Authorised report: (2020) 15 ACTLR 256

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Roberson v Icon Distribution Investments Limited and Jemena Networks (ACT) Pty Ltd trading as ActewAGL Distribution**
Citation:	**[2020] ACTSC 320**
Hearing Dates:	26 to 29 October 2020
Decision Date:	2 December 2020
Before:	Crowe AJ
Decision:	See [351]
Catchwords:	**CIVIL LAW** – NEGLIGENCE – Personal injury – plaintiff employed by defendant – damages claimed in relation to three separate injuries – plaintiff successful in two claims – assessment of damages **CIVIL LAW** – BREACH OF STATUTORY DUTY – Personal injury to employee – plaintiff claims breach by defendant of *Work Health and Safety Regulation 2011* (ACT) – defendant relies on s 267 of *Work Health and Safety Act 2011* (ACT) to defend claim – held that plaintiff's claim not precluded by s 267 – plaintiff's claim for breach of *Work Health and Safety Regulation 2011* (ACT) ss 34, 35, 36 and 60 successful **DAMAGES** – PERSONAL INJURY – Plaintiff claims loss of superannuation damages at 11.5% of amounts awarded for loss of earning capacity – defendant argues that 11% should be allowed – held appropriate to award damages at 11.5% **DAMAGES** – PERSONAL INJURY – Plaintiff claims interest on past loss of superannuation damages – defendant opposes award – held interest should be awarded
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) ss 42, 43, 44, 45, 102(2) *Legislation Act 2001* (ACT) s 148 *Limitation Act 1985* (ACT) ss 16A, 36 *Occupational Health and Safety Act 1985* (Vic) s 28 *Occupational Health and Safety Act 1989* (ACT) s 223 *Occupational Health and Safety Act 2004* (Vic) s 34 *Scaffolding and Lifts Act 1912* (ACT) *Scaffolding and Lifts Regulation 1950* (ACT) s 73(1)(b) *Superannuation Guarantee (Administration) Act 1992* (Cth) *Work Health and Safety Act 2011* (ACT) s 267 *Work Health and Safety Regulation 2011* (ACT) ss 34, 35, 36, 60 *Work Health and Safety (Hazardous Manual Tasks) Code of Practice 2011* (ACT) *Work Safety Act 2008* (ACT) s 225

Cases Cited:	*Acir v Frosster Pty Ltd* [2009] VSC 454 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 *Czatyrko v Edith Cowan University* [2005] HCA 14; 79 ALJR 839 *D'Arcy v Caltex Australia Petroleum Pty Ltd* [2019] ACTCA 27; 347 FLR 367 *Dykes v Bunnings Group Ltd (No 2)* [2016] ACTSC 226 *Fox v Wood* (1981) 148 CLR 438 *Govic v Boral Australia Gypsum Ltd* [2015] VSCA 130; 47 VR 430 *Heuston v Yore Contractors Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 9 March 1992) *Johnson v Forefront Automotive Industries Pty Ltd* [2013] ACTSC 44 *Macolino v Royal North Shore Hospital* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 22 April 1992) *Mason v Demasi* [2009] NSWCA 227 *Meyer v Cool Chilli Pty Ltd* [2015] ACTSC 336; 302 FLR 407 *Morvatjou v Moradkhani* [2013] NSWCA 157 *Najdovski v Crnojlovic* [2008] NSWCA 175; 72 NSWLR 728 *Stefek v Garnama Pty Ltd* [2014] ACTSC 140 *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182
Texts Cited:	Revised Explanatory Statement, Work Health and Safety Bill 2011 (Cth)
Parties:	Mitchell Roberson (Plaintiff) Icon Distribution Investments Limited and Jemena Networks (ACT) Pty Ltd trading as ActewAGL Distribution (Defendant)
Representation:	**Counsel** R McIlwaine SC with A Muller (Plaintiff) D Shillington (Defendant) **Solicitors** Maliganis Edwards Johnson (Plaintiff) Hall & Wilcox (Defendant)
File Number:	SC 552 of 2019

Crowe AJ:

Introduction

1. These proceedings involve a claim brought by Mitchell Roberson (**the plaintiff**) for damages in relation to three separate injuries said to have been suffered by the plaintiff in the course of his employment as an electrician with Icon Distribution Investments Limited and Jemena Networks (ACT) Pty Ltd trading as ActewAGL (**the defendant**). The injuries claimed by the plaintiff are:

(1) an injury to his lower back and right hip said to have been caused by work the plaintiff undertook in approximately November and December 2013 (**the 2013 Injury**);

(2) an injury to his lower back, said to have been suffered as the result of a frank incident of heavy lifting on 16 December 2017(**the 2017 Injury**); and,

(3) an injury to his left hip claimed to have occurred on 15 October 2018 when the plaintiff was required to adopt an awkward posture on top of a large switchboard to perform his duties (**the 2018 Injury**).

2. The plaintiff alleged negligence and breach of statutory duty by the defendant as his employer in relation to each injury. I will turn to the details of these allegations when I come to deal with the issue of liability.

3. The defendant, by its Defence, has put in issue liability, causation and damage in relation to each of the plaintiff's causes of action. Moreover, the defendant pleaded that the plaintiff's claim in relation to the 2013 Injury was barred by operation of s 16A of the *Limitation Act 1985* (ACT). The defendant also pleaded (in relation to each injury), that if the plaintiff was injured as alleged, that injury was caused, or contributed to, by the plaintiff's own negligence. Ultimately, the defendant only submitted that there was contributory negligence in relation to the 2013 Injury.

4. In response to the limitation defence, the plaintiff filed an Application in Proceeding on 20 October 2020 seeking an order extending the 3 year limitation period to the date on which he issued the Originating Claim which commenced these proceedings, namely 7 November 2019. The Application in Proceeding was returnable on 26 October 2020, which was the day on which the matter was listed for substantive hearing. Mr McIlwaine SC, leading Mr Muller, appeared for the plaintiff on that day. Mr McIlwaine SC sought to have the Application in Proceeding determined on the evidence which was to be called in the substantive hearing. That course was not opposed by Mr Shillington, who appeared as counsel for the defendant.

5. At the commencement of the hearing, Mr McIlwaine SC applied to amend the Statement of Particulars which had been filed on behalf of the plaintiff on 28 May 2020. The proposed amended statement of particulars became Exhibit P1. Most of the contents of the amendments proposed in that document were not opposed by the defendant. However, Mr Shillington did oppose the amendments proposed at paragraphs [10.5] to [10.8] (under the heading "Future Loss of Earning Capacity"). In his original Statement of Particulars, the plaintiff had claimed a total sum of $506,260 for future loss of earning capacity. He sought to amend that to a claim for $1,315,621, based on the assertion that he would suffer a loss of $1,318.39 net of tax per week to age 70.

6. I allowed the amendments other than those proposed in relation to future loss of earning capacity. I decided to reserve dealing with that application until completion of the evidence. Ultimately, the amendment in relation to future loss of earning capacity was not allowed.

The factual evidence

The plaintiff – evidence-in-chief

7. The plaintiff was born in 1988. He was thus 25 years of age at the time of the 2013 Injury, 29 years of age at the time of the 2017 Injury and 30 years of age at the time of the 2018 Injury. He is now 32 years of age. The plaintiff grew up in Australian Capital Territory (**ACT**). He completed Years 11 and 12 at Hawker College in 2004 and 2005. In early 2006, the plaintiff commenced work with a private business as an apprentice electrician. He worked with that business until mid-2006. He then started work with Woolworths stocking a fruit and vegetable department in one of its stores.

8. At the beginning of 2008, the plaintiff sought to return to his training as an electrician, this time with the defendant. He underwent a medical assessment for that purpose on 17 January 2008. He was passed as fit for his intended duties and in the following month he completed an introductory course with the defendant. The plaintiff commenced the course work required for the apprenticeship at the Canberra Institute of Technology (**CIT**) in March 2008. The plaintiff explained that he enjoyed the electrical work. He was fit and "good at physical things". He thought he had a good mind for the work and liked working with his hands. He regarded himself as being good at working out technical and physical issues. The plaintiff said that he also enjoyed working outside.

9. The plaintiff completed his apprenticeship with the defendant in April 2011 at which time he graduated from CIT with a Certificate III in Electrotechnology.

10. The plaintiff said that he had formed a relationship with Tegan Bailie in 2006. He and Tegan had been living together with one or other of their parents prior to early 2010, at which time they moved in together in rented accommodation in Dunlop.

11. At the end of 2010 the plaintiff had started working for the defendant performing installation work in the defendant's Greenfields Section. He remained in the Greenfields Section after he completed his trade qualification in 2011. The plaintiff's duties involved working on electrical infrastructure for new developments in the ACT. The electrical infrastructure was largely underground by that time. The plaintiff worked on fitting off what were referred to as "mini pillars", streetlights and other components of the electrical infrastructure. The "mini pillars" were green boxes to which either three or five residences could be connected. The plaintiff's job was to connect infrastructure cabling to the "mini pillars". This involved the plaintiff working within trenches which had already been dug by excavation contractors.

12. The plaintiff described the need to climb out of trenches around 15 times a day. This required him to put his tools up onto ground level and then to climb out of the trench by putting his leg up. The plaintiff said that in 2010 when he started these duties, he noticed that he would feel "quite sore and stiff" as the day went on. He said that the trenches were around 1.4 m deep, although they did vary in depth.

13. The plaintiff also worked on substations, although this was irregular and did not cause him any difficulties.

14. In relation to streetlights, the plaintiff said that the streetlights had already been erected and his task was to fit small switchboards through an access door which was about 300 to 400 mm above the ground level. He would then connect the switchboard to the wiring already in the light pole. This required him to "crouch down in sort of like

a frog pose" for about 20 minutes. The plaintiff said that this caused him to "cramp up" and "get quite sore in the hips". He also described there being a lot of "leverage" on the low back due to leaning into the light pole.

15. Mr McIlwaine SC asked the plaintiff about using a ladder to get into and out of the trenches. The plaintiff said that it would have been too cumbersome having regard to the tool bag he had to carry. He also thought that it would be difficult to safely place the ladder in the trenches having regard to the uneven surface of the trench floors.

16. The plaintiff said that sometimes steps were cut at one end of long trenches. Mostly he was not able to use steps to get out of the trenches. He saw no reason why more steps could not have been excavated to allow access to and from the trenches.

17. In relation to the streetlight work, in 2011 the plaintiff obtained his own camp stool to sit on while connecting the switchboards. He found that helped.

18. In 2012 the plaintiff and Tegan purchased a four-bedroom residential property in Chisholm in the ACT. They moved into that property.

19. During that year the plaintiff continued working in the defendant's Greenfields Section and performing similar duties to those described above. He said that his relationship with Tegan was "very good" during that year. They planned to have children and indeed Tegan became pregnant and in early 2013 their daughter Olivia was born.

20. In 2013, the plaintiff said that he continued working in the Greenfields Section. He said that he noticed "aggravations" in his right hip and lower back getting in and out of the trenches. He clarified that he was experiencing fatigue, cramping and aching, and that every now and again he would experience a stabbing pain as "he threw a leg over or something like that".

21. During 2012 and 2013, the plaintiff performed the Greenfields work with the assistance of Chris Burridge. From time to time he also worked with Amy Cuthbertson or Clinton Reilly. His supervisor during this time was Paul Rankin.

22. The plaintiff said that in the last few months before Christmas 2013, he started to get more constant pain in his right hip and lower back when climbing out of trenches. In particular, he described a stabbing pain in his right hip. The plaintiff said that due to his ongoing pain, Tegan had to take over some of the domestic tasks which he had previously done. He estimated this at around 10 hours per week of additional work for Tegan.

23. On 15 December 2013, with the help of Paul Rankin, the plaintiff completed what was referred to as a "Guardian" report. This was effectively an injury notification report.

24. The plaintiff continued working up to the Christmas break and returned to work performing his normal duties on 8 January 2014. He was then contacted by a person who he described as the defendant's "wellness advisor". This was said to be either Angela Seavers or Jessica Piechowski. The defendant's wellness advisor arranged for the plaintiff to see Dr P Warfe at Aspen Health in Deakin on 16 January 2014. Dr Warfe suggested that the plaintiff have an X-ray taken of his right hip and that the plaintiff undergo a course of physiotherapy. Dr Warfe also referred the plaintiff to Dr A Burns, an orthopaedic surgeon.

25. The plaintiff said that while he continued to work, the pain in his right hip and lower back was getting worse. At some time in early 2014, the plaintiff was certified for

restricted duties, although he was not able to recall the precise restrictions that were put in place at that time. He made a workers compensation claim in relation to the injury on 23 January 2014.

26. On 31 January 2014, the plaintiff had an MR Arthrogram of his right hip and on 5 March 2014 he underwent CT scanning of the right hip. On 20 March 2014, the plaintiff consulted Dr Burns who recommended surgery on the right hip. The following month the plaintiff attended Dr I Kelman, an orthopaedic surgeon, for assessment on behalf of Allianz Insurance which was the defendant's workers compensation insurer.

27. In July 2014, the plaintiff was promoted to the position of "Site Lead" in the Greenfields Section. He explained that he had been acting in that role previously as his predecessor had moved on. The duties of the position included supervising the trades assistant, making risk assessments and documenting the progress of work. His physical duties did not change, in particular he was still required to get in and out of trenches.

28. The plaintiff said that he was not aware of any risk assessment having been carried out in relation to the difficulty in getting in and out of the trenches, nor in relation to accessing the streetlight pole doors.

29. On 21 July 2014, Dr Burns performed surgery on the plaintiff's right hip. The plaintiff was discharged from hospital the following day, although he was required to use crutches to mobilise over the next 6 weeks. He was off work for 3 months after the operation.

30. In relation to the domestic work, the plaintiff said that Tegan had continued doing approximately 10 hours additional domestic work per week due to his incapacity. That arrangement continued at that level for around 6 months after the operation.

31. The plaintiff had physiotherapy and other rehabilitation treatment and in October 2014 he returned to work, although on restricted duties. He was not to work in the trenches and he had limits placed on the weights he was able to lift or move. Another electrician, Scott Farthing, was provided to assist the plaintiff on site. Eventually on 2 February 2015 the plaintiff returned to full duties.

32. From the plaintiff's perspective, the surgery was reasonably successful. He found that it helped to reduce his pain levels although he still had some aching and muscle tightness. He also had some "niggling aches" in the lower back area. Nevertheless, the plaintiff was able to continue with his full duties in the Greenfields Section until October 2017 when he transferred to the Substation Section at the defendant's Greenway depot. In the meantime, he and Tegan's second daughter, Sienna, was born in August 2015.

33. The plaintiff described the work in the Substation Section as involving the fabrication and installation of what he referred to as "chamber substations". Chamber substations are large metal substations which are placed in larger commercial buildings. His duties in the Substation Section included maintenance work on high voltage switching stations and the like. The fabrication work required the plaintiff to perform welding work, some of it at a low level which meant that he had to crouch down. He found that this caused him a problem with his right hip.

34. On 16 December 2017, the plaintiff was engaged in removing and replacing a switchboard at Canberra Airport. At one point this task required a switchboard to be

lifted from the room where it was located for the purposes of removal. The plaintiff and three other men did this by manually lifting and moving the item. The plaintiff identified the orange switchboards shown in photographs at pages 70 and 71 of Exhibit P6 as being very similar to the one which had to be removed. He said that the switchboard weighed about 400 kg. He also said that as in the photographs, the switchboard in question rested across a checker plate which covered over a cable trench.

35. The plaintiff was taken to page 69 of Exhibit P6. He confirmed that he had drawn the diagram at that page. It gave the dimensions of the switchboard as 2.12 m in length, 1.58 m in height and 1 m in width. The plaintiff's lifting position was shown to be at one end of the switchboard with his feet spread 600 mm apart to straddle the cable trench. One other man was shown lifting to the left and slightly forward of the plaintiff with the other two men each lifting the corners at the opposite end of the switchboard from that being grasped by the plaintiff.

36. According to the plaintiff it was not possible to push the switchboard out of position because of the cable trench underneath it. Also, the men required to remove the switchboard were not provided with mechanical or lifting equipment to remove it from the position it occupied over the trench.

37. The plaintiff described suffering "a very sharp pain" in his lower back as he lifted the switchboard in the position depicted on page 69 of Exhibit P6.

38. In response to a question from his counsel, the plaintiff said that he did not know why the team he was working with was not provided with equipment to lift the switchboard. He said that a mobile engine crane could possibly have been used to move the switchboard.

39. The plaintiff said that the back pain was eight or nine out of 10. The plaintiff said that the injury occurred sometime in the mid-morning and that he avoided doing any strenuous work for the rest of the day. In particular, he avoided lifting. It was the last day before the Christmas break. After work that day, the plaintiff went home and laid on the couch. He went to bed early that night.

40. The plaintiff was off work until 8 January 2018. He spent most of the holidays on a recliner couch or in bed. He was very stiff and not able to do much. The plaintiff described the pain during that period as "still around the eight or nine, very painful". Not only was Tegan doing most of the family's domestic tasks during this period, but she was also helping the plaintiff with his shoes and socks at that time. He estimated that Tegan was again spending around 10 hours per week doing the things that he would otherwise have been doing.

41. The plaintiff said that he did put in a "Guardian" form and that it was suggested that he obtain some physiotherapy treatment at Elite Rehab & Sports Physiotherapy (**Elite**) in Deakin, which he did. On his return to work he was working on "SCADA cabinets". He described these as being refrigerator size cabinets which contained the control telemetry for the electrical network. He was required to stand to fit the wiring into these cabinets. He continued to suffer lower back pain and also nerve pain going down his left leg. He also had some pain still in his right hip. The plaintiff said that he was told by someone at Elite that the pain was related to a facet joint and that it should get better.

42. In September 2018, the plaintiff saw a Dr Praet at the request of Allianz Insurance. Dr Praet referred the plaintiff to a podiatrist, Mr Balthazar with the intent that the plaintiff would obtain some orthotic inserts to correct a leg-length discrepancy.

43. On 15 October 2018, the plaintiff was working at the Australian National University (**ANU**) to fit out a new chamber substation. This type of substation was identified by reference to the photograph at page 74 of Exhibit P6. The plaintiff said that the ANU switchboard was of a similar weight (if not heavier) to the Canberra Airport switchboard. The team of workers at the ANU again had to manually lift the switchboard into position. The switchboard sat adjacent to the cable trench, rather than across it (as was the case at Canberra Airport). This was demonstrated by reference to the plan at page 76 of Exhibit P6.

