

# Supreme Court of New South Wales

## Hall v Adventure Training Systems Pty Limited and 2 Ors [2007] NSWSC 817 (2 August 2007)

New South Wales

### Supreme Court

**CITATION:** **1 Hall v Adventure Training Systems Pty Limited & 2 Ors**

**[2007] NSWSC 817**

**HEARING DATE(S):** 21, 22, 23, 24, 25, 28, 30 & 31 May 2007

**JUDGMENT DATE:** 2 August 2007

**JURISDICTION:** Common Law Division

**JUDGMENT OF:** Associate Justice Harrison

**DECISION:** **JUDGMENT (1) The first and second defendants are to pay the plaintiff the sum of \$1,457,711.91**

The Court orders that (2) The plaintiff's claim against the third defendant is dismissed

(3) The plaintiff is to pay the third defendant's costs as agreed or assessed. The first and second defendants are to pay the plaintiff's costs as agreed or assessed.

**CATCHWORDS:** Personal injury, fall, liability, damages, insurance policy

**FILE NUMBER(S):** SC 20150/2004

**PARTIES:** Norman Lindsay Hall - Plaintiff  
Adventure Training Systems Pty Limited - First Defendant  
Transfield Services (Australia) Pty Limited - Second Defendant  
QBE Insurance (Australia) Limited - Third Defendant

**LEGISLATION CITED:** [Law Reform \(Miscellaneous Provisions\) Act 1946 \(NSW\)](#) - [s 6](#)

**CASES & TEXTS CITED:** Burnie Port Authority v General Jones Pty Ltd [\[1994\] HCA 13](#); [\(1992-1994\) 179 CLR 520](#)

Cassidy v Ministry of Health [\[1951\] 2 KB 343](#)  
Chemetics International Ltd v Commercial Union Assurance Co of Canada (1984) 11 DLR (4th)  
Commonwealth v Introvigne [\[1982\] HCA 40](#); [\(1982\) 150 CLR 258](#)  
Ellis v Wallsend District Hospital Hospital [\(1989\) 17 NSWLR 553](#)  
GIO General t/as GIO Australia v Newcastle City Council [\(1996\) 38 NSWLR 558](#)

Griffiths v Kerkemeyer [1977] HCA 45; (1977) 139 CLR 161  
Kondis v State Transport Authority [1984] HCA 61; (1984) 154 CLR 672  
Legal & General Insurance Australia Ltd v Eather (1986) 6 NSWLR 390  
Leichhardt Municipal Council v Montgomery [2007] HCA 6; (2007) 81 ALJR 686  
Malec v J C Hutton Pty Ltd (No 2) [1990] HCA 20; (1989-90) 169 CLR 638  
Morris v CW Martin & Sons Ltd [1966] 1 QB 716  
New South Wales v Fahy [2007] HCA 20  
New South Wales v Lepore [2003] HCA 4; (2003) 212 CLR 511  
Van Gervan v Fenton [1992] HCA 54; (1992) 175 CLR 327  
Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40

**COUNSEL:** Mr S Campbell SC with Mr K Andrews - Plaintiff  
Mr R Gambi - Second Defendant  
Mr J Stevenson SC with Mr E Muston - Third Defendant

**SOLICITORS:** Wyatt Attorneys - Plaintiff  
N/A - First Defendant  
DLA Phillips Fox - Second Defendant  
Hicksons - Third Defendant

**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION**

**ASSOCIATE JUSTICE HARRISON**

**THURSDAY, 2 AUGUST 2007**

**20150/2004 - NORMAN LINDSAY HALL v ADVENTURE TRAINING SYSTEMS PTY LIMITED & 2 ORS**

**JUDGMENT (Personal injury, fall, liability, damages, insurance policy)**

**2 HER HONOUR:** The plaintiff seeks damages for personal injuries sustained on 29 January 2002, when during the course of his employment he was required to ascend the Endeavour High Ropes Course (the course) at HMAS Sterling in Western Australia, and while doing so a flexible steel rope broke causing him to fall to the ground suffering injuries primarily to his pelvis, left leg and left wrist. He says that as a result of the fall he now has trouble with his concentration and memory. He has not returned to full time work since the accident.

3 The plaintiff is Norman Lindsay Hall. The first defendant is Adventure Training Systems Pty Limited (Adventure Training). The second defendant is Transfield Services (Australia) Pty Limited (Transfield). The third defendant is QBE Insurance (Australia) Limited (QBE).

