects.

[79] If I am found to be wrong in relation to the above factual findings and that contrary to those findings Mr Billis did permit or require the plaintiff to lift the slew valves by hand, the conclusion here would be quite different. The duty imposed on employers is non-delegable. It should be clear from the above discussion, however, in my opinion that this is not what occurred. If it were the case that the plaintiff did go ahead and lift the slew valve caps in the way he has described, the only way that could have occurred is without the knowledge of the defendant or Michael Billis. In that instance, lifting slew valve caps would be something of a rogue activity. Any resultant injury from such an activity could not be reasonably foreseen by the defendant.

Is there an Injury or Disability Sounding in Loss and Damages?

[80] The following discussion is relevant only if I am wrong in relation to the conclusions already made.

[81] I have in the broader discussion referred briefly to some of the medical material, in terms of the response of the doctors to the footage taken of the plaintiff. I appreciate Dr Ng is a Consultant Physician in Occupational, Environment and Musculoskeletal Medicine and therefore may, as submitted on the behalf of the plaintiff, have taken a broader approach to the circumstances of the plaintiff. That seems a fair assessment. For example, Dr Ng referred to the fact that the plaintiff had an earlier shoulder injury that could have threatened his capacity to engage in employment, but he returned to work. Dr Ng also had regard to the likelihood that the plaintiff does not enjoy being poor and on a disability pension. Dr Ng also considered the plaintiff's statement that he has repeatedly tried to return to work but pain prevents him. It is the case that Dr Ryan, for example, was not aware of some of those facts and statements or did not rely on them.

[82] The evidence of the orthopaedic surgeons, some of which I have already referred to is that the plaintiff has quite normal functions. Although not finally determinative, the most recent scans show no pathology other than the pre-existing congenital and degenerative changes to the spine. I have summarised the surveillance material above. In the view of the majority of

doctors, this shows the plaintiff engaged in active and vigorous activities without restrictions. Some of the footage viewed shows the plaintiff labouring. Although I accept much of what Dr Ng says in relation to theories of pain and pain management, in this particular case, focusing on the question of disability and incapacity, I prefer the evidence of the orthopaedic surgeons that is based on clinical judgements, (in the case of Dr Ryan and Mr Kalnins), as well as the lack of restrictions or movement demonstrated by the plaintiff in the surveillance footage.

[83] Associate Professor Bauze formed his opinions on the basis of the visual material shown in Court and other evidence given. His conclusions are[85] that the plaintiff's claim of severe pain and disability are inconsistent with the video evidence which showed no restriction of spinal movement or inactivity; he also concludes those claims appeared to be inconsistent with the Court evidence, that the plaintiff has mislead examining doctors and that there is no objective evidence of continuing impairment or disability as a result of any injury that may have occurred in the subject incident. By itself, associate Professor Robert Bauze's opinion may not be conclusive as he was not an examining doctor, however, taken with the reports of Professor Ryan and Mr Kalnins, who were both prepared to accept, (perhaps with some reservations), the plaintiff's initial descriptions of pain and disability, after viewing the footage, have changed their opinion.

[85] Exhibit D42.

[84] In my view there is no disability or lack of capacity referable to the incident alleged by the plaintiff. Whatever injury to the spine the plaintiff has sustained, it is not caused by the defendant or any failure by the defendant to discharge their duty. In any event there is no, or negligible lack of capacity. I will not be making any order for damages.

Quantum of damages

[85] If I am in error with respect to any relevant finding, there remains the question of quantum. In the circumstances, what follows needs to be interpreted on the basis of assumptions inconsistent with the preceding conclusions.

[86] This requires consideration of the *Personal Injuries (Liabilities and Damages) Act* (NT) (PILDA). As a preliminary matter, Dr Brownjohn, on the basis of Dr Ng's report[86] assessed a whole of person impairment of 6% using the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition.[87] Counsel for the plaintiff drew my attention to s 18 of PILDA, and the definition of "prescribed guides". Prescribed Guides are defined as follows:

(a) The guides prescribed by the regulations; or

[86] Report of 27 August 2012.
[87] Dr Brownjohn's Report is Exhibit P48.

(b) If no guides are prescribed by the Regulations – the American Medical Association Guides to the Evaluation of Impairment (as modified by any regulation as published from time to time).

[87] There are no guides prescribed by the regulations. As can be seen, there is no specification of which of the AMA Guides are to be used; but those published "from time to time". It may be noted Dr Ng assessed 5% whole of person impairment as a result of the lumbar spinal condition using the 5th edition of the AMA Guides. One percent was added for the impact on other activities – the whole person impairment was assessed at 6% as a result.[88]

[88] The phrase "from time to time" simply comprehends the periodical nature of the publication of the AMA Guides (Guides). In my opinion, as a matter of practice, the most current of the Guides available is likely to be preferred; however, an assessment made using an earlier Guide is not by virtue of that fact invalid.[89] It may be that the earlier Guide was the relevant Guide at the time of the assessment. It may be expected that the most current Guide available would ordinarily be used by a Court, however, it seems to me that reliance on previous Guides by those who have made the assessment and the subsequent evidence are not by virtue of that fact disregarded.

---

[88] Exhibit P26.

[89] Words and Phrases Legally Defined (Fourth Edition) (at 1002), refers to the phrase "from time to time" meaning "as occasion may arise"; or the phrase is introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged their duty when they have once acted, and therefore not be able to act again. It is acknowledged here the definition in 'Words and Phrases' is not particularly apt to this issue.

[89] In my opinion the 6% whole person impairment is clearly the appropriate percentage for the purposes of s 27 PILDA (damages for non-pecuniary loss). This approach adopts the use of the most current available Guide, although it is based also on a report using the former Guide. Both Guides represent Guides published 'from time to time'. On this assessment of 6% of whole of person impairment, pursuant to s 27(3)(c) PILDA, there may be an award of 2% of the "maximum amount" ($555,500) which equals $11,110.00.

[90] In terms of the calculations, there is much that is not in dispute between the parties. In my view, given the plaintiff's experience as a labourer, his training both with the defendant and previously with another employer, contributory negligence should be attributed to him. I would assess this at 40% of any total.

[91] I substantially agree with the suggested assessment applying "Option 2" as it came to be known in the hearing, (in terms of calculating earning capacity), submitted on behalf of the plaintiff. Although on behalf of the defendant, it is pointed out that the evidence of Dr Kalnins indicates that it is unlikely that he will work as a labourer beyond age 60, that is the only evidence on the point and the availability of less onerous forms of work have not been fully explored.

Non-Pecuniary Loss		
(Calculated by reference to PILDA)		$11,110
Past Lost Earnings		
(Based on Option 2 - $736 Net Per Week)		$137, 021
Plus Interest (1.9%)		$9,326
Past Specials (incorporating interest)		$534
Future Loss Earnings		
(Multiplier to age 67, is 606)		
Net Loss per week $736		
Total loss $445,592		
Vicissitudes	20%	$356,474
Future Specials		$4,275
Sub Total		$518,740
Contributory Negligence	40%	
($207,496)		
	Total	$311,244

[92] Should the overall findings be disturbed elsewhere, I will hear the parties further on appropriate adjustments in relation to interest since the date of submissions being filed.

Orders

[93] 1. The plaintiff's claim is dismissed

2. Judgment is to be entered for the Defendant

3. I will hear the parties as to costs.