44. Once the switchboard was in position, the plaintiff's task was to fit copper busbars to the inside of the switchboard. The plaintiff would climb to the top of the switchboard and then using a kneeling board he would straddle the top of the switchboard, lean down and bolt the busbars into place. He described his posture as crouching down and kneeling straight over. While he was doing that, the plaintiff said that he experienced significant stabbing pain in his left hip and in the lower back. The plaintiff described the pain as a nine or 10 out of 10. He stopped work immediately. He was unable get comfortable.

45. The plaintiff said that he thought the work could have been done from a scissor lift. That would have avoided the need to adopt the posture in which he was injured. He had not been offered the use of a scissor lift.

46. Later that day, the plaintiff attended the Isabella Plains Medical Centre and obtained a referral to Dr Burns. It seems likely that he also received a referral for an X-ray of the left hip. This was carried out on 18 October 2018. The plaintiff saw Dr Burns on 8 November 2018. He underwent MRI scanning of his lower back on that same day at the request of Dr Burns, who also provided a medical certificate putting the plaintiff off work until 15 November 2018.

47. The plaintiff returned to Dr Burns on 22 November 2018 and was referred to Dr N Tsai, an orthopaedic surgeon, for management of his lower back condition. The plaintiff consulted Dr Tsai that same day. Dr Tsai certified the plaintiff as fit for light duties only for the next 6 weeks.

48. On 23 November 2018, the plaintiff had a CT guided cortisone injection into the L5/S1 disc area at I-MED Radiology in Woden.

49. Subsequently, on 29 November 2018, the plaintiff attended a General Practitioner (**GP**), Dr D Shanmugam at the Erindale Medical Centre. Dr Shanmugam has become the plaintiff's treating GP since that time. He has seen the plaintiff regularly since November 2018, usually in company with Ms Natalie Ettinger (an occupational therapist appointed by Allianz Insurance). The plaintiff has not returned to physical electrical work since November 2018.

50. The plaintiff has discussed the possibility of spinal fusion surgery with Dr Tsai. The plaintiff said that he is reluctant to go down the surgical path at this stage because of his age. Dr Tsai informed the plaintiff that if the lower back (presumably from L4 to S1) is fused, the healthy discs above those levels would deteriorate faster than would

otherwise be the case. The plaintiff's attitude is that he will not undertake a spinal fusion "until I absolutely need it."

51. In relation to the left hip, the plaintiff had cortisone injections into the joint on 10 December 2018 and again on 5 February 2019. He returned to work on restricted duties 3 hours per day, 3 days per week on 11 February 2019. This was administrative work which the plaintiff saw as being of little utility.

52. The plaintiff recounted that he had been feeling "pretty useless" after his left hip injury, and that his relationship with Tegan has suffered as a result. This led to constant arguments and the breakdown of their physical relationship. He also feels the loss of his trade keenly.

53. On 27 February 2019, the plaintiff attended Dr Burns again. On this occasion Dr Burns recommended surgical treatment for the left hip. Initially Allianz Insurance declined to cover the cost of the planned left hip operation. As a result of that decision, the plaintiff sought legal advice from his current solicitors. The plaintiff saw Mr J Little for the initial consultation on 1 April 2019. As a result of the advice given by Mr Little, the plaintiff became aware, for the first time, that he could bring an action for damages in relation to the three injuries which are the subject of these proceedings.

54. By this time, the plaintiff was working 4 hours per day, 3 days per week.

55. On 24 June 2019, the plaintiff underwent the operation recommended by Dr Burns on his left hip. He paid the cost of approximately $6,000 himself. Since then, Allianz Insurance reconsidered its position and ultimately decided to reimburse the plaintiff.

56. After the hip operation, the plaintiff was again off work for 3 months. He returned to light duties 4 hours per day, 3 days per week on 25 September 2019. His hours increased to 5 hours per day from 27 November 2019.

57. On 6 November 2019, the plaintiff consulted Dr Tsai in relation to his back condition. Dr Tsai prepared a document setting out various recommendations arising from the plaintiff's back condition. Dr Tsai's recommendations included that the plaintiff was not to lift 10 kg from ground to head height, that he not lift 10 kg while twisting at the waist, and that he be restricted from climbing in and out of trenches and crawling into confined spaces. Dr Tsai also suggested that the plaintiff should not exert a pushing force of 50 kg and that he should avoid driving on uneven terrain.

58. The plaintiff said that with these restrictions he was unable to return to his previous duties as an electrician, or indeed to do any manual work.

59. The plaintiff confirmed that he had attended a number of experts for the purposes of this case. In particular, the plaintiff confirmed the accuracy of the symptoms he described to Dr L Le Leu, occupational physician, and Mr T Sutton, psychologist.

60. On 13 May 2020, the plaintiff's hours were increased to 6 hours per day, 3 days per week. However, this led to an increase in symptoms which particularly interfered with the plaintiff's sleep, with the consequence that his hours were again reduced to 5 hours per day, 3 days per week. The plaintiff has continued to work those hours, although he continues to have constant pain in his lower back. The plaintiff said that as the day goes on, the pain seems to spread throughout his back even up towards his shoulders. At the beginning of the shift at work the pain is four or five out of 10, but by the end it will increase to six or seven out of 10.

61. The plaintiff said that his hips ache and that he will get a sharp pain every now and then, particularly if he sits too long in a chair. The plaintiff said that he has a sitting tolerance of an hour or so.

62. Dr Shanmugam referred the plaintiff to a Mr B English, pain psychologist. The plaintiff attended him for the first time the week before the hearing commenced. The plaintiff said that he found the session with Mr English to be helpful, having regard to his current mental state.

63. Tegan has continued to perform the additional 10 hours or so a week in domestic chores up to the present time.

64. The plaintiff has continued to see Dr Shanmugam every 4 to 6 weeks. The plaintiff takes Panadol, Nurofen and Mobic as required, and occasionally Valium to help with sleep and Panadeine Forte when his pain is bad. He is not having ongoing physiotherapy, although the last course he had did provide some assistance.

65. Overall, the plaintiff said that he was unsure and anxious about his future.

The plaintiff – cross-examination

66. Mr Shillington commenced the cross-examination by exploring with the plaintiff the work which he was currently doing (which involved producing training manuals for electricians). The plaintiff agreed that he was not having difficulties in performing those duties. Although his current duties involve computer work, the plaintiff did not agree that he had good computer skills.

67. The plaintiff expressed hope to be able to utilise his electrician skills in some form (perhaps in a supervisory or training role) in the future. He agreed that he was keen to work.

68. In relation to the domestic tasks at home, the plaintiff agreed that he was able to drive to pick up the children from school, and that he did that. The plaintiff agreed that he was able to look after the children and provide them with meals and snacks. The plaintiff said that he had difficulties with loading and unpacking the dishwasher.

69. Mr Shillington asked the plaintiff about the work in the Greenfields Section which the plaintiff had performed in the years leading up to the 2013 Injury. The plaintiff agreed that he had worked in many different locations, although he would spend many months on each separate development project. The projects varied in size and there were differing developers and contractors. Some of the civil works contractors would prepare the sites differently from others. The plaintiff agreed that his job at the time entailed physical work and a lot of walking on uneven surfaces wearing heavy boots. The plaintiff had an ActewAGL van which he could sometimes take onto the work sites, although there were other occasions where this was not possible.

70. The plaintiff did not play any sport during that time, however he did engage in some motor bike riding. At the time of the hearing he owned five motorcycles. The plaintiff said that he thought he owned two or three motorcycles in 2011.

71. In response to questions about manual handling training, the plaintiff recalled some general safety training, although he could not recall any such training being part of his induction.

72. Mr Shillington suggested that the depths of trenches in the Greenfields Section could vary depending on the civil contractor on a particular site. The plaintiff agreed with this, however he did not agree with the suggestion that they could be as shallow as 80 cm. The plaintiff also agreed that whether or not steps were cut into the trenches depended on the contractor, and the specific trench in question.

73. The plaintiff agreed that he would have worked at several different Greenfields sites during each year and that he would be guessing to identify those now. However, the plaintiff said that he had a diary which might contain that information.

74. In relation to the steps cut in trenches, the plaintiff confirmed that where they were present, the steps were only at one end of a trench. The plaintiff said that he thought that the most he would have to walk would be a few hundred metres when he was working in a trench to access the steps. However, on occasions he would be working quite close to steps. The plaintiff said that after he became the Site Lead he did complain a couple of times to the civil contractors about the absence of steps, although that did not seem to make any difference.

75. The plaintiff was questioned at some length as to whether he could have carried and used a ladder to get in and out of trenches. He saw some difficulty with that course having regard to the tools which he carried from pillar to pillar.

76. The plaintiff confirmed that he completed a job risk assessment form each day after he became the Site Lead. The plaintiff said that he could not remember complaining about trenches in these assessment forms, although he believed he had raised an issue about underground pits. The plaintiff could also not recall which sites he worked on during the latter half of 2013, although he said that they were in the Gungahlin area. Nor could he remember who the civil contractors were working on those sites.

77. Mr Shillington put to the plaintiff that he could have slid into trenches rather than jumping into them. The plaintiff said that the impact on landing was much the same.

78. The plaintiff was taken to a medical questionnaire which he completed in March 2013 for his employment. That document commenced at page 172 of Exhibit P5. In response to the question “Do you have any other health problems or symptoms that you think are work-related?”, the plaintiff had answered “Yes”. In the space provided for more details the plaintiff had written “Sore back (lower) – not all the time – re-occurring.” In response to a question as to why he had not mentioned his right hip in the questionnaire, the plaintiff said that he did not know that the pain was related to his right hip until he saw Dr Burns and Dr Warfe.

79. In relation to the worsening of symptoms in late 2013, the plaintiff agreed that this occurred as a gradual process. Mr Shillington put to the plaintiff that the worsening symptoms were not associated with any particular activity at work. The plaintiff demurred. The plaintiff said that the worsening symptoms were associated with getting in and out of trenches and working on the streetlights. The plaintiff was then shown a copy of the workers compensation claim form which he confirmed he had completed. It was dated 23 January 2014 (see pages 1 to 2, Exhibit D1). Mr Shillington drew the plaintiff’s attention to the section under the heading “Injury Details” where the plaintiff had written “Gradually worsening injury caused by continuous work on uneven ground and awkward positions.” Mr Shillington pointed out to the plaintiff that he had not referred to getting into and out of trenches in the form. The plaintiff responded as follows:

> Well, the way I explained I get in and out of (sic) is an awkward position, so that's what I meant by awkward position. Same with wiring the streetlights, the crouching.

The plaintiff confirmed that walking on soft ground caused symptoms.

80. The plaintiff specifically identified an injury to his right hip in the workers compensation claim form. Mr Shillington referred to the plaintiff's earlier evidence as to uncertainty as to the source of his lower back pain and questioned how it was that the plaintiff knew that his hip was the problem by the time of the workers compensation claim form. The plaintiff said that he had noticed that when he moved his leg, he suffered pain in the right hip. That caused him to identify the hip as the source of the pain.

81. Mr Shillington then asked the plaintiff about the history which he had provided to Dr J Bodel. Dr Bodel is an orthopaedic surgeon who assessed the plaintiff on 12 February 2020 at the request of the plaintiff's solicitors. Dr Bodel's report commences at page 31 of Exhibit P6. Dr Bodel recorded the circumstances of the 2013 Injury as follows:

> [The plaintiff] first suffered an injury at work on 9 December 2013. He developed back pain and right hip and buttock pain while fitting "multiple street lights and pillars" at a location in Canberra. He indicates that to do this work he had to squat down for fairly lengthy periods of time to access a "junction box" which is at the bottom of the erected street light. The electrical cable comes in from underground and he has to then make the connection to the street light which is erected in its completed form. The only thing that needs to be done is to make the connection to the electrical circuit.
>
> He developed pain throughout that day as he had quite a large number to do.

82. In response to a question as to why he had not mentioned difficulties in climbing in and out of trenches, the plaintiff said that he could not recall whether he had told Dr Bodel about the trenches. He agreed with Mr Shillington that he was doing his best to tell the doctor how the injury occurred.

83. The plaintiff was then questioned about the history which he had given to Dr I Kelman. The plaintiff saw Dr Kelman for Allianz Insurance on 16 April 2014 (the report commences at page 23 of Exhibit D1). Indeed, it seems that Dr Kelman was the first specialist doctor the plaintiff attended for the purposes of the assessment of his claim. The plaintiff agreed with the proposition put by Mr Shillington that his memory of the relevant events was better in 2014 than it was in the present time. Mr Shillington then put to the plaintiff the history of injury as provided to Dr Kelman:

> [The plaintiff] stated that he began to have discomfort in his right hip region and lower back towards the end of 2013. His pain was worse with driving and he considers that it may be the seat of his vehicle.

The plaintiff responded "Yes, I remember when I was getting that pain that aggravated it so that would have been something I mentioned to Dr Kelman."

84. The following exchange then occurred:

> MR SHILLINGTON: But I suggest to you that you are having problems with the seat in your vehicle and that was what you thought might have been causing your right hip pain. Do you agree with that?
>
> PLAINTIFF No, not causing just aggravating?
>
> MR SHILLINGTON: All right. Well **you then go on to say** that pain was aggravated by activities of crouching, bending and climbing in and out of trenches?
>
> PLAINTIFF: Yes

MR SHILLINGTON: Right, so I suggest to you that you told Dr Kelman that your injury or your problem was caused by driving but it was aggravated by those other activities. Do you agree with that?

PLAINTIFF: No.

(Emphasis added.)

85. The reference to "you then go on to say (etc)" (emphasised above) was to the history recorded by Dr Kelman immediately following the words "seat of his vehicle." It was in these terms:

> However the pain was aggravated by activities of crouching, bending, climbing in and out of trenches.

86. Mr Shillington then asked the plaintiff about the history given to Dr Kelman of the plaintiff having reported his injury to his employer on 5 December 2013 after he had put his leg in a flexed and twisted position and suffered severe shooting pain into the anterior thigh. When asked about the event described by Dr Kelman, the plaintiff said:

> I remember being in pain and I manipulated my leg because I was thinking where is this coming from and I got a sharp shooting pain in my right leg, down my leg, in my hip.

87. The plaintiff agreed with Mr Shillington that prior to 5 December 2013 he had not complained to the defendant that he had problems with his hip or with climbing in and out of trenches, nor had he complained about working low down on the streetlights.

88. The plaintiff also agreed that from about 2011, when he obtained his own camp stool, he did not have to squat down to do the streetlight work.

89. Mr Shillington referred the plaintiff to a consultation with Dr P Warfe on 16 January 2014 in which the plaintiff was recorded as wondering if his hips were misaligned, or whether his pants were too tight. The plaintiff could not recall the consultation, although he accepted that what was recorded by the doctor must have been part of the conversation at that time. Mr Shillingtom then referred to the note made by Dr Warfe that the plaintiff was an electrician who was "driving +++". The plaintiff agreed that he was doing a lot of driving at that time. The following exchange then occurred:

MR SHILLINGTON: The reason you told Dr Warfe that was because you thought your right hip…problem might have been to do with doing a lot of driving, is that right?

PLAINTIFF: No, it would have been as an aggravation that's what I would have suggested.

90. The plaintiff said that he did tell Dr Warfe about his problems in climbing in and out of trenches.

91. The plaintiff was also referred to the record of a consultation at the same practice (Aspen Medical) on 8 January 2014 with Dr Horsley. The plaintiff agreed that he had told Dr Horsley of a 4 week history of pain originating in the hip and radiating down the front of his leg to his knee. The plaintiff agreed that he must have said that the pain was sharp and stabbing, and that it was variable. He did not agree with the record that he had some pain-free days. He agreed that he had told the doctor that particular positions made the pain worse and that there was no history of trauma. Mr Shillington referred to the note by Dr Horsley that the plan was for the plaintiff not to work in trenches. The plaintiff was unable to recall seeing Dr Horsley.

92. Nor was the plaintiff able to recall seeking Dr Suthayakhom at the same practice on 23 January 2014. The plaintiff did however agree that he must have told Dr Suthayakhom that driving was the activity which most aggravated his condition if symptoms were present.

93. Mr Shillington directly challenged the plaintiff's evidence as to the apparent cause of his symptoms. This occurred in the following exchange:

> MR SHILLINGTON: Seven years ago in the several months leading up to December 2013, you were doing lots of physical tasks at work, weren't you?
>
> PLAINTIFF: Yes.
>
> MR SHILLINGTON: And they included walking on uneven ground, carrying tools, for example. You were driving with a van which you had a problem with the seat. Is that right?
>
> PLAINTIFF: Well, it made my hip have more pain.
>
> MR SHILLINGTON: Right and you were doing lots of activities involving bending, squatting and sitting. Isn't that right?
>
> PLAINTIFF: Yes.
>
> MR SHILLINGTON: And pulling cables?
>
> PLAINTIFF: Yes.
>
> MR SHILLINGTON: You agree with that and carrying tools?
>
> PLAINTIFF: Yes.
>
> MR SHILLINGTON: And you say that the pain symptoms came on gradually?
>
> PLAINTIFF: M'mm.
>
> MR SHILLINGTON: And I suggest to you that you are unable to identify any particular activity that caused the problems with your right hip in the several months leading up to December 2013. Do you agree with that?
>
> PLAINTIFF: No, because I had identified that the pillars, the trenches and the streetlights was the majority of my work and gave me the biggest pain increases.

94. Mr Shillington confirmed with the plaintiff that he returned to full, unrestricted duties in February 2015 and that he did not require assistance from Tegan with the family domestic duties from that time. The plaintiff was challenged about his estimate of 10 hours per week for Tegan's assistance, particularly prior to the surgery on 21 July 2014. However, he did not resile from that estimate.

95. The plaintiff was then questioned about the 2017 Injury. Mr Shillington suggested that one reason why a lifting mechanism could not be used to remove the switchboard was that the site was electrically live. The plaintiff disagreed, he said that he and his fellow workers were using equipment in that area while it was live. The plaintiff did agree that the roof was low and that it would not have been possible to use a crane. The plaintiff maintained that a device such as an engine crane (an example of which is at Exhibit P7) could have been used. However, there was no such machine available at the Canberra Airport site. Indeed, the defendant did not possess such a machine at that time.