4 Adventure Training is a company based in Brookvale, New South Wales. Its involvement relates to fabrication, installation, maintenance and repair of certain aspects of the course and its component parts. Transfield is the contractor pursuant to a comprehensive maintenance contract with the Commonwealth of Australia in respect of Defence establishments situated in Western Australia, including HMAS Stirling.

5 It is the plaintiff's case that Adventure Training was the agent of Transfield during the performance by it of its work at HMAS Stirling, at least after 29 August 2000. QBE is the public and product liability insurer of Adventure Training pursuant to a contract of insurance entered into in the state of New South Wales. On 28 October 2005, Hoeben J granted leave for QBE to be joined as a defendant pursuant to [s 6, Law Reform \(Miscellaneous Provisions\) Act 1946](#) (NSW). On the day of the accident the plaintiff was employed by the Royal Australian Navy as a Reservist. He has not brought proceedings against his employer.

6 Adventure Training has taken no active role in these proceedings. It was called three times outside the Court at the commencement of the hearing and did not appear. An ASIC search revealed that this company is still registered (Ex U). An order has been made that damages as against Adventure Training are to be assessed.

7 It is common ground that the substantive law governing the plaintiff's entitlements is the common law of Western Australia, to which no civil liability statute applies. No claim for contributory negligence is made.

8 I shall refer to the plaintiff's background, the accident and the liability of each defendant in turn and then assess damages in that order.

## Background

9 The plaintiff was born on 2 August 1964. He is 43 years of age and currently resides in Broome, Western Australia.

10 In 1979 at age 15, the plaintiff left high school having attained his School Certificate. While at high school, the plaintiff spent 2½ years in the Naval Cadets. His first job was working with his father in a timber mill for four months as a labourer. In 1980, the plaintiff joined the Royal Australian Navy and trained upon HMAS Nirimba. He undertook a Shipwright Apprenticeship for 2¼ years (t 17.25). He then served at various posts; HMAS Cerberus, HMAS Yarra, HMAS Stuart and HMAS Sterling. His roles included shore-based training, boiler training, ancillary machinery and water pump training, as well as a role as a qualified tradesman and welder. In 1997, he carried out four months of a 12 month tour of Cambodia teaching welding, but the tour was cut short due to the internal problems in that country. Teaching in Cambodia was a highlight of his career (t 19.21)

11 On 30 July 2001, the plaintiff retired from the Navy as a Petty Officer with an honourable discharge, having served for 21 years. He spent nine of those years at sea, and he suffered from seasickness. Ongoing seasickness was a catalyst for his decision to leave the Navy.

12 Upon discharge from the Navy, the plaintiff was entitled, after 20 years service, to a superannuation pension (t 25.20-28). He currently receives a disability pension by way of Veterans Affairs of approximately \$115 per fortnight for tinnitus and his neck (t 122.9, 123.4). Both pensions are not means tested (t 179.39, 180.30).

13 During July 2001, the plaintiff completed training as a crane driver with Brambles. He

obtained certificates as a dogman, forklift driver and crane driver of up to 60 tonnes. He has both a motor vehicle licence and a semi trailer driver's licence.

- 14 From 31 July 2001, the plaintiff commenced working as a Navy Reservist for four days per week. As a Reservist, he was required to perform duties at the course initially as an assistant facilitator and then as a facilitator and a maintainer. The course was a physical fitness course used by members of the defence forces, sometimes civilians and AFL teams. It was located in an isolated area surrounded by bush about 100 metres from the ocean.
- 15 Prior to the accident, the plaintiff had great physical prowess. He loved the outdoors. He was friendly. He used to run three times a week and do weights at the gym. While aboard HMAS Cerberus, he was captain of the tug-of-war team and dragon boat team (t 22.22-26).
- 16 About four weeks prior to the accident, the plaintiff and his girlfriend Sandy commenced living together. They married in 2003. Sandy has three children from a prior relationship, Adelaide aged 15 years, Jackson aged 10 years and Campbell aged 8 years. The plaintiff had a previous relationship of 12 years, and is the father of two children from that relationship, Tegan aged 18 years and Maddison now aged 10 years.
- 17 In 1980, the plaintiff had commenced abseiling while he was with HMAS Nirimba. While in the Navy he completed the course "probably 20 times", the first time being "probably about 1985" (t 23.40-45). Between July 2001 and January 2002, he undertook the course ten or more times as a facilitator. He considered himself to be experienced with the layout and operation of the course.

### **The High Ropes Course**

- 18 To understand the layout of the course, a diagram (Ex E) is helpful. It is reproduced below. In 1993, the course was built by or installed by Rope Tech Australia Pty Limited in conjunction with Merrybrook Pty Limited. Rope Tech is a predecessor of Adventure Training. The course formed part of HMAS Stirling Naval Base in Western Australia and has now been dismantled.

### **Reproduction – Exhibit E**

- 19 The course comprised of 10 poles, which made up a series of 10 challenges through which participants passed in order to complete the course. It gradually increased in difficulty as a participant went along. The challenges were named, in order from the start (at top left hand side of Ex E) Burma Bridge; Postman's Walk; Balance Beam; Trapeze; Climbing Wall; Abseiling Platform; Hour Glass; Horizontal Playpen; Milking Machine; and Flying Fox. The participant ascended the course through a series of "staples", which commenced approximately halfway up the first pole at the Burma Bridge.
- 20 The course was set out in a triangular configuration, its apex being at the fifth pole from the left, on the diagram. Affixed to each pole was a platform. At the top of each pole was a safety wire. A separate safety wire was connected between each activity. A travelling block was attached to the safety wire. Above each platform there was a safety strop

(which is referred to in the diagram as a safety cable). The safety strop was attached to the pole at a point lower than the safety wire. It was the safety strop attached to the pole at the end of the Milking Machine which is the one that failed.

- 21 Each safety cable was connected to the pole by an eyebolt that went through the pole itself. At the end of the eyebolt was a mallion, which is a similar device to a karabiner except that it has a permanent screwgate and required a spanner to be fastened or unfastened. A washer and one, or sometimes, two nuts secured the eyebolt at the other end (t 331.20-35) (Ex B (2)). This safety cable was meant to be rated to carry 300 kilograms. In late 1993 or early 1994, a few months after the course opened, shrink wrap had been applied to all the safety strops (t 328.50). The shrink wrap was applied to cover the ferrule and the wire so that participants of the course did not spike their hands on a strand of wire when using the strop. The shrink wrap (also referred to as "the cover" in this judgment) is similar to electrical tape but it is opaque.
- 22 As the maintainer, the plaintiff was the only one at height who carried out the safety checks of the course while the safety number remained on the ground. Given the distance between the ground and the lowest staple, the plaintiff used a ladder to reach the first staple on the first pole of the course. When maintaining the course, the plaintiff would climb as high as the ladder went (approximately 3 metres (t 29.14)). He would then use the "cowstails" connected to his safety loop by a screwgate karabiner to attach himself to each staple as he ascended (t 28.05-28.35), using his feet to push himself up (t 29.29). He would make a visual check of the components of the course, and conduct minor repairs such as hammering nails in accordance with the standing operating procedure (Ex N – Course Manual, pp 6-8).

## The accident

- 23 On 29 January 2002, the plaintiff in his role as the maintainer was carrying out an inspection of the course. He attached the abseil harness around his waist with loops around his bottom and legs. He ascended the course by means of a ladder as outlined earlier in this judgment. The plaintiff looked for anything out of the ordinary; anything loose; anything broken; anything corroded; anything rusty; anything at all that he thought was unusual or should not be there (t 38.33-35). He had satisfied himself that there was nothing untoward about the course (t 39.13). He carried a 20 metre rope with him which he intended to use to descend the course. After completing his inspection, he tried to find the lowest point to the ground near the end of the course, so that he could “double-over” his 20 metre rope and abseil down safely, whilst his rope reached the ground (t 47.24-47).
- 24 He climbed down onto the last platform on the Milking Machine. There was no place other than the safety strop that would allow him to safely reach the ground (t 49.42-44). He attached a figure-of-eight friction device to the safety ring on his abseil harness, using a screwgate karabiner. The figure-of-eight device was used to control the rate of his descent to the ground. The plaintiff drew a diagram which explained how the rope passed through the figure-of-eight friction device and the eye of the screwgate karabiner. For an actual example of the figure-of-eight friction device with the rope configuration, see Exs H and K.
- 25 The plaintiff adopted the correct abseiling procedure. He swung himself around so that he would not injure himself on the fixed platform, placed his left hand on the figure-of-eight just above his waist, and his right hand on the brake. He applied weight to both strands of rope with his right hand so there was friction with the figure-of-eight and rope, which controlled the rate of his descent. The plaintiff then leant back to abseil down. That is all he can remember. His next recollection is a very foggy recollection of a blinding white light and “ridiculous amounts of pain”. He described it as being “like a dream” (t 55.36-44).
- 26 Mr Glenn Askew, the eyewitness to the accident, gave evidence. He was a qualified facilitator and had completed the course about 15 times mostly as a participant, but also as a facilitator. He was the safety number on the day of the accident. His role as the safety number was to stay on the ground, observe the maintainer and ensure that he (the maintainer) performed the check of the course in a safe manner.
- 27 Prior to the plaintiff ascending the course Mr Askew checked that the plaintiff’s harness was done up in the correct manner. The plaintiff was wearing a helmet, appropriate footwear, and had two pieces of rope, known as cowtails, affixed to his harness. Screwgate karabiners were attached to the loose end of each cowtail. Mr Askew visually observed the plaintiff as he checked the components of the course, specifically checking that he was proceeding through the course in a safe manner. This procedure took the plaintiff between half an hour to an hour. The plaintiff was in Mr Askew’s sight for the entire time.
- 28 When the plaintiff reached the final pole (at the Milking Machine), Mr Askew observed him as he prepared to abseil to the ground below. The plaintiff was standing on the platform about 10 metres above the ground. Mr Askew watched the plaintiff thread a line of rope through the karabiner affixed to the loose end of the safety strop, which in turn was affixed to the final pole of the course. Both ends of the doubled-over rope touched the ground. Mr Askew gave evidence that the rope was rigged in this manner both to allow the plaintiff firstly, to remove the rope from the course once he was safely on the ground; and