96. Mr Shillington asked the plaintiff why he and the team at the Canberra Airport did not cease work until they worked out a safe way of moving the switchboards. The plaintiff

said that it did not occur to them that the system of work which they were using was unsafe because that was the way they always did that task.

97. The plaintiff said that he suffered the excruciating lower back pain halfway through the lift. He said to his co-workers (whom he named) “Oh, that hurt my back”. Mr Shillington asked the plaintiff whether he filled out a workers compensation claim form at that time. The plaintiff said that he had not done so because he thought that he had just strained his back.

98. Mr Shillington put to the plaintiff that he had told Dr Tsai that he had hurt his back lifting a heavy cable. The plaintiff denied that. He said that lifting cables was part of the work that day. The injury had occurred mid-morning. Thereafter, the plaintiff said, he did not continue with his full normal duties, although he remained working until the required finishing time. He did not seek medical treatment after work.

99. Mr Shillington asked the plaintiff whether he had injured his back the next day when he lifted up his daughter. The plaintiff said that he felt the same sort of pain and in the same area when he lifted his daughter. He agreed that the pain was excruciating and that he had to sit down for a couple of hours after that episode. Mr Shillington asked the plaintiff if he had felt a “pop” in his back when he was lifting his daughter. The plaintiff responded “No, it’s just the same pain as the day before.” He denied the proposition that he did not complete a workers compensation claim at that stage because he thought that the injury was suffered while lifting his daughter. The plaintiff explained that he did not put in such a claim until 16 January 2018 because he was on leave and he thought his symptoms would “gradually get better”.

100. The plaintiff was then cross-examined on medical records relating to the back injury. The first was a history recorded by Dr Shanmugam. The history recorded by Dr Shanmugam on 30 November 2018 included the following:

> [The plaintiff] reports sustaining back injury whilst lifting heavy items on 16/12/2017 mainly transformers. Was lifting daughter the next day 17/12/2017 - felt a pop to lower back spine with excruciating pain to low back region. Has had pain for a full month. [History of] previous back pain issues before hurting back on 16/12/2017.

When that was put to him, the plaintiff took issue with the use of the word “transformers”. He thought that the doctor had misunderstood his explanation. The plaintiff confirmed that he was lifting a switchboard when he suffered the injury. He also denied that the “excruciating pain” had first come on when he was lifting his daughter. He said that he felt “another excruciating pain” on 17 December 2017.

101. Mr Shillington also took the plaintiff to notes made by Ms M Dennis, exercise physiologist. The plaintiff agreed that at the first consultation on 18 January 2018 he had told Ms Dennis that he was attending her because he had suffered acute back pain against a background of chronic pain. Mr Shillington put to the plaintiff the following note made by Ms Dennis:

> Soreness end of last year one week.
>
> Slowly accumulated.
>
> Always gets a sore back.

The plaintiff did not understand what Ms Dennis intended to convey by the first entry. The plaintiff denied that he told Ms Dennis that the pain in his back had come on over

1 week. He said that the reference to always getting a sore back was to the situation since the back injury on 16 December 2017.

102. The plaintiff was also asked about a further note in the 18 January 2018 entry. That note read:

> Woke up one day + was sore.
>
> At work lifting lots of things at work.
>
> Following day lifted daughter up and felt back grab/pop and dropped him. Immediate pain. About 17/12/17

Mr Shillington suggested to the plaintiff that he had told Ms Dennis that while he may have had some previous back pain at work lifting lots of things the immediate, excruciating pain only came on when he was lifting his daughter on 17 December 2017. The plaintiff denied that proposition.

103. Towards the end of the entry the following appeared:

> Duties: lifting cables, installing mini pillars, trenches, ladders. + 15kg.
>
> Back hasn't stopped doing work just hurts.
>
> Usually brought on by bending + digging

The plaintiff was again unable to shed light on the reference to the duties he previously performed. He did not agree with the suggestion that his back pain did not stop him from doing his work.

104. On 22 February 2019, the plaintiff attended Dr Sabetghadam, occupational physician, at the request of Allianz Insurance. Mr Shillington put the first paragraph of the history recorded by Dr Sabetghadam to the plaintiff. That paragraph was in the following terms:

> [The plaintiff] reported that he felt lower back pain on 16.12.2017 while he was installing large transformers at the workplace. He remembered that that was the last day of work before the Christmas holidays. He stated that the pain gradually deteriorated over the day. He believed lifting heavy objects at the workplace caused his lower back pain. However, he could not pinpoint any specific incident.

105. The plaintiff corrected the reference to transformers (they were switchboards) and denied that he had had not pinpointed any specific incident. He repeated that he had felt a sharp pain when lifting a switchboard. He agreed that he had previously lifted heavy cables on that day. He was unable to say whether lifting the heavy cables might have contributed to the injury he suffered when he lifted the switchboard.

106. Mr Shillington then referred the plaintiff to the injury report the plaintiff had completed on 16 January 2018 for his employer. That report contained the following under the heading "Summary": "Strained back while lifting cables/installing switchboard." The plaintiff said that those words provided the description of the job that he and the others were doing at the Canberra Airport on 16 December 2017. Mr Shillington then suggested to the plaintiff that the reason he wrote that entry was that he had strained his back over a gradual process during the day while lifting cables and installing the switchboard. The plaintiff disagreed with that proposition, however he did agree that the work he did prior to the switchboard incident would have led to muscular strain.

107. The plaintiff was then taken to the entry under the heading "Detailed Description". That stated:

> Working Saturday, before i went on leave. Strained back as mentioned, gradually got worse over the break through normal everyday activities.
>
> I did not enter a Guardian report straight away, as I was on leave the next day and thought it was just a slight strain that would promptly recover.

The plaintiff explained that he was not able to undertake normal everyday activities over the Christmas break. He was very restricted. When he did attempt to undertake such activities, the plaintiff said that it made his pain worse. He said that he had used the words "slight strain" because he did not know what was happening with his back and he hoped that it was indeed a slight strain.

108. On 15 February 2018, the plaintiff completed a workers compensation form in relation to his back injury. In response to the question "How did the injury occur?" The plaintiff answered, "Lifting switchboards & cables @ work". The plaintiff said that that was the work that he was doing on the day of his injury. He provided a similar response in relation to the question on the form "What were you doing when the injury happened?". The answer which he provided on the form was "Lifting & moving heavy items, sometimes in awkward positions". The plaintiff agreed that lifting cables that day injured or aggravated his back. He also agreed that he returned to normal duties in the January of 2018.

109. The attendance on Ms Dennis on 18 January 2018 referred to at paragraph [101] above was the commencement of a course of rehabilitation with Elite. The plaintiff continued that course of rehabilitation during 2018. As well as Ms Dennis, the plaintiff saw exercise physiologist Mr L Slater from time to time. The plaintiff attended Mr Slater on 20 March 2018. Mr Slaters' record of that attendance included the comment "back pain fine– nerve pain worse". The plaintiff accepted the reference to nerve pain, but did not accept that the description of the state of his back at that time was accurate.

110. The plaintiff saw Mr Slater again on 26 March 2018. He again disagreed with the accuracy of the note suggesting that his back pain had "almost all gone". Mr Shillington then referred the plaintiff to the note made by Mr Slater on 18 May 2018 that the plaintiff's "back pain is back". The plaintiff said that the back pain was always there. The plaintiff said that if he had nerve pain, it meant that he also had back pain. He also said that the nerve pain was a stabbing pain which went through his left hip down the buttocks through the thigh to the back of the knee, then behind the shin to the ankle.

111. Part of the program devised by Mr Slater included working with weights at a gym. The plaintiff said that he only lifted the weights recommended by Mr Slater. Mr Shillington asked the plaintiff if he was performing activities that required him to squat 80 kg. The plaintiff did not agree that he was lifting as much as that, although he was unable to remember the weights which he was lifting at that time. Mr Shillington put to the plaintiff that he suffered a flareup in his back pain while squatting 80 kg in about September 2018. The plaintiff reiterated that he was just performing the program given to him by Mr Slater.

112. On 21 September 2018, the plaintiff attended a podiatrist who diagnosed a leg length discrepancy. He provided inserts for the plaintiff's shoes with an 8 mm difference in an attempt to moderate the effects of the discrepancy.

113. Mr Shillington asked the plaintiff whether he had had a problem with his left hip before 15 October 2018. The plaintiff said that he was unsure because he had the lower back pain going down the left side. Mr Shillington then took the plaintiff to Mr Slater's note dated 11 October 2018. That note reads:

> phone call: Nici Travers
>
> Dr believes pain is coming from hip? previous injury
>
> referred to podiatrist- footcare
>
> had glucose injections-Dr Praet,
>
> will try with Megan [Ms Dennis] next week- Nici would like assessment on hip to see if this is the cause
>
> Nici is unsure of what is currently going on- no emails or reports from GP or podiatrist sent to elite

114. Mr Shillington asked the plaintiff if he had attended on Mr Slater on 11 October 2018. The plaintiff agreed that he had, although he had no recollection of any phone call to Ms Travers (Ms Travers was the officer from Allianz Insurance who was dealing with the plaintiff's workers compensation claim in relation to the 2017 Injury). In response to the suggestion that the entry indicated that the plaintiff had left hip symptoms on 11 October 2018, the plaintiff said that he was questioning it because of the lower back pain. In response to the question as to whether the plaintiff was having any difficulties before the incident on the switchboard at the ANU on 15 October 2018, the plaintiff said that he was unsure, but that in that incident he had felt a sharp pain. He was also unsure as to whether he had been suffering left hip pain for a few weeks before 15 October 2018.

115. The plaintiff attended on Ms Dennis on 17 October 2018. He was asked a series of questions in relation to Ms Dennis' note of that attendance. The note relevantly reads:

> **Reason for Contact:** Left pelvic dysfunction
>
> Left side acute on chronic LBP ?L5/S1 facet + L5 nerve related
>
> **Subjective:**
>
> Left-sided hip pain for the last few weeks. Acue (sic) pain on Sunday
>
> Put lift in shoes from podiatrist on right foot and now left hip is more sore.
>
> Feels the same as right hip was (labral repair in 2014)
>
> Nerve pain kept going on - 6-8 weeks to settle low back pain.
>
> Dr Burns said left hip may go in the future.
>
> Going to book in with Al Burns on 8/11/18 - getting an xray prior to that.
>
> Now gets lateral hip pain.
>
> Deep hip pain.
>
> Pain not referring down into the knee.
>
> Doesn't feel as "nervy"
>
> Feels more like a deep sharp stabbing pain.

116. The plaintiff was unable to remember any incident on the Sunday, 14 October 2018. He believed that he had told Ms Dennis about the incident at the ANU on the Monday. The plaintiff said that he did not recall Dr Burns warning him about his left hip. In relation to having left hip pain for weeks before 15 October 2018, the plaintiff was unsure because he was suffering lower back pain in the same area.

117. Mr Shillington also took the plaintiff to a handwritten form completed on 15 August 2019 by Dr Shanmugam for the purposes of a disability insurance policy. In that form, the doctor recorded the history in relation to the plaintiff's left hip. The doctor recorded that the plaintiff had experienced left hip pain since early October 2018 due to heavy lifting at work. The plaintiff again confirmed that he was unsure of the source of the left hip pain. He thought that it was related to his lower back condition. Dr Shanmugam had commented "[The plaintiff] is unable to provide any details of specific injury as a contributing factor to the left hip pain." The plaintiff did not agree with that comment.

118. On 19 December 2018, the plaintiff completed a workers compensation claim form in relation to the left hip injury. In response to the question as to how the injury occurred, the plaintiff answered, "While working in trenches & on ladders, pulling & terminating heavy cables onto switchboards." The plaintiff explained that he was describing the work which he was doing on the day he suffered the injury.

119. The next question on the form was: "What were you doing when the injury happened? (e.g. slipped when climbing a ladder)." The plaintiff's answer on the form was "Climbing, squatting, pulling, pushing, holding. Awkward positions." Mr Shillington put each of those activities to the plaintiff who said that the injury had not occurred while he was climbing or pushing or pulling, although they were all activities which he was doing that day. He was squatting, holding something and in an awkward position when the injury occurred. The plaintiff denied that his answer on the form suggested that he suffered a gradual injury while performing those activities during the course of the day.

120. The plaintiff was then taken to a letter dated 30 January 2020 sent to Mr M Lawrance, ergonomist, by the plaintiff's solicitor. The events leading to the 2018 Injury were summarised in the letter as follows:

> [The plaintiff] was working on the site at the Australian National University installing a new switchboard alongside with a colleague. The switchboard measured approximately 2.5m tall, 0.7m wide and 0.5m deep. [The plaintiff] used a ladder to climb up the side of the switchboard. While he was leaning in, he experienced a sudden sharp pain in his left hip.

The plaintiff confirmed that that description was correct.

121. Mr Shillington then took the plaintiff to a comment in the report of Mr Lawrance dated 17 February 2020 in which the plaintiff was said to have described the onset of the pain in his left hip as being, in part, connected to his right hip condition and the resulting compensatory movements and actions adopted to avoid using his right hip. The plaintiff did not agree that he had told Mr Lawrance that. He thought he would have told Mr Lawrance that he might have been moving differently because of his back pain, not right hip pain.

122. The plaintiff was then referred to the paragraph in Dr Sabetghadam's report summarising the history of the 2018 Injury. That paragraph was in the following terms:

> [The plaintiff] reported that almost early October 2018, he suffered from gradual onset of left hip pain. He believed the left hip pain developed following lifting heavy objects at the workplace. He did not report any specific incident.

When asked if he agreed with the history recorded by the doctor, the plaintiff repeated that he was getting pain in his left hip, but that he was not sure whether that was coming from his back. He could not recall telling the doctor that the pain was related to heavy lifting. He said he found it difficult communicating with the doctor. He disagreed with the assertion that he did not tell the doctor about any specific incident causing left hip pain.

123. Mr Shillington then questioned the plaintiff about the history recorded by Dr Shanmugam at a consultation on 30 July 2019. That history was consistent with the history recorded by Dr Sabetghadam. The plaintiff said that he did not know where the pain was coming from. Mr Shillington then put to the plaintiff the note made by Dr Shanmugam that the plaintiff "initially thought that the left hip pains are referred pain from the back, but realised that they are separate issues due to different characteristics of pain." The plaintiff said that he thought that the comment had come from a report from Ms Dennis. He could not remember commenting in those terms to Dr Shanmugam.

124. Reference was then made to the note made by Dr Shanmugam that the back pain had "flared up two months ago when [the plaintiff] felt pain whilst doing workups in gym with 80 kg of weightlifting ...". The plaintiff agreed that he had told the doctor that his pain had increased with the exercises he was doing, however he did not recall referring to lifting 80 kg. He also believed that he had told Dr Shanmugam that he had hurt his left hip leaning into a switchboard.

125. Mr Shillington then put to the plaintiff notes of a meeting which he attended with Ms Ettinger and supervisors from the defendant. The plaintiff agreed with most of what was put to him, although again he did not recall lifting 80 kg. He also demurred from the suggestion that his nerve pain had gone away at any time since the 2017 Injury. In relation to the left hip injury, Mr Shillington put to the plaintiff that he did not mention the incident at the ANU site, notwithstanding that one of the supervisors at the meeting (Tom Mossop) had been present at the ANU site on 15 October 2018. The plaintiff did not agree that he did not mention the incident. He could not specifically recall, however he said that would have mentioned it if he had been asked.

126. The plaintiff confirmed that he kept working after 15 October 2018 until 8 November 2018.

The plaintiff – re-examination

127. The plaintiff said that the 1.8 m ladders provided by the defendant for his work were made of fibreglass, because they were non-conductive. The fibreglass ladders were heavier than aluminium ladders. They weighted 10 to 15 kg.

128. In relation to the lifting of cables on 16 December 2017 at the Canberra Airport (before the lifting of the switchboard), the plaintiff said that he had not felt any pain in his back while doing the cable work. The plaintiff said that he had felt sharp pain when he lifted the switchboard.

129. As to the reference to weightlifting, the plaintiff said that the only such exercise he did was that prescribed by the rehabilitation providers.

130. The plaintiff was then taken back to the workers compensation claim form for the 2018 Injury and specifically his answer to the question "What were you doing when the injury happened?". The plaintiff explained by reference to the whole task of connecting the switchboards together that it did in fact involve "Climbing, squatting, pulling, pushing, holding, awkward positions."

131. In response to a question from the Bench, the plaintiff said that he considered that having regard to the result of the operations on both hips if it was not for his back condition he could have returned to his normal duties as an electrician.

Tegan Bailie

132. Ms Bailie confirmed that she and the plaintiff had been in a relationship since 2006. She was an APS 5 in the Commonwealth public service. She described the plaintiff, prior to 2013, as a motivated and socially outgoing person. He was supportive, caring and fun to be around. Ms Bailie said that the plaintiff was physically fit and able and their interpersonal relationship was good. Ms Bailie said that she and the plaintiff shared the family's domestic responsibilities equally. At that time Ms Bailie was playing representative Oztag and so she would be training and playing 4 nights a week.

133. In the latter part of 2013, Ms Bailie noticed that the plaintiff was "slowing down" with the performance of the domestic tasks. She said that the plaintiff started complaining of being in pain. Her recollection was that it was in his "lower left (sic) and back". As a result, from that time to his operation in July 2014, Ms Bailie estimated that she was doing at least 8 hours per week of extra domestic work which the plaintiff was not able to do.

134. During the 3 months after the operation Ms Bailie said that the burden on her increased. She was spending over 10 hours per week undertaking domestic responsibilities during that time. By the time the plaintiff returned to work on light duties he had increased his contribution nearly back to what it had been before his injury. Ms Bailie said that during the period from when the plaintiff returned to work until he went on to full duties at the beginning of February 2015, she was doing about 2 hours additional domestic work per week. After than it returned to an approximately equal contribution until the 2017 Injury.

135. Ms Bailie recalled that on 16 December 2017 when the plaintiff came home from work, he said that he had done something to his back and was very concerned about it. He told her that he had been lifting something at work and he felt it pull.

136. Ms Bailie said that during the Christmas break the plaintiff seemed to be in a lot of pain. He told her he was suffering pain in his lower back. She said that she thought it must be more serious than initially thought because he was not someone who usually complained about pain. The plaintiff spent a great deal of time in bed or resting on the couch – to the extent that Ms Bailie described the period as being a "less than average Christmas."

137. After the plaintiff returned to work in January 2018, Ms Bailie said that he was coming home and going straight to bed. His contribution to the family domestic duties dropped away. Also, the plaintiff's mood deteriorated. Ms Bailie said that he was

"hard to be around". He had no patience and avoided company. Their relationship had broken down and, Ms Bailie moved into a different bedroom in the latter part of 2019.

138. As a consequence of the reduction in the plaintiff's domestic contribution Ms Bailie was back to doing over 10 hours additional domestic work per week.

139. Under cross-examination, Ms Bailie conceded that she had not kept records of the additional work she was doing. However, she did not agree that she was just guessing. She believed that her estimation was correct.

140. In relation to the incident on 17 December 2017 when the plaintiff hurt his back lifting his daughter, Ms Bailie said that she was not present, although the plaintiff had told her that he had felt pain when lifting their daughter.

The expert evidence

Mr M Lawrance

141. Mr Lawrance is an occupational therapist and ergonomist. His evidence was contained in a report to the plaintiff's solicitors dated 17 February 2020. He was not cross-examined.

142. The descriptions given of the work being done by the plaintiff in the lead up to each injury was broadly consistent with the descriptions given by the plaintiff in his evidence. However, the reference to the plaintiff having to squat or kneel to reach into a low doorway (300 mm above ground level) in relation to the 2018 Injury (see page 73 of Exhibit P6) is not consistent with the plaintiff's account in his testimony.

143. Mr Lawrance considered that each of the tasks claimed to have contributed to the injuries suffered by the plaintiff met the definition of hazardous manual tasks under the *Work Health and Safety (Hazardous Manual Tasks) Code of Practice 2011* (ACT). Indeed, he saw some additional tasks (such as the plaintiff having to lift and carry a 15 to 20 kg tool bag) as being hazardous. In each case, Mr Lawrance expressed the opinion that the work being done by the plaintiff created reasonably foreseeable manual task hazards. He opined that:

    (1) In relation to the 2013 Injury, reasonably practical risk controls included:

        (i) Providing access to the trenches by ladder, steps or earthen ramps; and,

        (ii) Sourcing streetlights with access panels higher in the poles.

    (2) In relation to the 2017 Injury, the plaintiff and his team should have been provided with suitable lifting equipment.

    (3) In relation to the 2018 Injury, reasonably practical risk controls included:

        (i) Installing items in the switchboard before it was put in place to avoid the need for a person to work awkwardly from a ladder or the top of the switchboard itself; and,

        (ii) Providing a suitable work platform such as a mobile scaffold or a platform ladder.

Dr M Pell

144. Dr Pell is a neurosurgeon. He was qualified on behalf of the plaintiff. He provided a report dated 13 January 2020, and was cross-examined as to his opinion.

145. Dr Pell assessed the plaintiff in consultation on 17 December 2019. He obtained a history largely consistent with the plaintiff's evidence, although he did note that the plaintiff said that his back was getting sore when he was moving cables before the switchboard incident in December 2017. Nevertheless, Dr Pell was of the view that the plaintiff suffered a L5/S1 disc prolapse in the work he was doing on 16 December 2017 which was aggravated when he lifted his daughter the next day. In relation to the 2018 Injury (the doctor recorded it as occurring on 18 October), he thought that the plaintiff had suffered a labral tear in the left hip on that occasion.

146. Dr Pell expressed the following conclusions:

> **10 Prognosis;**
>
> [The plaintiff] has ongoing low back pain, left hip and left L5.S1 disc protrusion and spondylolisthesis. This has not improved with extensive physiotherapy or peri-radicular injection. He remains on light duties. He has been recommended L4 to S1 fusion. Prognosis will be of ongoing pain. He will not be able to return to full duties as an electrician and will require retraining. If he underwent surgery there may be improvement with him returning to pre-injury duties.
>
> **10 (sic) Details of any recommendations you would make for further medical/psychological assessment, tests of treat; and**
>
> [The plaintiff] should pursue surgery for his L5.S1 disc prolapse and spondylolisthesis. He would require up to date imaging and I would recommend progress MRI scan of the lumbar spine, as well as Isotope bone scan to see the extent of disco-vertebral disease at the L4.5 level. Plain x-rays flexion and extension views would show whether there was instability at the segments involved. Previous MRI scan of the lumbar spine has shown broad based disc bulge at the L4.5 level and hence Dr Tsai's recommendation would include this in the fusion construct. If there is no discovertebral disease on Isotope bone scan, there may be an indication to do L5.S1 fusion only. [The plaintiff] is aware of the risks of accelerated segmental degeneration and the possible need for further fusion procedures in the future.
>
> If [the plaintiff] did not proceed with fusion surgery, as he has declined to date, then he would require retraining in a lighter occupation through TAFE.

147. Under cross-examination, Dr Pell said that the spondylolisthesis from which the plaintiff suffered could have been congenital, or could have come on during early teenage or childhood years. Dr Pell said that spondylolisthesis was a defect which could be asymptomatic, although it does predispose the sufferer to discal injury. This was particularly so in a person performing hard physical work.

148. In relation to the surgery he recommended, Dr Pell saw the fusion as being necessary to stabilize the spondylolisthesis. In the absence of that condition, the appropriate surgical procedure would have been a discectomy.

149. Mr Shillington asked the doctor to assume a history of pain with the lifting of cables and a switchboard on 16 December 2018 which led the plaintiff to believe that he had a slight strain of the back followed by an episode of intense pain the following day when he picked up his daughter. On that basis, Mr Shillington suggested that the disc prolapse was probably caused by the child lifting incident. Dr Pell did not agree. He considered that if there was pain before, the lifting of the child would have been a progression of the disc prolapse.

150. Mr Shillington put to Dr Pell that if the plaintiff had significant back symptoms, he would have been unlikely to perform a squat lifting 80 kg. Dr Pell said that he might well be able to perform such a lift, but it might well further aggravate his injury.

151. In relation to the left hip pain, Dr Pell saw the plaintiff's complaint of pain into the hip and down the left leg before 15 October 2018 as pain radiating down the sciatic nerve, rather than direct hip pain.

Dr L Le Leu

152. Dr L Le Leu, occupational physician, was also qualified on behalf of the plaintiff. His opinion was set out in his report dated 6 February 2020, based on an examination which occurred on 30 January 2020.

153. In relation to the 2013 Injury, Dr Le Leu obtained a history of a stabbing pain to the right hip while the plaintiff was getting in and out of trenches. Dr Le Leu recorded the plaintiff as having said that he was also getting what felt like "right-sided lower back pain, but concentrated in the right buttock". At one point the plaintiff was said to have lifted his right leg and suffered an intense stabbing pain over the right hip. This occurred on the same date that he reported to the 2013 Injury.

154. As to the 2017 Injury, the doctor recorded a history broadly consistent with the plaintiff's evidence, although the switchboard was said to have weighed 500 to 600 kg.

155. Dr Le Leu recorded that the plaintiff had informed him that about a month before the 2018 Injury he had told his physiotherapist that he thought that his left hip was "going" since it was producing symptoms similar to those which he had suffered with his right hip. However, the physiotherapist thought that the problem was not with the hip.

156. The history otherwise recorded in relation to the 2018 Injury was again broadly consistent with the plaintiff's evidence.

157. In response to a question in the qualifying letter as to whether the plaintiff suffered from any pre-existing conditions, Dr Le Leu said that it was quite possible that the plaintiff had pre-existing abnormality of both hips, although there was no documentation of that or evidence of relevant symptoms. The radiology suggested that the plaintiff did have spinal abnormality before the subject injury.

158. Dr Le Leu diagnosed the plaintiff as having suffered from bilateral hip impingement with labral tears, discogenic low back pain with variable radiation to the left leg and contribution to back pain from exacerbation of probably pre-existing spondylolisthesis plus musculoligamentous injury.

159. In relation to the prognosis the doctor said:

> The prognosis for the hips is for little change now that he has had appropriate surgery although the left-sided symptoms may improve with time to about the level of the right side since he had his operation in around June 2019. The prognosis for the lower back is for ongoing symptoms at or near the current level for the foreseeable future.

160. In relation to treatment of the back condition, Dr Le Leu suggested that the plaintiff should consult with Dr Tsai in relation to a possible surgical solution. However, he did comment: "The results could not be guaranteed anyway but would be even less certain in the presence of pre-existing spinal abnormality."

161. Dr Le Leu considered that the plaintiff should permanently avoid work of a moderately to highly physical nature. He saw him as being capable of working in an administrative area using a sit/stand desk arrangement to allow frequent changes in posture. He also thought that the plaintiff could perform domestic duties, but that he would have difficulty with duties involving significant lifting, carrying, pushing and pulling. Dr Le Leu thought that the plaintiff would require 2 hours domestic assistance each week and an average of 3 hours garden assistance each month. De Le Leu considered that that need was likely to continue for the foreseeable future unless there is an unexpected improvement in back symptoms (possibly due to treatment). The need for domestic assistance would have doubled in the 6 to 8 weeks after the hip operation.

162. Mr Shillington put to Dr Le Leu the history that the plaintiff had suffered lower back and right hip symptoms extending back to 2011, and right hip symptoms from time to time associated with his work, including particularly walking on uneven ground and driving his vehicle. Mr Shillington asked whether in the light of that more complete history, it was possible to say whether the injury suffered in December 2013 was referable to getting in and out of trenches. Dr Le Leu responded:

> Well it would be difficult to associate the onset and ongoing symptoms before the incident obviously with the incident but it appears he was doing lots of other heavy work before the incident which may have been contributory.

163. In relation to the 2017 Injury Mr Shillington confirmed with the doctor that he had not taken a history of the plaintiff lifting his daughter on 17 December 2017. Mr Shillington then put to the doctor that after the child lifting incident the fact that the plaintiff said that he had intense pain or a pop in his back and had to sit down for a couple of hours indicated a more severe injury than the injury sustained on the previous day where the plaintiff was able to continue working. Dr Le Leu said that the fact that the plaintiff might have worsened the injury lifting his daughter did not deny the causation of the injury on 16 December 2017.

164. Mr Shillington asked Dr Le Leu whether he was aware that the plaintiff had suffered left hip symptoms before the 2018 Injury. The doctor pointed to the paragraph in his report referring to the plaintiff's discussion with his physiotherapist about a month before that date. After further questioning the doctor agreed that the symptoms which had come on a month beforehand were worsened by the 15 October 2018 Injury.

165. Dr Le Leu was then taken to page 11 of his report and confirmed that the plaintiff had told him that he could use a computer "very well". He also confirmed that the plaintiff had presented well as a "pleasant, relaxed and outgoing young man of 31". Having regard to his qualification as an electrician, Dr Le Leu saw the plaintiff as having good transferable skills and good prospects of employment in the future, aside from moderate to heavy physical work.

166. In re-examination, Mr McIlwaine SC asked whether the labral tear suffered by the plaintiff in his right hip could have been caused by a twisting type mechanism, consistent with swinging a leg over to get out of a trench which was 1.4 m deep. The doctor said that such a movement was making the hip go to extremes of movement, although there was not always a close relationship between a labral tear and a person's work history.

167. In relation to the 2017 Injury, Dr Le Leu said that if the plaintiff had injured his back lifting the very heavy switchboard it would be expected that he would suffer

exacerbation of his pain in bending and lifting his daughter the following day. In response to questions from the Bench, the doctor explained that the "pars defect" in the lower back can predispose to discal problems when under load. He thought that it was quite possible that the plaintiff suffered a disc injury on 16 December 2017 which would explain the severity of the pain when he lifted his daughter the next day. In relation to the hips, the doctor explained that his reference to impingement was a reference to "bony abnormality" or other overgrowth from the acetabular surface or the head of the femur which can cause a mismatch which causes impingement. Such an impingement might or might not cause a labral tear.

168. Leave was given to counsel to ask any questions arising out of the questions which I had asked. Mr Shillington asked the doctor if the bony abnormality in the plaintiff's hips predisposed him to injury. Dr Le Leu replied that it was possible for such abnormalities to be asymptomatic, even over a lifetime. People who do repetitive hip movements, particularly if extreme, were more likely to get symptoms. Dr Le Leu suspected that it was the repetitive activities as described by the plaintiff that caused his problem.

169. Mr McIlwaine SC then asked the doctor about the significance of the labral tear demonstrated by the radiology dated 31 January 2014. Dr Le Leu said that the tear was of significance, but so was the "over-coverage" referred to in the report. (The report stated "Evidence of over-coverage in keeping with femoral acetabular impingement.") Dr Le Leu said that that was a reference to over-coverage of the femoral neck just around where the articular surface is. That causes the surface to be raised so that it does not fit properly with the socket, resulting in the impingement. That could be caused by repetitive activity or some long-term hip abnormality, such as Perthes disease (although there was no historical evidence of that disease). Dr Le Leu thought that the likely cause of the abnormality here was repetitive and highly extensive movement of the hips.

Dr J Bodel

170. Dr Bodel, who is an orthopaedic surgeon, was qualified by the plaintiff's solicitors. He examined the plaintiff on 12 February 2020. His opinion was set out in his report dated 17 February 2020. He was not cross-examined.

171. The history of the 2013 Injury recorded by Dr Bodel is set out in paragraph [81] above. Otherwise the short description of how the next two injuries occurred was broadly consistent with the plaintiff's evidence. Dr Bodel was satisfied that each of the injuries was caused by the activities as described by the plaintiff in his histories. He described the plaintiff as suffering from "mechanical backache associated with minor disc pathology in the lumbosacral junction and labral tears in both hips." The doctor saw the prognosis as guarded, however he thought that the plaintiff should continue with conservative care. He did not think the plaintiff required further surgery in relation to the back condition or the ongoing hip symptoms.

Mr T Sutton

172. The plaintiff was sent by his solicitors to Mr T Sutton, psychologist, for assessment and report. Mr Sutton saw the plaintiff on 5 February 2020 and produced a report dated 16 February 2020. Mr Sutton was not cross-examined.

173. Mr Sutton carried out psychometric testing of the plaintiff. He was satisfied from the validity tests that the plaintiff was not malingering or exaggerating his symptoms. He found no evidence of psychological embellishment of the plaintiff's pain and symptom condition. He did think that the plaintiff could benefit from psychological pain management techniques.

174. Mr Sutton found no clinically significant psychopathology, although there was evidence of relatively mild anxiety and depression. These symptoms were a consequence of the plaintiff's injuries and the related restrictions in his social and career circumstances. Mr Sutton concluded that there had been a direct negative impact from the plaintiff's pain and restrictions upon his personal relationship with Ms Bailie and said that this should be addressed with relationship counselling. Indeed, Mr Sutton thought that the plaintiff required individual counselling support with a psychologist over 6 to 12 months at around 10 to 12 sessions. He concluded his report with the following comment:

> [The plaintiff's] interpersonal style is self-assured, confident and dominant with leadership qualities. During the session he came across as thoughtful and insightful. These traits mean that he is likely to be successful transferring to management roles, be they project management, site management or similar. I would strongly encourage him to seek out retraining in these roles (with appropriate support) as part of his psychological treatment.

Dr I Kelman

175. The defendant relied on a report from Dr Kelman, orthopaedic surgeon, who assessed the plaintiff for Allianz Insurance on 16 April 2014. The history recorded by Dr Kelman was put in some detail to the plaintiff in cross-examination – see paragraphs [83]-[86] above.

176. Dr Kelman referred to the MR Arthrogram performed on 31 January 2014 which demonstrated a large labral tear, and also the report of CT scanning performed on 5 March 2014. In relation to the latter, Dr Kelman noted "Findings consistent with combined pincer and Cam type femoroacetabular impingement at the right hip."

177. Dr Kelman stated, under the heading "Aetiology":

> Aetiology of condition is usually traumatic. The trauma event may not be appreciated initially. It comes about as a result of a twisting injury under load in the labrum becomes separated from its bony attachment. Labrum is then loose, often impinges in the mechanism of the hip joints producing pain.

178. In response to a question from the insurer as to causation Dr Kelman said:

> He has a detached labrum which has come about as a result of a previous twisting injury to the hip while under strain or carrying out physical work which (sic) he may not have been fully aware. In view of the work which he does it is likely that this came about as a result of the work condition. He does not participate in any activities outside work which would contribute to this.

179. Dr Kelman agreed that the surgery proposed by Dr Burns was appropriate. Dr Kelman thought that once the plaintiff's hip problem had been corrected by surgical treatment, his prognosis was good, including for return to his normal duties at work.

Dr R Sabetghadam

180. Dr Sabetghadam, who is an occupational therapist, examined the plaintiff for the defendant on 22 February 2019 and reported on 1 March 2019. The history from the

plaintiff recorded by the doctor in relation to the 2017 Injury is extracted in paragraph [104] above, and in relation to the 2018 Injury at paragraph [122] above. In relation to the plaintiff's back injury, Dr Sabetghadam diagnosed a "non-specific lower back pain". He provided a detailed explanation of this, and his conclusion as to causation, as follows:

> [The plaintiff] suffered from temporary exacerbation symptoms of lower back pain on 16.12.2017. It is anticipated in a gentleman with significant changes in his lumbar spine, which are reported on the MRI scan of 08.11.2018, who suffers from minimal anterolisthesis in· L4/5, shallow posterior broad-based disc bulge in L4/5, mild anterolisthesis and bilateral pars defects in L5/S1, posterior left paracentral disc herniation resulting in likely abutment of the traversing left L5 nerve root, bilateral facet joint arthropathy and mild bilateral neuroforaminal exit narrowing with possible contact of exiting left L5, to suffer from a degree of non-specific lower back pain. The terminology of non-specific lower back pain is the terminology applied to a medical condition which causes lower back pain arising from abnormal biomechanic or degenerative changes in the lumbar spine due to the presence of multiple structures in lower back pain. Based on evidence in medical literature it is difficult to pinpoint which one is the causality of this pain. This terminology will be defined based on AMA Guides to the Evaluation of Disease and Injury Causation. People with abnormal biomechanics of the lumbar spine and degenerative changes in the lumbar spine could experience intermittent non-specific lower back pain regardless of their occupational and social activities. The pain could have a waxing and waning nature. It could happen multiple times or it could change to recurrent characteristics. [The plaintiff] probably had a temporary exacerbation of non-specific lower back pain on 16.12.2017. However, his current symptomatology is mote related to an underlying medical condition.