secondly, to add further friction to the figure-of-eight descending device affixed to his harness. This added friction allowed the plaintiff to lower himself from the course without the need for a brake person on the ground (t 202.28-41).

- 29 Mr Askew watched the plaintiff secure his karabiners and figure-of-eight descending device in preparation to abseil down from the platform. Once this was completed, Mr Askew observed the plaintiff lean back slightly from the pole to draw taut the rope and descending gear. Mr Askew was satisfied with the plaintiff's preparation and that the plaintiff was in a position to safely abseil from the platform to the ground. Mr Askew observed the plaintiff lean over the edge of the platform and move back to a 30° - 40° angle. Once the plaintiff reached the 30° - 40° angle the plaintiff did not stop, but kept going until he hit the ground. Mr Askew stated that "it gave away straightaway" and the plaintiff fell to the ground at the foot of the pole (t 203.5-40).
- 30 Mr Askew ran over to the plaintiff. The plaintiff was not breathing. There was no pulse. There was no noise or movement emanating from the plaintiff. Mr Askew performed CPR upon the plaintiff for maybe one to three minutes (t 216.10-11). There was no response. Mr Askew thought the plaintiff was dead. He raced to his car that was parked 30-40 metres away and retrieved his mobile phone (t 204.7). He was returning to the plaintiff when he observed that the plaintiff's leg was twitching. The plaintiff had regained consciousness, was moaning and was trying to move. Mr Askew comforted him and instructed him not to move. Mr Askew simultaneously had to lean on the plaintiff to stop him trying to get up while he was speaking on his mobile phone to a female operator at the base health centre (t 204.13). Mr Askew stayed with the plaintiff until the ambulance arrived. An ambulance arrived at the scene 5 to 15 minutes later (t 204.27).
- 31 Mr Askew helped the two ambulance officers to remove the plaintiff's harness and load him into an ambulance. The ambulance left the scene with the plaintiff 5 to 10 minutes later (t 204.52).
- 32 Mr Askew remained at the scene. He collected the helmet, the eye with the swaged wire end, the safety strop and karabiner. The eye and the karabiner were connected to the harness and the rope. He put this equipment into the nearby shed because he knew there would be an enquiry on account of the seriousness of the accident (t 204.36). There was a ComCare enquiry.
- 33 The day after the accident, Mr Gaias, a Navy Reservist course facilitator and friend of the plaintiff, ascended the course. He retrieved the safety cable which had broken and caused the plaintiff to fall. Mr Gaias also retrieved two other safety strops from other poles on the course. One was taken to the boatswain. That safety wire was cut and inspected (Ex O). The third safety strop taken from the course, remains intact (Ex A). In relation to the broken safety strop, the shrink wrap was still attached to the safety strop at the time Mr Gaias retrieved it (t 332.54). The broken safety strop, the shrink wrap and the swage are in evidence (Ex C).

## **The safety strop**

- 34 The wire rope in the safety strop comprised of flexible steel wire. Each wire was made up of seven bundles, or cores. Each bundle contained 19 individual strands. There were 133 individual wires overall in the wire rope. The wire rope was coiled or looped back upon itself, brought in parallel with its parent and the two adjacent strands were swaged with an aluminium alloy ferrule. A thimble (sometimes referred to as a hard eye)

was then inserted into the loop to make it more rigid. If one visually looks at the broken strop at the ferrule end, the strands of wire in the broken strop have not snapped exactly in the same place, but upon visual inspection all the strands have broken within about one centimetre of each other.