181. In relation to the left hip condition, Dr Sabetghadam expressed a similar conclusion. He said:

> [The plaintiff's] left hip condition is related to degenerative changes in his left hip. Based on AMA Guides to the Evaluation of Disease and Injury Causation, the ergonomic factors of his work as an electrician are unlikely to contribute to the development, aggravation. deterioration or recurrence of the underlying medical condition of the left hip. However, people with degenerative changes in the hip and it there is a labral tear, dislike some physical activities such as frequent squatting, running and side movements of the hip. This could exacerbate the symptoms. Exacerbation of the symptoms does not directly correlate with aggravation, deterioration or recurrence of an underlying medical condition. As soon as they cease the activity, the symptoms will subside to the residual level.

182. Dr Sabetghadam thus concluded that any work-related aggravation of the back and left hip conditions had ceased. The plaintiff's ongoing symptoms were due to the underlying abnormal biomechanics of the plaintiff's lumbar spine and left hip. The pain from these abnormalities would, he said, "continue in its own path." The doctor concluded:

> …[The plaintiff's] pain symptoms were believable considering the significant degenerative changes of the spine and the left hip. He appeared to me to be a work-oriented, motivated gentleman. He was straightforward and honest with his symptoms. I do recommend the company provides occupational duties that he is comfortable with in a supervisory role and minimise the physical demands of his job to accommodate his pain related to abnormal biomechanics and degenerative changes in his lumbar spine and also degenerative changes in his left hip.

183. The doctor was cross-examined by Mr Muller as to these opinions. Dr Sabetghadam did not agree with the proposition that the plaintiff's left leg symptoms were consistent with abutment of the L5 left nerve root by the disc protrusion at L5/S1. He considered that the left leg symptoms were referable to the left hip injury. He found no radiculopathy present on examination. Indeed, Dr Sabetghadam completely rejected

the diagnosis of a L5/S1 disc prolapse arising out to the lifting incident on 16 December 2017. He did not understand how a neurosurgeon could make that diagnosis on scientific grounds.

184. Under further questioning, the doctor resiled somewhat from that position. He allowed that in exceptional cases such a diagnosis could be made, however by reference to the history and the delayed MRI in this case such a diagnosis here "could not be scientifically defendable and possible."

185. Having regard to his analysis, Dr Sabetghadam did not see surgical treatment as being appropriate for the plaintiff's low back condition.

186. Mr Muller put to the doctor the history of a frank injury while the plaintiff was engaged in lifting a 400 kg switchboard. He asked whether such a lift was capable of causing spinal trauma. The doctor answered in the negative. He saw that proposition as an example of the fallacy encapsulated by the Latin phrase "post hoc (sic) propter hoc". He explained his position as "Something happened after something, it doesn't mean that is the cause of the event." The doctor referred to medical literature to support the proposition that any stress on the lower back could result in a disc prolapse, including, for example, lifting a pen from the floor. Disc prolapses are a product of age and genetic predisposition. Dr Sabetghadam did accept that four men lifting a 400 kg object was well and truly in excess of any safe lifting guidelines in Australia.

187. In relation to any exacerbation caused by the incidents at work on 16 December 2017 and 15 October 2018, the doctor saw that as being, in each case, a temporary exacerbation of symptoms, not of the underlying pathology.

188. Dr Sabetghadam rejected the proposition that medical evidence supported a causal link between occupational loading of the spine and disc degeneration. He also rejected the proposition that guidelines or standards imposing manual handling limits suggested that there was a correlation between heavy lifting and spinal injury.

189. In relation to the plaintiff's lower back condition, the doctor agreed that it was likely that it will worsen with the passage of time.

Submissions of the parties

Plaintiff's submissions

190. The plaintiff relied on the principles stated by the High Court of Australia in *Czatyrko v Edith Cowan University* [2005] HCA 14; 79 ALJR 839 and *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 for the elucidation of the duty of care owed by an employer to an employee. The plaintiff also relied on ss 42 to 44 of the *Civil Law (Wrongs) Act 2002* (ACT) in relation to the analysis of whether a breach of that duty had occurred. None of those principles were put in controversy by the defendant.

191. The plaintiff submitted that he had causes of action against the defendant in relation to each injury for breach of statutory duty. In respect of each injury, the plaintiff alleged that the defendant was in breach of duties owed to him under ss 34, 35, 36 and 60 the *Work Health and Safety Regulation 2011* (ACT) (***WHS Regulation***). Furthermore, in relation to the 2013 and 2018 injuries, the plaintiff submitted that the defendant was in breach of s 73(1)(b) of the *Scaffolding and Lifts Regulation 1950* (ACT).

192. In relation to the work health and safety causes of action, the plaintiff relied on Victorian authority to argue that s 267 of the *Work Health and Safety Act 2011* (ACT) (***WHS Act***) did not preclude his claims.

193. The plaintiff submitted that I should make factual findings leading to the following conclusions:

    (1) In relation to the 2013 Injury, the defendant breached its duty of care to the plaintiff in failing to carry out an adequate risk assessment of the work being done by the plaintiff. It also failed to devise and implement a safe system of work. In particular, the defendant failed to ensure that the plaintiff had safe means of entering and exiting the trenches where he had to work by having steps cut into them at appropriate locations at the time of excavation. Also, in relation to the connection of the streetlights, the defendant had in place a system of work which required the plaintiff to repetitively adopt a kneeling or crouching position for periods of around 20 minutes.

    (2) In relation to the 2017 Injury, the defendant breached its duty of care in failing to provide a suitable mechanical lifting device which avoided the need for the plaintiff and his co-workers to manually lift a 400 kg switchboard.

    (3) In relation to the 2018 Injury, the defendant breached its duty of care in failing to devise and implement a system of work which avoided the need for the plaintiff to adopt an awkward posture to access the interior of the switchboard. In particular, the defendant failed to provide a scissor lift to provide the plaintiff with safe access to his work.

    (4) In relation to each injury, the defendant breached its statutory duties to the plaintiff as stated by Mr Lawrance in his report.

194. The plaintiff further argued that, in light of the suggested factual findings, I should conclude that each of the plaintiff's injuries was caused by the relevant breaches of duty summarised above. In coming to that conclusion, the plaintiff submitted that it was necessary to analyse causation in accordance with the requirements of s 45 of the *Civil Law (Wrongs) Act* as explained by the High Court (in relation to the equivalent provision under the NSW statute) in *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182. Mr McIlwaine SC also suggested that the payment of workers compensation by the defendant (or its insurer) could be taken as an informal admission that the treatment and incapacity was materially contributed to by the relevant work injury. In that regard, he relied on the decisions of *Heuston v Yore Contractors Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 9 March 1992), *Macolino v Royal North Shore Hospital* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 22 April 1992) and *Morvatjou v Moradkhani* [2013] NSWCA 157.

195. In relation to the plaintiff's application for an order extending the limitation period in relation to the 2013 Injury, it was submitted that the plaintiff was unaware that he had a right to bring a claim for damages for that injury until he consulted Mr Little on 1 April 2019. (That consultation had come about in relation to the refusal at that stage by Allianz Insurance to cover the cost of the proposed surgery on the plaintiff's right hip, as explained at [53] above.) Thereafter, it was submitted that the plaintiff and his solicitors took appropriate steps without delay to investigate and commence

proceedings. The plaintiff relied on the steps described in the affidavit of Mr Bedi (Exhibit P10) to support this submission.

196. The plaintiff claimed that damages should be awarded in relation to each accident in accordance with the following:

Head of damage	**Accident 1**	**Accident 2**	**Accident 3**
General damages	$70,000.00	$200,000.00	$90,000.00
Interest	$7,350.00	$5,700.00	$2,700.00
Past Economic Loss	$30,206.47	$98,476.28	$63,316.99
Interest on unpaid component PEL	$ -	$4,832.80	$1,296.92
Superannuation (past)	$3,473.74	$11,324.77	$7,281.45
Interest on past superannuation	$729.49	$968.27	$436.89
Fox v Wood	$12,564.23	$18,468.35	$19,313.52
Future Economic Loss	$ -	$506,000.00	$ -
Superannuation (future)	$ -	$65,780.00	$ -
Past out-of-pocket expenses	$27,355.55	$49,806.60	$21,950.86
Interest on unpaid Past OOPS	$ -	$34.20	$408.43
Future out-of-pocket expenses	$5,000.00	$102,640.00	$10,000.00
Past domestic care and assistance	$19,600.00	$37,765.00	$14,595.00
Interest on past domestic care and assistance	$4,116.00	$3,228.91	$875.70
Future domestic care and assistance	$ -	$436,950.00	$ -
TOTAL	**$180,395.48**	**$1,541,975.18**	**$232,175.76**

197. I note that subject to findings against the defendant in relation to liability and causation, the figures for past out of pocket expenses, past loss of earning capacity and the *Fox v Wood* (1981) 148 CLR 438 amounts in relation to each injury are agreed by the defendant.

198. In relation to the issue of interest on past superannuation, Mr Muller was unable to refer me to an authority in which this issue was analysed, although he provided a reference to a decision of Sidis AJ in this Court in *Johnson v Forefront Automotive Industries Pty Ltd* [2013] ACTSC 44 (***Johnson***) in which her Honour awarded interest

on past loss of superannuation damages. There was however no discussion in that case of the basis on which the interest was allowed (which was at the rate of 9% per annum).

Defendant's submissions

199. In relation to the 2013 Injury, Mr Shillington for the defendant pointed out that the plaintiff's claim was nearly 3 years out of time. The defendant has pleaded the 3 year limitation under s 16A of the *Limitation Act*. Mr Shillington conceded that under s 16A there is a potential for an extension of time under s 36 of the Act. However, the defendant argued against such an extension of time. The defendant, by reference to the criteria to be taken into account under s 36(3), made the following arguments:

    (1) The plaintiff did not provide a satisfactory explanation of the delay in bringing his claim.

    (2) The defendant had suffered actual prejudice in investigating the plaintiff's claim. The plaintiff could not identify the particular work sites that he had been working on in the lead up to the 2013 Injury, and in any event those sites are now established suburbs. Moreover, the defendant had not been able to contact the co-worker identified by the plaintiff in his evidence. This was in circumstances where the plaintiff had refused to provide the names of relevant witnesses in the particulars previously provided. It was argued that the assessment of the claim for workers compensation was a very different matter from the assessment of a claim for damages.

200. The defendant submitted that the Court should not be satisfied that it would be just and reasonable to extend the limitation time under s 36.

201. In relation to the substance of the claim relating to the 2013 Injury, the defendant argued that the plaintiff had failed to establish negligence. In particular, the defendant submitted that the plaintiff was the person responsible for making the risk assessments. He could have walked the maximum distance of a few hundred metres necessary to access the steps cut into trenches, although on other occasions the steps were close to where he had to work. Alternatively, the plaintiff could easily have used a ladder. It was argued that the plaintiff's explanation for why carrying a ladder around was impractical was unconvincing. In relation to the streetlight work, Mr Shillington pointed out that the plaintiff had purchased his own camp stool so that from 2011 he no longer had to squat or crouch down in an awkward posture when performing those duties.

202. If I was satisfied that the defendant had breached its duty of care, and I found in favour of the plaintiff on causation, the defendant submitted that I should conclude that the plaintiff had contributed to his injury by his own failure to take reasonable care for his safety. Mr Shillington suggested that a deduction for contributory negligence of 20% was appropriate. In relation to the contributory negligence submission, the plaintiff relies on s 102(2) of the *Civil Law (Wrongs) Act*, which provides that the defence does not apply to a wrong constituted by a breach of statutory duty.

203. In relation to causation, Mr Shillington pointed to the inconsistencies between the contemporaneous records and medical histories and the plaintiff's evidence as to the significance of the trench access compared with the other aspects of the plaintiff's

work at that time (such as walking on uneven ground, driving in his van etc.). Mr Shillington submitted that the plaintiff had failed to discharge the onus that the alleged breach (effectively, the failure to provide safe trench access) was a necessary condition of the injury suffered to the right hip.

204. The defendant did not take issue with the assertion of a breach of its duty of care if the Court concluded that the plaintiff was injured as he alleges in the course of lifting the 400 kg switchboard on 16 December 2017. However, the defendant contended that having regard to the records and medical histories put to the plaintiff in course of cross-examination, and the intensity of the symptoms suffered by the plaintiff on the following day while he was lifting his daughter, I should find that any disc prolapse was caused by that lifting incident, and not whatever had occurred at work the day before. The defendant suggested that even if I do not come to that conclusion, I should find that the plaintiff has failed to discharge his onus on causation.

205. In relation to the 2018 Injury, the defendant submitted that I should find that the plaintiff's evidence overall on this issue was unimpressive. Mr Shillington again relied on the cross-examination on the contemporaneous records and the inconsistent medical histories given by the plaintiff. Mr Shillington pointed to the reference to the plaintiff having injured his left hip on "Sunday" (i.e., Sunday 14 October 2018) and the lack of an explanation for that entry. Mr Shillington also pointed to the very general allegation of injury in the workers compensation claim form.

206. Mr Shillington ultimately submitted that I should find that the plaintiff suffered a minor injury to his left hip in the course of his work on 15 October 2018 in the context of significant left hip symptoms developing over the month or so before that date. On that basis the plaintiff has, it was argued, failed to establish that his left hip injury was relevantly caused by any breach of duty on the part of the defendant on 15 October 2018.

207. In relation to the plaintiff's reliance on the *WHS Regulation*, the defendant argued that s 267 of the *WHS Act* precludes the plaintiff from bringing a civil proceeding against the defendant in reliance on the *WHS Regulation*.

208. As to the issue of damages, Mr Shillington provided, on behalf of the defendant, a schedule of awards in relation to each injury, should I reach the conclusion that the plaintiff is entitled to damages for the injuries. The schedule is as follows:

General damages	$60,000	$100,000	$50,000
Interest	nil	$3,625	$1,250
Out-of-pocket expenses - agreed	$27,356	$49,807	$21,950
Past economic loss	$30,206	$98,476	$63,316
Fox v Wood	$12,564	$18,468	$19,313
Future economic loss- buffer	nil	$100,000	$50,000
Super- PEL & FEL x 11%	$3,322	$27,500	$9,020
Future treatment	nil	$15,000	nil

G v K- past	$6,000	$15,000	$10,000
G v K- future - buffer	nil	$15,000	nil
	$139,448	**$442,876**	**$224,849**

Consideration

The time bar

209. There is no issue that s 16A of the *Limitation Act* applies to the plaintiff's claim in relation to the 2013 Injury. Subsection 16A(2) provides:

> The action is not maintainable if brought 3 or more years after the day the injury happened.

210. It seems clear that the plaintiff's claim accrued no later than 5 December 2013 when he suffered an episode of sharp pain upon manipulating his right leg. Thus, the time in which to commence proceeding expired on 5 December 2016, if not a little earlier given the symptoms which the plaintiff had been suffering during the months before 5 December 2013. As noted above, the current proceedings were not commenced until 7 November 2019.

211. The plaintiff sought relief under s 36 of the *Limitation Act*. Again, there is no issue that the section applies to the plaintiff's claim. The relevant parts of s 36 are thus:

> **36 Personal injuries**
>
> …
>
> (2) If an application is made to a court by a person claiming to have a cause of action to which this section applies, the court, subject to subsection (3) and after hearing such of the persons likely to be affected by that application as it considers appropriate, may, if it decides that it is just and reasonable so to do, order that the period within which an action on the cause of action may be brought be extended for the period that it determines.
>
> (3) In exercising the powers given to it by subsection (2), a court shall have regard to all the circumstances of the case, including, for example, the following:
>
> (a) the length of and reasons for the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
>
> (c) the conduct of the defendant after the cause of action accrued to the plaintiff, including the extent (if any) to which the defendant took steps to make available to the plaintiff means of ascertaining facts that were or might be relevant to the cause of action of the plaintiff against the defendant;
>
> (d) the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he or she knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of the advice the plaintiff may have received.

…

212. In *Dykes v Bunnings Group Ltd (No 2)* [2016] ACTSC 226 Refshauge J adopted with approval the summary of principles applicable to an application made under s 36 of the *Limitation Act* which had been stated by Mossop M (as his Honour then was) in *Stefek v Garnama Pty Ltd* [2014] ACTSC 140 (***Stefek***). Some of the paragraphs from *Stefek* are not relevant for current purposes. I set out those which I regard as pertinent here:

> [22] The primary question is whether, in all the circumstances, it is "just and reasonable" to grant the application: s 36(2); *Sessions v Phengsiaroun* [2008] ACTSC 132 at [40].
>
> [23] A material, and often the most important, question is whether, by reason of the time which has elapsed, a fair trial is possible: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 547-548, 550, 555. *Sessions* at [41]; *Laws v Web Scaffolding* [2010] ACTCA 3 at [37].
>
> [24] The overall onus is on the plaintiff to demonstrate that it is just and reasonable to extend time. That onus remains with the plaintiff throughout. If a defendant, however, wishes to rely on actual prejudice then the defendant bears the onus of adducing or pointing to evidence sufficient to establish that fact: *Brisbane South* at 547, 551, 553-554, 566-567; *Laws v Web Scaffolding* at [34]-[36].
>
> [25] The criteria specifically referred to in s 36 are not exhaustive. However, they do point reasonably comprehensively to areas of relevance: *Sessions* at [42].
>
> …
>
> [27] The prospects of success of the proposed plaintiff are also a matter which may be considered: *Paramasivam v Flynn* (1998) 90 FCR 489 at 496-497; *Doyle v Gillespie* (2010) 4 ACTLR 188 at [43].
>
> [28] When assessing the prejudicial effects of delay it is relevant to consider the whole of the delay between the cause of action arising and a hearing of the proceedings if leave is granted rather than the marginal delay between the end of the limitation period and such a hearing: *Brisbane South* at 548-549, 554-555, 556
>
> [29] Prejudice may be presumed as a consequence of the effluxion of time even if actual prejudice is not demonstrated: *Brisbane South* at 551, 556.
>
> [30] Where actual prejudice of a significant kind is demonstrated or a real possibility then it is more in accord with the legislative policy underlying limitation periods that the plaintiffs lost right should not be revived than the defendant should have a spent liability reimposed: Brisbane South at 555.

213. I commence by addressing each of the paragraphs of s 36(3).

Length of and reasons for the delay

214. The total delay between the cause of action arising and the hearing of the proceeding is about 7 years. That is a very significant period having regard to the 3 year limit prescribed by the legislature. However, the length of time is by itself not determinative.

215. The explanation for the bulk of the delay is fairly straightforward. The plaintiff had obtained a good outcome from the surgical treatment of his right hip. He had no reason to seek legal advice until many years later when the insurer refused to cover the cost of the operation on his left hip. I accept that he had no awareness of the potential for a damages claim in relation to the 2013 Injury until he consulted with Mr

Little on 1 April 2019. I infer that he also had no awareness of the limitation period applicable to such a claim until then.

216. As to the period between 1 April and 7 November 2019, Mr McIlwaine SC submitted for the plaintiff that the reason for delay during that period was the recalcitrance on the part of the defendant and its insurer in providing copies of documents which had been requested by the plaintiff's solicitors. I do not accept that submission. It is clear from the letter from the defendant's solicitor dated 26 September 2019 (see Annexure A to Exhibit P10) that there was some confusion as to the correct name of the defendant as at 2013 which led to a miscommunication between the plaintiff's solicitors and the defendant's insurer and the defendant's solicitors. I am satisfied that it was this confusion which led to the delay in the provision of the documents rather than any deliberate attempt to withhold relevant records from the plaintiff.

217. Overall, I find that the plaintiff's explanation for the delay is satisfactory.

Likely prejudice to the defendant

218. The defendant relies on actual prejudice, in addition to the prejudice which might be readily inferred from a delay of 7 years or so. I was informed from the bar table by Mr Shillington that the defendant had not been able to contact Mr Burridge, the plaintiff's co-worker, in the short time between when he was identified in the evidence of the plaintiff and the completion of the case. It would usually be expected that some evidence would have been tendered to establish this, however I note that there was no objection to the statement from the bar table. Moreover, having regard to the circumstances I am not surprised that the defendant was not able to contact Mr Burridge.

219. The defendant complained that the difficulty it faced was compounded by the fact that the plaintiff had, in responding to a request for particulars dated 3 January 2020, declined to provide the names of the person the plaintiff was said to have been working with in performing the Greenfields duties. Given that this person was referred to in paragraph 2.14 of the Statement of Claim, I very much doubt that the answer given by the plaintiff's solicitors that "The names of witnesses are not matters for particulars" was adequate or appropriate. Be that as it may, it has resulted in a situation where the defendant has not been able to obtain potentially relevant evidence (from Mr Burridge) as to the precise circumstances of the work which the plaintiff was performing between 2012 and 2013.

220. In that context, I refer to my comments in paragraphs [233]-[240] in relation to the plaintiff's evidence as to the relative significance of his actions in getting in and out of trenches to the onset of symptoms in the right hip.

221. It is difficult to assess the importance of the evidence which might have been available from Mr Burridge, assuming that he could be located and that he would have been able to recall sufficient detail of the work which he and the plaintiff were doing in the Greenfields sites in 2012 and 2013. For example, Mr Burridge may have recalled that the number of trenches where it was necessary to climb in or out of which were 1.4 m deep was relatively few, either because of the depth of trenches or because of the availability of steps, concrete pads or other means of getting in or out. Suffice to say that in a case where causation is hotly contested, and there is an inconsistency between the documentary record, some of the histories given by the plaintiff, and his testimony, I conclude that there is at the very least a real possibility

that the defendant's capacity to obtain a fair trial has been prejudiced by the delay, and the circumstances under which the application for an extension of time has been made. I will return to this latter issue below.

The defendant's conduct

222. I have dealt with the question of the defendant's conduct in the context of s 36(3)(c) in paragraph [216] above. There was no other suggestion that the defendant had done anything (or failed to do something) which was relevant under this consideration.

Disability

223. There has been no suggestion of any disability which might have been relevant under s 36(3)(d).

The plaintiff's actions

224. The delay between 1 April 2019 and the commencement of proceedings is discussed at [216] above. It seems to me that the plaintiff acted promptly and reasonably once he knew he had a potential damages claim in relation to the 2013 Injury, and that he took appropriate steps to obtain the advice needed to decide whether proceedings should be commenced.

Generally

225. I was informed by Mr Shillington that the practice has developed in this Court that applications for extension in time under s 36 are to be dealt with in the usual course at the substantive hearing of the case. Such a course has some obvious advantages. Such an approach would avoid the duplication of evidence, including cross-examination. However, it seems to me that if such a course is to be adopted there must be clear directions to the parties as to the filing of the plaintiff's application in proceeding and all affidavit and documentary evidence relevant to the time limitation issue well before the hearing date.

226. For some reason that did not occur here. As indicated in paragraph [4] above the plaintiff's Application in Proceeding was filed on 20 October 2020, less than a week before the hearing date. The evidence to be relied upon, apart from the affidavit of Mr Bedi (Exhibit P10) was said to be:

    2. Viva voce evidence from the Plaintiff at the trial of the proceedings;

    3. Documents to be tendered into evidence at the trial of the proceedings.

227. It seems to me that this approach has a real potential to interfere with the efficient running of a hearing. This is particularly so if, as occurred here, the plaintiff has failed to notify the defendant of the identity of a potentially relevant witness in sufficient time before the hearing to allow the defendant to conduct the appropriate investigations as to the whereabouts of that person and as to the contents of any evidence which he or she might be able to give.

228. Mr Shillington did foreshadow at the beginning of the hearing the possible need for an adjournment should the defendant be taken by surprise by the evidence given by the plaintiff in relation to the time limitation issue. Such an application was not made. However, that does leave the parties and the Court with the unsatisfactory prospect of the defendant being prejudiced in terms of fairly meeting the allegations of the plaintiff

in relation to the 2013 Injury. Having regard to the way this issue was raised and discussed in relation to the potential adjournment of the hearing based on the plaintiff's late application to amend the Statement of Particulars, I do not believe that the defendant should be criticised for the decision not to seek to adjourn the hearing to attempt to contact Mr Burridge. It seems to me that the defendant was placed in a position where it was entitled to make that forensic decision as a result of the circumstances under which the application for extension in time was made.

229. In all of the circumstances, I am not satisfied that it would be just and reasonable to extend the time. While the positive and negative factors are finely balanced, I see the reasonable possibility of actual prejudice to the defendant in dealing with the issue of causation as significant. While the plaintiff has a reasonably arguable claim as to liability in relation to the 2013 Injury, it does seem to me that there are real prospects that the plaintiff might have fallen short of proving that the activity of getting in and out of trenches was a necessary condition for the development of the labral tear in the right hip in late 2013. I will address that issue further in dealing with the plaintiff's evidence on that issue below.

230. I am also conscious that the plaintiff's claim here is a relatively minor one. He has received workers compensation for his out-of-pocket expenses and for his loss of earnings. There seems to be no doubt that the 2013 Injury arose out of and in the course of his work generally. It follows that although he may not be able to recover common law damages, he will have continuing workers compensation rights in relation to the right hip, should he need to rely on those rights.

231. It follows from the above that I must dismiss the plaintiff's application for an extension of time. There is no answer to the defendant's reliance on the time bar. There must be judgment for the defendant on the claim in relation to the 2013 Injury.

Fact finding

The 2013 Injury

232. The principal witness in the plaintiff's case was the plaintiff himself. Overall, I reached a similar conclusion as to the plaintiff's character and presentation as that reached by Mr Sutton. In particular, it seemed to me that the plaintiff is a young man who has real potential to be retrained into a management stream where he can make use of his electrical training and experience. However, I must say that I found the plaintiff's explanations of the inconsistencies between what was recorded in contemporaneous documents and indeed even in some of the histories more recently given to medico-legal assessors hard to accept. This was particularly so in relation to the 2013 Injury.

233. It seemed to me that the plaintiff had unconsciously reconstructed the relative significance of the activities he was performing in 2012 and 2013 with the advantage of hindsight and in the context of the litigation. I do not doubt that he believed the evidence he gave during oral evidence that "the pillars, the trenches and the street lights was the majority of my work and gave me the biggest pain increases."

234. However, it did seem to me that his explanation (see paragraph [79] above) for why he did not include a reference to the trenches in his workers compensation claim form (Exhibit D1, dated 23 January 2014) was infected by a somewhat self-serving rationalisation. If the reality was that the major contribution to his evolving hip pain

during the previous several months was getting in and out of trenches, why did he not say so in the claim form?

235. The first doctor the plaintiff attended was probably Dr Horsley at the Aspen Medical practice on 8 January 2014. Dr Horsely recorded that the plaintiff gave a history that "particular positions" made his hip pain worse. He noted "? Hip injury, ? Hip pain, ? Cause." He also noted a plan of "Not to work in trenches". That suggests that the plaintiff was having some difficulty in trenches, at least by that time.

236. The plaintiff then attended Dr Warfe, as to which see paragraphs [89]-[90] above. It seems to me that the activity which the doctor elicited from the plaintiff as the most significant at that time in terms of pain was driving. The plaintiff could not remember the consultation, but later said that he had told Dr Warfe that the problems he had included climbing in and out of trenches. It may be that the plaintiff had a recollection of the previous consultation with Dr Horsely. However, I have some difficulty in accepting his evidence on this point.

237. On 23 January 2014, the plaintiff saw Dr Suthayakhom at Aspen Medical. The cross-examination on this consultation is summarised in paragraph [92] above. The relevant entry in the clinical record reads: "Aggrevates (sic): Driving is the worst if symptoms are present."

238. Making due allowance for the reservations about the accuracy of clinical notes as discussed by Basten JA in *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 and *Mason v Demasi* [2009] NSWCA 227, I have considerable difficulty in accepting the accuracy of the plaintiff's current recollection as to the relationship between his pain and particular work activities in the light of these records.

239. This difficulty is compounded by the history which the plaintiff provided to Dr Kelman on 16 April 2014. It will be remembered that the plaintiff saw Dr Kelman at the request of Allianz Insurance in a medico-legal context. The cross-examination as to the history provided at that time is summarised at paragraphs [83]-[85] above. It seems clear to me from the contents of the history recorded by Dr Kelman that as at April 2014 the plaintiff considered that the most significant work activity in terms of causing pain in the right hip/lower back area was driving. It is apparent that the plaintiff thought that there was a problem with the seat in his (presumably, work) vehicle. He saw the other activities of crouching, squatting and getting in and out of trenches as secondary, aggravating, factors.

240. In the light of the contemporaneous records, and having regard to the passage of time, it seems to me that the evidence of factual causation here is far from straightforward. The opinions of the medical witnesses relied on by the plaintiff are not determinative because they are dependent on the history accepted by each doctor which does not in any case take into account the contemporaneous records referred to above. Also, it is far from clear that the plaintiff's reference to "swinging his leg up" to get out of trenches comprehended the extreme hip joint movements apparently assumed by Dr Le Leu in his ultimate opinion on this issue. However, because of the conclusion I have reached as to the potential prejudice suffered by the defendant arising from the delay in the plaintiff's claim as discussed above I do not see it as appropriate or necessary for me to make a final determination of the issue of causation in relation to the 2013 Injury.

The 2017 Injury

241. In relation to the 2017 Injury, I am not as concerned about the inconsistencies between medical notes and histories given to treating and medico-legal doctors and the plaintiff's description of the sequence of events on 16 and 17 December 2017 and the following weeks. The plaintiff's evidence on this issue was cogent and was supported to a considerable extent by the evidence of Ms Bailie as to the plaintiff's complaints when he came home from work on the evening of 16 December 2017 (see paragraph [135] above). The natural probabilities are also strongly against the counter-factual hypothesis pressed by Mr Shillington. That is, that the severe injury to the plaintiff's back occurred when he lifted his four-year-old daughter on 17 December 2017, and not when he was lifting the 400 kg switchboard on 16 December 2017.

242. I should say that I found Ms Bailie to be a clear and straightforward witness. I accept her evidence, both as to the plaintiff's apparent pain levels and his complaints, and also as to the consequences of his injuries for their relationship and the division of domestic tasks.

243. I accept that the plaintiff did suffer a significant onset of low back pain while he was lifting the 400 kg switchboard with three other men, and that although he had been lifting heavy cables earlier that day, he had not suffered any back pain while he was performing those duties. I also accept that the plaintiff was lifting the switchboard in the posture demonstrated by the diagram at page 69 of Exhibit P6.

244. Having regard to the nature of that lift and the intensity of pain described by the plaintiff (corroborated by Ms Bailie later that day), I find that the plaintiff probably did suffer a prolapse of the L5/S1 intervertebral disc while lifting the switchboard. I accept Dr Pell's evidence on that issue. I do not accept the opinion of Dr Sabetghadam. That doctor seemed to me to insist on a strict scientific analysis to the point of pedantry. His opinion on causation, in my view, is contrary to the common sense analysis which accords with Dr Pell's view. I should say that I have come to the same conclusion with respect to the insistence by Dr Sabetghadam that the 2017 and 2018 injuries constituted nothing more than short term aggravations of pre-existing abnormalities in the plaintiff's anatomy. I prefer the opinions of Dr Le Leu, Dr Pell and Dr Bodel as to the nature of these injuries.

245. On that basis, I accept that the incident when the plaintiff had further pain while lifting his daughter should be understood as the aggravation of an already injured L5/S1 disc. It was the kind of aggravation which was the natural and probable consequence of the injury suffered the previous day.

246. Insofar as the defendant suggested that the plaintiff suffered a new intervening event by lifting an 80 kg weight at the gym in or around September 2018, I come to a similar conclusion. That is, the gym incident was itself the natural consequence of the original disc injury on 16 December 2017. It will be remembered that the plaintiff was unable to recall lifting that much. However, even if he was, it is clear that he was doing so as part of a rehabilitation program which was itself put in place as a consequence of the 2017 Injury. He only lifted weights as prescribed by those running that program.

247. I will address the consequences for the plaintiff of the 2017 Injury when I deal with the issue of damages below.

The 2018 Injury

248. In relation to the 2018 Injury, there is some force in the submissions made by Mr Shillington for the defendant. However, I also accept that it would have been difficult for the plaintiff to disentangle the causes of the pains which he was experiencing through the left hip and down the left leg in the weeks before 15 October 2018. I accept that he probably saw that pain as related to his back condition, at least until fairly shortly before 15 October. I note that Mr Shillington's cross examination-of the plaintiff in relation to the 11 October 2018 clinical note of Mr Slater at Elite assumed that it was the plaintiff providing the history which is recorded in that note – see paragraphs [113]-[114] above. However, on reflection it seems to me more likely that the note reflects the contents of a telephone call between Mr Slater and Ms Travers from Allianz Insurance. It is true that the plaintiff accepted that he was at the consultation. However, the pattern of the clinical note is simply not consistent with that. There is no reference to reason for the attendance, subjective complaints, objective findings, or the treatment plan as would normally be the case. Rather, it seems to me, that the note reflected information which was provided to Mr Slater by Ms Travers. I suspect that the "doctor" referred to, who thought that the pain might be hip related, was Dr Praet. (Ms Travers had referred the plaintiff to Dr Praet. The plaintiff saw him twice in September 2018.) I can find no evidence that Dr Praet had conveyed his suspicion to the plaintiff.

249. Nonetheless, it must be said that the clinical note of Ms Dennis on 17 October 2018 (see paragraph [115] above) is troubling. One explanation is that Ms Dennis simply made an error either due to miscommunication or mis-typing, in recording "Sunday" instead of "Monday". That explanation would make sense of the evidence of the plaintiff that he had told Ms Dennis of the incident on 15 October 2018, which was a Monday, and that he could not recall any separate incident on the Sunday. So far as I can see there is no other evidence that the plaintiff suffered any injury to his left hip on Sunday, 14 October 2018.

250. This issue could easily have been clarified. The plaintiff gave evidence that he had attended a GP at the Isabella Medical Centre on 15 October 2018. It might be expected that the clinical note of that attendance would have recorded the reason for the consultation. For reasons which were not explained, and notwithstanding the tender of over 600 pages of clinical records, those from the Isabella Medical Centre were not tendered. Of course, those notes could have been tendered by either party, so I do not propose to draw an adverse inference either way.

251. I should say that the plaintiff did not assist the clarity of his case by way in which he completed his workers compensation claim form on 19 December 2018 (see pages 10 to 12 of Exhibit D1, and paragraphs [118]-[119] above). The answers to the questions on the form do rather suggest that the hip injury was caused by the general nature and conditions of the plaintiff's work, rather than by a specific incident. The plaintiff's explanation as to what he intended to convey by those answers was not particularly convincing. However, I thought that this was more an example of a failure to appreciate the significance at the time of a specific incidence of injury against a background of developing pain symptoms, rather than evidence that there had been no such incident.

252. It is important to note that the defendant did not directly attack the plaintiff's evidence that he had suffered an injury in the course of his work at the ANU on 15 October

2018. Rather, the thrust of the defendant's case was that the plaintiff had been suffering left hip pain, probably due to the deterioration of the hip joint itself, for some weeks before the 15 October 2018 incident. In that context, the defendant argued that the injury on that day was a relatively minor aggravation of the evolving condition in the hip.

253. As noted above, I did not regard the plaintiff as a dishonest witness. Ultimately, I accept his evidence as to the occurrence of sharp hip pain while he was working on the switchboard at the ANU on 15 October 2018. I consider that the reference to the "Sunday" in Ms Dennis' clinical note probably was an error, and that it should have been "Monday". It seems to me that that conclusion more accords with the probabilities than the proposition that there had been another separate injury on the Sunday.

254. It follows that I accept the plaintiff's evidence that the sharp pain came on while he was kneeling on the top of the switchboard and leaning forward and down to access the internal parts of the switchboard, as summarised in paragraph [44] above. I also accept that the dimensions of the switchboard were as described in the qualifying letter sent to Mr Lawrance on 30 January 2020 (see Exhibit P6, page 97). It was there stated that the switchboard measured approximately 2.5 m in height, 0.7 m in width and 0.5 m in depth. There was no challenge to this description and no other evidence as to the height of the switchboards in question. That figure for the height accords with the evidence that the plaintiff needed a ladder to access the top of the switchboard. It is also consistent with its overall proportions having regard to the photograph in Mr Lawrance's report at pages 74 to 75 of Exhibit P6.

255. Having come to that conclusion however, I should also say that I am persuaded that the plaintiff was developing left hip pain similar to that which he had suffered in his right hip in the lead up to 15 October 2018. I also accept that he probably told Ms Dennis that Dr Burns had told him that there was a risk that he may suffer problems in his left hip in the future. I suspect that the plaintiff had forgotten the latter, and was surprised when Mr Shillington put it do him in the course of the cross-examination.

256. As with the 2017 Injury, I will deal with the consequences of the 2018 Injury in addressing the issue of damages.

Liability

257. As noted above, the defendant conceded that if I found that the plaintiff had suffered an injury to his lower back in the course of lifting the switchboard at Canberra Airport on 16 December 2017, it followed that the injury was caused by an unsafe system of work. That concession is not surprising. The system of work which required four men to lift such a large weight, particularly in the awkward conditions created by the presence of the trench was, it seems to me, extremely hazardous. Indeed, I note the reference on page 8/11 of the injury notification form dated 16 January 2018 (Exhibit D2) to the comment, apparently by the supervisor responsible for the investigation of the injury, that "Machines/equipment" was a factor in the plaintiff's injury. The form states under "Reasons" (apparently from a drop-down menu) "Equipment suitability for task including ergonomics, safety and function." Under "Further reasons" it is noted "Equipment to better move switchboards has been ordered." This response was plainly too late for the plaintiff.

258. It follows that I find that the defendant was negligent in failing to provide appropriate lifting equipment to avoid the need for the plaintiff to manually lift the switchboard at the Canberra Airport on 16 December 2017.

259. The concession by the defendant, and the absence of any allegation in submissions of contributory negligence in relation to the 2017 Injury means that it is not necessary for me to address the breach of statutory duty claims in relation to that injury.

260. The defendant did not make a similar concession in relation to the 2018 Injury. Having said that however, it is apparent from the submissions of the defendant that the main focus was on the issue of causation. However, I have found that the plaintiff did suffer an injury to his left hip on 15 October 2018. It follows that it is firstly necessary to determine whether that injury occurred as the result of a breach by the defendant of its duty of care for the safety of the plaintiff.

261. In deciding whether or not there was such a breach, it is necessary to have regard to the criteria set out in ss 43 and 44 of the *Civil Law (Wrongs) Act*. Those sections provide:

> **43 Precautions against risk—general principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
>
> (a) the probability that the harm would happen if precautions were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
>
> (d) the social utility of the activity creating the risk of harm.
>
> **44 Precautions against risk—other principles**
>
> In a proceeding in relation to liability for negligence—
>
> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
>
> (b) the fact that a risk of harm 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 it was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

262. In relation to s 43(1)(a) the relevant risk here is the risk that a worker could suffer an injury due to the need to adopt an awkward posture so as to complete the duties of his/her work in connecting the switchboards at the ANU. The evidence of

Mr Lawrance is a little confusing on this point. At paragraph 6.1.3 of his report he said:

> **Third injury incident of 15 October 2018 - Left hip**
>
> [The plaintiff] worked from a ladder to access the open top of the switchboard to install key equipment into a switchboard such as busbars.
>
> This required prolonged and sustained reaching and stretching from the ladder or squatting on a board across the open top of the switchboard.
>
> This work also required the frequent lifting and carrying of tools and materials weighing up to 15 to 20 kg up the ladder.
>
> In my opinion this work presented reasonably foreseeable hazards that included work-related risk factors that could give rise to low back pain and injury, including:
>
> - Lifting and forceful movements,
> - Awkward postures, bending and twisting,
> - Heavy physical work.

263. It is apparent that although Mr Lawrance was dealing with the 2018 Injury, he has referred to the risk of injury to the lower back. However, it seems reasonable to me to extend that risk to a soft tissue hip injury given the rather extreme posture described by the plaintiff. In the course of submissions, Mr McIlwaine SC confirmed that the plaintiff was kneeling on the top of the switchboard and leaning forward and down to work in the open access panel at the towards the top end of the switchboard, as shown in the photograph at page 74 of Exhibit P6. That is, I should say, the way that I understood his evidence, although it was not as clear as it might have been. It is immediately apparent that working in this way for any length of time created a range of not insignificant risks of injury, which included a soft tissue injury to one or other of the hips.

264. I am satisfied that s 43(1)(a) and (b) of the *Civil Law (Wrongs) Act* are satisfied in the case of the 2018 Injury.

265. The question of whether a reasonable person would have taken precautions against the relevant risk requires attention to be given to each of the matters set out in s 43(2). I will deal with those in turn.

266. In relation to s 43(2)(a), there is no evidence as to the magnitude of the risk. Indeed, it must be conceded that the risk which was much more likely to result in an injury to a worker engaged in the system of work in question, was the very real risk that the worker might have fallen from the top of the switchboard. However, I conclude having regard to the opinions expressed by Mr Lawrance in his report that enough is known about the possibility of injury when a person is engaged in repetitive or lengthy tasks requiring awkward or strained postures to enable the conclusion that there was a more than trivial probability of the plaintiff suffering a soft tissue strain injury to his hips and/or lower back in performing his duties from the top of the switchboard. I come to that conclusion assuming that the plaintiff had no particular predisposition to injury in the hips, although the history here rather suggests that he did have such a predisposition.

267. As to s 43(2)(b) it seems to me that the likelihood of a serious injury arising from a postural strain would be fairly low. It would be reasonable to expect such an injury to be at the lower end of the range in terms of the consequences for the injured person.

268. The precaution suggested in the plaintiff's case was the provision of a lightweight mobile scaffold or platform ladder (see Mr Lawrance at page 87, Exhibit P6), or a scissor lift (see Exhibit P7). I note that the latter would have cost $405 to hire for a day. Either way, having regard to the nature of the task to be performed, it seems to me that the burden on the defendant to provide a safe alternative means of performing the connection task was relatively small.

269. Section 43(2)(d) is not relevant here.

270. The parties have not specifically suggested that any other considerations are relevant to the assessment to be made under s 43(2)(c), although it seems to me that the fact that the defendant was the plaintiff's employer and that the evidence disclosed that the defendant was a corporation which installed and maintained the electrical infrastructure of the ACT are relevant matters.

271. On the one hand, the risk of a strain injury might have been small, and the consequences of such an injury might be assessed at the lower end of the range of seriousness. However, the fact that the burden of providing a safe means of performing the connection task to be completed by the plaintiff was slight leads me to the conclusion that a reasonable person in the position of the defendant would have taken one or other of the precautions suggested in the plaintiff's case.

272. I have borne in mind the principles set out in s 44 *Civil Law (Wrongs) Act*, however having regard to the above analysis, I conclude that the defendant was negligent in failing to implement a system of work which avoided the need for the plaintiff to fit the busbars from the top of the switchboard in the way he described.

273. Having regard to the fact that the defendant did not concede negligence in relation to the 2018 Injury, and in case I am wrong in my analysis of its liability under the common law, I will address the plaintiff's causes of action under the *Scaffolding and Lift Regulation* and the *WHS Regulation*.

274. In relation to the former the plaintiff relies on s 73(1)(b) which relevantly provides:

> Any person who directly or by his or her servants or agents (including every independent contractor from time to time engaged in that work) carries out any building work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in the building work and for this purpose, without limiting the generality of the foregoing, the person shall –
>
> …
>
> (b) provide and maintain safe means of access to every place where any person has to work at any time…

275. The defendant puts in issue that the plaintiff was engaged in "building work" at the time of the 2018 Injury. However, having regard to the width of the definition of that term in the *Scaffolding and Lifts Act 1912* (ACT), which applies to the *Scaffolding and Lifts Regulation* pursuant to s 148 of the *Legislation Act 2001* (ACT), I find that the plaintiff was indeed engaged in building work. He was performing work on equipping the building at the ANU where the switchboards were located. I have little doubt that once connected, the switchboards became fixtures within that building. In that respect I adopt the approach taken by Mossop AsJ (as his Honour then was) in *Meyer v Cool Chilli Pty Ltd* [2015] ACTSC 336; 302 FLR 407 at [67].

276. In my view, the place where the plaintiff had to perform his work here was the internal part of the switchboard where he had to connect the busbars. Having regard to my finding that the posture required of the plaintiff to access that place was unsafe it must follow that the defendant failed to provide safe access in breach of s 73(1)(b).

277. Having reached that conclusion it is, again, not strictly necessary for me to determine the *WHS Regulation* claim. However, in case I am wrong in my analysis of the Scaffolding and Lifts claim I propose to deal with the work health and safety claim. (I should not for completeness that the defendant did not submit that I should find contributory negligence in relation to the 2018 Injury).

278. Counsel for the plaintiff referred me to the decision of the ACT Court of Appeal in D'Arcy v Caltex [2019] ACTCA 27; 347 FLR 367 (***D'Arcy***) at [107]-[110]. The Court said in those paragraphs:

> [107] In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others will be regarded as involving a correlative private right: *O'Connor v SP Bray Ltd* [1937] HCA 18; (1937) 56 CLR 464 (O'Connor) at 477-478; *John Pfeiffer Pty Ltd v Canny* [1981] HCA 52; (1981) 148 CLR 218 at 231. That is largely dependent upon the policy of the provision, rather than the meaning of the instruments: *O'Connor* at 478. Such a right is independent of negligence. The statute provides the right and the common law provides the remedy: *Downs v Williams* [1971] HCA 45; (1971) 126 CLR 61 at 74.
>
> [108] The correlative private right will arise where the legislature creates a duty intended to protect a specified class of persons and the rights of a person within that class are infringed. The fact that a provision incorporates a penalty for breach does not necessarily exclude a right to sue for breach of statutory duty: *Darling Island Stevedoring & Lighterage Co Ltd v Long* [1957] HCA 26; (1957) 97 CLR 36 at 53; *Sovar v Henry Lane Pty Ltd* [1967] HCA 31; (1967) 116 CLR 397 at 405-406.
>
> [109] Where the terms of the legislation creating the duty are both beneficial and penal, it is necessary to extract from the legislation the fair meaning of the words. In doing so it must be remembered that the legislation is a remedial measure passed for the protection of a particular class of persons. It must not be construed so strictly as to deprive the protected class of persons of the protection that the legislature intended they should have. Because of that, the rule that penal statutes should be strictly construed is clearly one of last resort. The process of construction must yield for all purposes a definitive statement of the incidence of an obligation imposed on the persons to whom it is directed: *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156 at 164-165. In other words, the measure of the duty does not change with the character of the proceedings taken to enforce it: *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249 at 252.
>
> [110] It may be the case that a provision prescribes the end but not the means. If the provision does not identify any specific precaution or measure which an occupier should take for the safety of others, it should not be construed as conferring a private cause of action: *McDonald v Girkaid Pty Ltd* [2004] NSWCA 297 at [177].

279. I will approach the plaintiff's claim here in the light of the principles stated in *D'Arcy*.

280. As I have indicated above, the defendant relied upon s 267 of the *WHS Act* to resist the imposition of any liability under the *WHS Regulation* sections relied on by the plaintiff (attached and marked "A" is an annexure containing the text of ss 34, 35, 36 and 60 of the *WHS Regulation*). That section provides:

> **267 Civil liability not affected by this Act**
>
> Except as provided in part 6 (Discriminatory, coercive and misleading conduct), part 7 (Workplace entry by WHS entry permit-holders) and division 13.7 (WHS civil penalty provisions), nothing in this Act is to be construed as—

(a) conferring a right of action in a civil proceeding in relation to a contravention of a provision of this Act; or

(b) conferring a defence to an action in a civil proceeding or otherwise affecting a right of action in a civil proceeding; or

(c) affecting the extent (if any) to which a right of action arises, or a civil proceeding may be brought, in relation to breaches of duties or obligations imposed by regulation.

281. In *D'Arcy*, the Court referred to paras (b) and (c) of s 267 and said (at [87]) "The relationship between these two limbs of s 267 may be problematic." However, given the way the issue arose in that case, it was not necessary for the Court to determine the precisely how the two paragraphs should operate. Indeed, it appears that the issue has not been determined authoritatively in the ACT up to the present.

282. It is important to note that that *WHS Act* and the *WHS Regulation* were introduced with the express intention of harmonizing work health and safety laws in Australia as part of the Council of Australian Governments' National Reform agenda; see the General Outline at pages 2 to 3 of the Revised Explanatory Statement, Work Health and Safety Bill 2011 (Cth). This is important because it appears that s 267(c) has its origins in the Victorian work safety legislation. There certainly was no equivalent provision in the *Occupational Health and Safety Act 1989* (ACT) (see s 223) or the *Work Safety Act 2008* (ACT) (see s 225).

283. In *Acir v Frosster Pty Ltd* [2009] VSC 454 Forrest J referred to the way in which s 28 of the *Occupational Health and Safety Act 1985* (Vic) had been applied apparently over many years in Victoria. Section 28 provided:

28. Civil liability not affected by Part 3

Nothing in this Part shall be construed as—

(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part;

(b) conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings; or

(c) affecting the extent (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by the regulations.

284. His Honour rejected the argument that s 28 applied to prevent the plaintiff from maintaining a claim for damages for breach of regulations made under the Victorian Act; see [221]-[225].

285. A similar issue arose in *Govic v Boral Australia Gypsum Ltd* [2015] VSCA 130; 47 VR 430 (***Govic***). By the time of the events in question in that case the legislation under consideration was the *Occupational Health and Safety Act 2004* (Vic) and regulations made under that Act. Section 34 of the Act provided:

34 Civil liability not affected by this Part

Nothing in this Part is to be construed as—

(a) conferring a right of action in civil proceedings in respect of a contravention of a provision of this Part; or

(b) conferring a defence to an action in civil proceedings or otherwise affecting a right of action in civil proceedings; or

(c) affecting the extent (if any) to which a right of action arises, or civil proceedings may be taken, with respect to breaches of duties or obligations imposed by the regulations.

286. The requirements of the regulations in question in *Govic* were very similar to those arising under the regulations relied on by the plaintiff in the present case. The Victorian Court of Appeal analysed the history of the Victorian work safety legislation at some length at paragraphs [138]-[150]. After setting out the competing submissions as to the effect of s 34, the Court concluded:

> [166] Section 34 of the 2004 Act draws a clear distinction between the consequences of a contravention of a provision of the Act as distinct from a breach of a duty or obligation imposed by the regulations made under that Act. While conduct which constitutes a breach of the Act cannot give rise to a private right of action, conduct which constitutes a breach of a duty or obligation imposed by a regulation may do so depending on the application of the principles set out at [122] to [126] above. Section 34(b) also recognises that criminal and civil liability are not co-extensive, in the sense that conduct which does not attract a criminal penalty because of the applicability of a defence may nevertheless give rise to civil liability.
>
> (Footnotes omitted).

287. Although the legislative history in Victoria is appreciably different from that of the Territory, the fact that the precise provision which has been interpreted in Victoria as preserving an injured person's private right of action for a breach of a regulation designed to safeguard just such a person was added to the section otherwise precluding civil proceedings for damages under what was then the new *WHS Act* is powerfully persuasive that s 267(c) should be interpreted in the same way.

288. In that context, I accept the submission of the plaintiff that s 267 of the *WHS Act* does not prevent him from pursuing his claims for breach of statutory duties under ss 34, 35, 36 and 60 of the *WHS Regulation*.

289. Having regard to the terms of those regulations and the principles extracted above from *D'Arcy*, I am satisfied that the defendant was in breach of ss 34, 35 and 36 in failing to identify the risk involved in working from the top of the switchboard, and failing to minimize the risk by providing a scissor lift or the like. I also conclude that, in breach of s 60, the defendant failed to appropriately manage the risk to the plaintiff of a musculoskeletal disorder arising from the hazardous manual task of the plaintiff trying to fit busbars and the like from the top of the switchboard.

Damages – The 2013 Injury

290. In the event that I am wrong in my decision in relation to the plaintiff's extension in time application, and the plaintiff obtains a favourable decision on liability in relation to the 2013 Injury, I propose to provide my assessment of damages for that injury.

General damages and interest

291. As can be seen from the submissions of the parties, there is no great difference between them. The plaintiff suffered from significant symptoms and disability for about 1.5 years. He has suffered from some low grade symptoms since that time. However, so far as I can see, the right hip condition has not interfered with his work or domestic life. I would award $60,000 for general damages of which I would allocate $50,000 for the past and $10,000 for the future.

292. For some reason which was not explained, Mr Shillington did not include a figure for interest under this head. I can see no reason why interest should not be awarded on the usual basis. I would allow 2% on $50,000 for 7 years, which calculates to $7,000.

Past out of pocket expenses

293. That figure was agreed in the sum of $27,356.

Future out of pocket expenses

294. The plaintiff claimed $5,000 on the basis that the plaintiff has had a “less than perfect” outcome from the 2014 operation. The defendant submitted that no sum should be awarded under this head. While it is true that the plaintiff did complain of some ongoing symptoms in the right hip, there is no evidence that he has sought treatment for it since the end of his rehabilitation in early 2015, nor did it interfere with his work capacity during the years before his 2017 Injury. So far as I can see, there is no suggestion in the medical evidence of a need for any further treatment of the 2013 Injury. I am not persuaded that it would be appropriate to award any sum under this head.

Past loss of earning capacity damages

295. This was agreed in the sum of $30,206. This was paid as workers compensation so there is no claim for interest.

Fox v Wood component

296. This was agreed in the sum of $12,564.

Future loss of earning capacity

297. No claim was made under this head.

Domestic care and assistance and interest

298. The plaintiff claimed the sum of $19,600 based on the need for assistance at the rate of 10 hours per week for a period of 56 weeks from December 2013 to January 2015. The defendant, on the other hand, suggested that only $6,000 should be awarded under this head. The basis for that figure was not disclosed.

299. I was impressed by the evidence of Ms Bailie on this issue (see paragraphs [132]-[140]). Her estimations appeared to me to be considered and reasonable, and I accept them. The rate of $35 per hour was agreed between the parties as the appropriate rate for the calculation of damages under this head. Doing the best I can, I calculate this claim on the basis of 8 hours for 26 weeks, 10 hours for 13 weeks and 2 hours for 15 weeks. On this basis, I would award $14,000. I was informed that the figure of $35 per week has been in place for many years now as an accepted figure for damages under this head. On that basis, it seems to me that it is appropriate to award interest at the rate claimed by the plaintiff. I would allow 3% for 7 years as claimed resulting in the figure of $2,940.

300. No claim was made for future damages under this head.

Loss of Superannuation

301. The plaintiff claimed a loss of $3,474 based on 11.5% of the past loss of earning capacity figure. The defendant submitted that the figure of $3,322 would be appropriate based on 11%. Having regard to the date of the loss I would award the figure suggested by the defendant. The plaintiff claimed interest on this award. The defendant submitted that interest should not be awarded. I was not referred to any authority on the issue other than the decision of *Johnson* referred to at paragraph [198] above.

302. The conventional method of calculating the value of loss of superannuation contributions of calculating 11% of the past loss of earning capacity figure represents something of a short cut compromise to avoid the need for complicated actuarial analysis. I see considerable value in that approach. However, so far as I can establish, the adoption of this percentage does not take account of the fact that in a case such as this the loss suffered by the plaintiff occurred many years in the past. On that basis it seems to me appropriate to allow interest as claimed – that is at the rate of 3% for 7 years. I would therefore allow $698.

Summary

303. In summary, had the plaintiff succeeding in his claim in relation to the 2013 Injury I would have awarded him damages as follows:

Head of Damage	**Amount**
General Damages	$60,000.00
Interest	$7,000.00
Out of Pocket Expenses	
Past	$27,356.00
Interest	
Future	
Loss of Earning Capacity	
Past	$30,206.00
Interest	
Future	
Domestic Care/Assistance	
Past	$14,000.00
Interest	$2,940.00
Future	
Loss of Superannuation	$3,322.00
Interest	$698.00
Fox v Wood	$12,564.00
Total	**$158,086.00**

Damages – The 2017 Injury

General damages and interest

304. It is clear that the injury to the plaintiff's lower back has had major consequences for his life. It is this injury which, given the largely successful treatment of his hip

conditions, has terminated his career as an electrician. It has left him with a significant degree of pain and disability, which he will likely experience for the rest of his life. While I accept that the plaintiff's pre-existing spondylolisthesis may have predisposed the plaintiff to injury, particularly given the heavy nature of the work he was doing, there is no way of assessing with confidence when, or even if, such an injury might have occurred.

305. I also take account of the disruption in the plaintiff's home life and in his relationship with Ms Bailie. Although Mr Sutton did not diagnose a frank psychological disorder, it was clear from the way in which both the plaintiff and Ms Bailie gave their evidence that the plaintiff's 2017 and 2018 injuries have caused them enormous stress and anguish. That has resulted in the break-down of the physical and emotional relationships between them.

306. The plaintiff submitted that the figure of $200,000 was appropriate for this injury, whereas the defendant argued that $100,000 would be sufficient. I am not persuaded that either of these is appropriate. I am conscious that there is a degree of overlap between the effects on the plaintiff of the 2017 and 2018 injuries. Taking due account of that overlap I award general damages of $140,000 for the 2017 Injury. Of that I assess $70,0000 for the past and $70,000 for the future. I allow interest at 2% for 2.85 years on the past amount, which I round up to $4,000.

Past out of pocket expenses

307. That figure was agreed in the sum of $49,807. I will round this up to $49,840 to account for a small amount of interest on the $400 which was not covered by workers compensation payments.

Future out of pocket expenses

308. The plaintiff claimed $102,640 on the arithmetical basis set out at footnote 24 to the plaintiff's written submissions. The defendant submitted that $15,000 would be an appropriate award under this head. I am not persuaded that damages here should be awarded on the arithmetical basis suggested. While I accept that the plaintiff's back condition will require regular medical treatment by GPs with intermittent periods of physiotherapy type treatment, I do not consider that this can be converted into a straightforward arithmetical calculation. I would allow the sessions with Dr English as claimed, and I would allow a buffer for the medications which the plaintiff will require in the future. (The evidence is, again, not sufficient for an arithmetical calculation.)

309. The assessment of the claim for the operation on the plaintiff's low back is problematic. There is a reference in the Statement of Particulars to a cost of over $80,000 based on the contents of a publication which was attached to the Statement of Particulars as filed. This was not the subject of evidence and I treat the claim as just that. The only evidence as to the cost of the proposed surgery was that of Dr Pell who estimated the cost to be $25,000.

310. It is also not possible to be definite as to when this surgery will be required. The plaintiff made it clear that he would only undergo spinal surgery as a last resort. This is understandable having regard to the warnings he has been given about the potential consequences of a two level fusion from L4 to S1.

311. Given the range of uncertainties here, it is not possible to assess these damages on a mathematical basis. I propose to award the sum of $45,000 by way of a buffer to account for the plaintiff's future medical needs, including the need for surgical treatment.

Past loss of earning capacity damages and interest

312. This was agreed in the sum of $98,476. The plaintiff claimed interest on the amount of $56,524 which was not covered by the workers compensation incapacity payments. Interest is claimed at the rate of 3% for 2.85 years in the amount of $4,833. I allow this claim.

Fox v Wood component

313. This was agreed in the sum of $18,468.

Future loss of earning capacity

314. The parties have agreed that the plaintiff would be earning, if he was working full hours and performing full duties, $2,113 per week net of tax, and that he is currently earning for 15 hours per week $680 net of tax. That results in a current loss of $1,433 net per week.

315. The plaintiff has shown himself to be motivated and hard working in the past. I am confident that once the stresses and uncertainties of the litigation are in the past he will reassess his career and seek to retrain so that he can use his undoubted skills and natural abilities in administrative or supervisory work where he is not required to perform the heavy physical duties which characterised his work as an electrician.

316. The plaintiff claimed damages under this head of $506,000 either on the basis as pleaded in the Statement of Particulars, or by reference to the alternative calculation at footnote 16 to his written submissions. That latter calculation assumes the need for 3 years out of the workforce to retrain and a further loss of 50% of his pre-injury earnings for 4 years thereafter.

317. The defendant submitted that the plaintiff should be awarded a buffer of $100,000. I do note that the defendant would also allow a buffer of $50,000 for the 2018 Injury, although the plaintiff makes no claim for future loss of earning capacity damages in relation to that injury.

318. I consider that the plaintiff should be allowed damages here on the basis that he will require 2 to 3 years to retrain and that there will thereafter be a lag before he returns to the level of his pre-accident earnings. Doing the best I can, I allow $300,000 to cover the total loss during the period of the plaintiff's retraining and a buffer of $150,000 for his potential losses thereafter. I award total damages under this head of $450,000.

Domestic care and assistance and interest

319. The plaintiff claimed the sum of $37,765 for the past based on the need for assistance at the rate of 10 hours per week for the periods of 17 December 2017 to 15 October 2018, and then from 5 August 2019 to the present. The plaintiff submitted that the gap between October 2018 and August 2019 was the time during which it

was reasonable to attribute the plaintiff's incapacity and need for assistance to the 2018 Injury.

320. The defendant argued that $15,000 should be awarded under this head. However, I did not understand the defendant to disagree with the necessarily somewhat arbitrary allocation between the effects of the 2017 and 2018 injuries.

321. Having regard to the evidence of Ms Bailie, I accept the approach advocated by the plaintiff and I award the amount of $37,765 accordingly. I also allow interest as claimed in the sum of $3,329.

322. In relation to the future the plaintiff claimed $436,950 based on the proposition that the plaintiff will require 10 hours assistance for the rest of his life. However, the duration of the claim is then reduced to age 60 to account for the prospect that the plaintiff's pre-existing abnormality in the lower spine would have led to a need for domestic assistance in any event. This claim was made at the rate of $45 per hour, which is the rate agreed between the parties in relation to future care and assistance.

323. The defendant submitted that a very modest buffer of $15,000 should be allowed.

324. There is some attraction in the approach adopted by the plaintiff, having regard to the likelihood that the plaintiff will need some degree of assistance with the performance of heavier domestic tasks for the rest of his life. I also accept that there must be some discount for the risks that that need might well have arisen earlier than otherwise would have been the case having regard to the plaintiff's pre-existing back condition.

325. However, I do not accept that the plaintiff will require 10 hours' assistance on an ongoing basis. I note that Dr Le Leu assessed the plaintiff's need at 2 hours per week plus an allowance for gardening on a seasonal basis. While I accept that Ms Bailie has been shouldering the burden of caring for the family's domestic needs to the tune of an extra 10 hours per week, I note that Olivia is now 7 years of age and Siena is 5 years of age. It may be expected that as the girls move into teenage years the need for domestic tasks to be performed for them will reduce. Assuming that the plaintiff and Ms Bailie are able to mend their relationship it might be expected that over time when the girls become independent and move out of home the couple might well move into a smaller dwelling requiring less by way of upkeep, cleaning and the like. The imponderables here rather mitigate against the calculation proposed on behalf of the plaintiff.

326. I consider that the level of care required by the plaintiff will taper off over the next 10 years or so to something closer to the level assessed by Dr Le Leu. In that context, I propose to award damages for the future under this head by reference to the assumption that the plaintiff will require 5 hours per week for 10 years and thereafter a buffer based on the assumption that the plaintiff will require assistance at the rate of 2 to 4 hours per week to age 60.

327. I calculate the first part of this approach as follows: 5hrs/wk x $45 x 452 = $101,700. The plaintiff is now 32 years of age. An award of 18 years at 3 hours per week at the rate of $45 would be $98,250. Allowing for deferral for 10 years leads to the following: $98,250 x 0.744 = $73,120. Having regard to all of the circumstances, it seems to me that these figures could slightly undervalue the plaintiff's future needs. Doing the best I can to deal with the variables here, I award $200,000 to account for the risk that the

plaintiff will need periods of slightly greater assistance in order to assist him in remaining full time in the workforce.

Loss of superannuation and interest

328. The plaintiff claimed $11,325 for his past loss. This was based on 11.5% of the figure for past loss of earning capacity. Interest was claimed at 3% for 2.85 years. The defendant would allow past loss at the rate of 11% only.

329. The figure of 11% of the past loss of earning capacity award has been accepted since the decision in *Najdovski v Crnojlovic* [2008] NSWCA 175; 72 NSWLR 728 (***Najdovski***) as being the appropriate way to assess damages for loss of superannuation. This avoids the more complicated calculations required to work out the true value of 9% of a plaintiff's gross loss, where 9% is the minimum required employer contribution under the *Superannuation Guarantee (Administration) Act 1992* (Cth). Of course, since *Najdovski* the minimum percentage figure has increased incrementally to the current figure of 9.5%. The plaintiff has provided no authority for the increase from 11 to 11.5%, and I have not been able to find any cases applying an increase to the 11% figure. However, it does seem to me that the increase in the statutory minimum in recent years does warrant a slight increase to the conventional figure. I therefore award damages for loss of superannuation in the sum of $11,325. For the reason given in paragraph [302] above, I award interest on that figure as claimed, in the sum of $968.

330. In relation to his future loss, the plaintiff claimed 13% of the amount awarded for future loss of earning capacity. The defendant contended that these damages should be calculated using the figure of 11%. The plaintiff argued that the higher figure should be used having regard to the proposed sequence of increases in the minimum percentage to 12% over the coming years.

331. It seems to me that there is insufficient certainty that the minimum percentage figure will in fact be increased as proposed. For the reasons given in paragraph [329] above, I award damages for future loss of superannuation at 11.5% of $450,000 giving a total of $51,750.

Summary

332. Having regard to the above I summarise my award of damages for the 2017 injury as follows:

Head of Damage	**Amount**
General Damages	$140,000.00
Interest	$4,000.00
Out of Pocket Expenses	
Past	$49,840.00
Interest	
Future	$45,000.00
Loss of Earning Capacity	
Past	$98,476.00
Interest	$4,833.00
Future	$450,000.00
Domestic	

Care/Assistance	
Past	$37,765.00
Interest	$3,329.00
Future	$200,000.00
Loss of Superannuation	$11,325.00
Interest	$968.00
Future	$51,750.00
Fox v Wood	$18,468.00
Total	**$1,115,754.00**

Damages – The 2018 Injury

General damages and interest

333. The plaintiff has suffered in his left hip a very similar injury to that suffered in his right hip. While it is apparent that the overall nature and conditions of the plaintiff's work must have been contributing to the worsening of the plaintiff's left hip before 15 October 2018, it is only that incident (which was probably the final tearing of the labrum), which is the subject of the plaintiff's claim for damages. The evidence does not allow a definite conclusion to be drawn as to whether that tearing was inevitable having regard to the prior symptoms, however it must be regarded as a real possibility. Be that as it may, the defendant must take the plaintiff as it finds him. In my view the incident on 15 October 2018 caused a significant increase in the plaintiff's symptoms and associated disability. I have elsewhere adopted the approach that the plaintiff's disability (including incapacity for work) was primarily caused by his hip condition until shortly after the repair operation performed by Dr Burns on 24 June 2019. I will award the damages in relation to this injury consistently with that approach.

334. The plaintiff submitted that the plaintiff has not had quite as good a result from the operation on the left hip as he obtained from his right hip. On this basis, it was argued that he should recover general damages of $90,000 for the 2018 Injury. The defendant argued that the appropriate award is $50,000.

335. I am conscious that it is now only 2 years since the 2018 Injury, and a little over 1 year since the surgical repair. As noted above, I am also conscious of the overlap between the 2017 and 2018 injuries. Having regard to these matters, and the development of left hip symptoms prior to 15 October 2018, I consider that the appropriate award is $50,000 as suggested by the defendant. I allocate half of that to past. I therefore allow interest at 2% x 2 years x $25,000 resulting in the figure of $1,000.

Past out of pocket expenses

336. That figure was agreed in the sum of $21,951. The plaintiff claimed interest on amounts which he was required to pay personally, as I understand it, largely in relation to his operation. His submission claimed interest at the rate of 3% for 2 years on $6,207. It is appropriate that he recover interest as claimed and I allow the amount of $408 accordingly.

Future out of pocket expenses

337. The plaintiff claimed $10,000 under this head. The defendant would allow nothing. It is true that the plaintiff indicated in his evidence that he did not regard the outcome of the operation on his left hip as having been as favourable as that of the right hip surgery. However, the medical evidence did not suggest that the plaintiff was going to require ongoing treatment of his left hip of any significance. I will allow a small buffer of $1,000 to cover the risk that the plaintiff will require some GP consultations and perhaps some rehabilitation type treatment of the hip in the future.

Past loss of earning capacity damages and interest

338. This was agreed in the sum of $63,316. I note that the period to which this loss relates is between 15 October 2018 and 5 August 2019. The plaintiff claimed interest on the amount of $21,615 which was not covered by the workers compensation incapacity payments. Interest is claimed at the rate of 3% for 2 years in the amount of $1,297. This seems an appropriate way to calculate the interest in the circumstances. I allow this claim.

Fox v Wood component

339. This was agreed in the sum of $19,314.

Future loss of earning capacity

340. The plaintiff made no claim under this head. This is appropriate given his evidence that but for his back injury he would have been able to return to his full normal duties.

Domestic care and assistance and interest

341. The plaintiff claimed the sum of $14,595 for the past based on the need for assistance at the rate of 10 hours per week for the period from 15 October 2018 to 5 August 2019. The defendant argued that $10,000 should be awarded under this head.

342. The plaintiff's claim accords with the evidence and is reasonable. I allow it. I also allow interest as claimed in the sum of $876.

343. The plaintiff made no claim for future care/assistance.

Loss of superannuation and interest

344. The plaintiff claimed $7,281 for his past loss. This is based on11.5% of the figure for past loss of earning capacity. Interest was claimed at 3% for 2 years. The defendant would allow past loss at the rate of 11% only.

345. For the reasons given in relation to the equivalent claim made in relation to the 2017 Injury, I accept the submission of the plaintiff. I award $7,281 for loss of superannuation and $437 for interest.

346. There is no claim for future loss.

Summary

347. Having regard to the above I summarise my award of damages for the 2018 Injury as follows:

Head of Damage	**Amount**
General Damages	$50,000.00
Interest	$1,000.00
Out of Pocket Expenses	
Past	$21,951.00
Interest	$408.00
Future	$1,000.00
Loss of Earning Capacity	
Past	$63,316.00
Interest	$1,297.00
Future	Nil
Domestic Care/Assistance	
Past	$14,595.00
Interest	$876.00
Future	
Loss of Superannuation	$7,281.00
Interest	$437.00
Future	Nil
Fox v Wood	$19,314.00
Total	**$181,475.00**

Conclusion

348. It follows from my decision to dismiss the plaintiff's application for extension of the limitation period in relation to the 2013 Injury that the defendant's reliance on the time bar must succeed. It is entitled to judgment in its favour in relation to that injury.

349. In relation to the other two injuries, the plaintiff has succeeded in establishing liability and must recover damages of $1,115,754.00 and $181,475, or $1,297,229 in total. No submission has been made that separate judgments should be entered in respect of the 2017 and 2018 injuries. In those circumstances I will enter judgment in favour of the plaintiff in the sum of $1,297,229.

350. I will hear the parties on the question of costs.

Orders

351. The orders of the Court are:

(1) The plaintiff's Application in Proceeding dated 20 October 2020 is dismissed.

(2) Judgment for the defendant in relation to the injury suffered by the plaintiff in 2013.

(3) Judgment for the plaintiff in the sum of $1,297,229.

I certify that the preceding three hundred and fifty-one [351] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Acting Justice Crowe

Associate:

Date:

Annexure A

Work Health and Safety Regulation 2011 (ACT)

34 Duty to identify hazards

A duty holder, in managing risks to health and safety, must identify reasonably foreseeable hazards that could give rise to risks to health and safety.

35 Managing risks to health and safety

A duty holder, in managing risks to health and safety, must—

(a) eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety—minimise those risks so far as is reasonably practicable.

36 Hierarchy of control measures

(1) This section applies if it is not reasonably practicable for a duty holder to eliminate risks to health and safety.

(2) A duty holder, in minimising risks to health and safety, must implement risk control measures in accordance with this section.

(3) The duty holder must minimise risks, so far as is reasonably practicable, by doing 1or more of the following:

(a) substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk;

(b) isolating the hazard from any person exposed to it;

(c) implementing engineering controls.

(4) If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls.

(5) If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment.

Note A combination of the controls set out in this section may be used to minimise risks, so far as is reasonably practicable, if a single control is not sufficient for the purpose.

60 Managing risks to health and safety—Act, s 19

(1) A person conducting a business or undertaking must manage risks to health and safety relating to a musculoskeletal disorder associated with a hazardous manual task, in accordance with part3.1(Managing risks to health and safety).

Note WHSAct—s 19 (see s 9).

(2) In determining the control measures to implement under subsection (1), the person conducting the business or undertaking must have regard to all relevant matters that may contribute to a musculoskeletal disorder, including—

(a) postures, movements, forces and vibration relating to the hazardous manual task; and

(b) the duration and frequency of the hazardous manual task; and

(c) workplace environmental conditions that may affect the hazardous manual task or the worker performing it; and

(d) the design of the work area; and

(e) the layout of the workplace; and

(f) the systems of work used; and

(g) the nature, size, weight or number of persons, animals or things involved in carrying out the hazardous manual task.