35 Mr Patrick Donohue, a chartered professional engineer and certified professional ergonomist, provided a report, gave evidence and was cross examined. The cause of the accident was that the safety cable had failed. Its swaged end was affected by corrosion a few millimetres above the ferrule. The source of the contamination leading to corrosion was seawater. The corrosion went undetected because the swaged end was covered in shrink wrap. The process of corrosion from contamination would take at the very least several months to occur (t 311.36) and in all probability eight to ten months (t 312.4; 315.45). In conditions of light or low usage such as those which occurred after October 2001, the period is extended (t 316.8). Had the shrink wrap been removed at the time of Adventure Training's attendance on 12 December 2001, the obvious signs of advanced corrosion described by Mr Donohue (t 314.16-27) would have been visible. The visible signs would have been essentially the same, even assuming the extended period (t 316.53).

36 Mr Donoghue opined that three factors jointly led to the accident. They were, firstly, there was a poor inspection and corrective maintenance regime; secondly, there was a poor method of covering the ends of the wire rope, from a concept design engineering perspective; and thirdly, there was poor consideration given to the environment of use, being one adjacent to airborne, salt-contaminated droplets. It is Mr Donoghue's view that once rust or corrosion starts, it will continue to corrode if conditions favourable to corrosion continue, such as enclosure, liquid, and access to air (t 318.29-31). As previously stated, the cause of the plaintiff's fall was that the safety strop which was covered with shrink wrap corroded and broke.

### **The course inspection and maintenance**

37 During the period from the inception of the course in 1994 until 1999, the course had been maintained by Fremantle Foundries Pty Limited (t 237.49). The maintenance was rudimentary in nature. It consisted of a heavy weight, in the order of 300 kilograms, being placed on each of the cables and that weight was traversed along the length of the cable. There was concern amongst Naval personnel responsible for the course that there was uneven stretching of the cables which resulted in inordinate loading (t 240.6-11).

38 In about 1999, in order to find out what maintenance and inspection procedures should be adopted, Lieutenant Commander Astfalck approached some different civilian organisations to find out what maintenance and inspection procedures they implemented. Both Adventure Training and Nobles were recommended. In the summer of 1999/2000, she spoke to Richard Hope of Adventure Training who by chance was in Western Australia. Lieutenant Commander Astfalck said that she remembered "discussing our current requirements in detail with Richard Hope" (t 257.42-43). He inspected the course. Both Lieutenant Commander Astfalck and Richard Hope climbed the course and went through the components until the fourth pole when Richard Hope expressed the view that he would not trust the safety wire (t 242). They did not continue to use the safety wire, but rather inspected the rest of the course by physically climbing up and down most of the poles by using cowtails.

- 39 Mr Hope of Adventure Training recommended that the whole safety belay system on the course needed to be replaced. He estimated that it would cost about \$100,000 (t 244.27-38). On 12 December 1999, Richard Hope of Adventure Training recommended that the course and tower be taken out of service because it was below the safety standard. His report outlined the recommendations and actions required to bring the course and its elements to a safe operational standard. In his view, it was only after the recommended action had been addressed that the course should be used.
- 40 QBE placed much emphasis upon SOP 801, which as Lieutenant Commander Astfalck explained was the “standard operating procedure” for Navy personnel and Training Centre West. Part of SOP 801 outlined of the annual rigging inspection procedure (Annexure D) (t 261.25). In 2000, this annual rigging inspection procedure was in the process of review. Under SOP 801 the strops were allocated as falling within “Schedule 2”, “Survey and Test”. That means that “The item shall be visually surveyed, throughout its extremities and examined for its serviceability.”
- 41 I accept that firstly, there was an instruction in SOP 801 that read any assembly of wire or structural support should not be disassembled for the purpose of the test unless directed by the Department of Defence representative nominated by Adventure Training; and secondly, that no specific instruction was given by Lieutenant Commander Astfalck to Adventure Training to disassemble the strop and look under the shrink wrap cover.
- 42 The SOP 801 also had a requirement that a test load of 300 kilograms be applied to the safety wire. This requirement was not implemented in the December 2000 inspection by Adventure Training. Lieutenant Commander Astfalck recalled that Adventure Training disagreed with those requirements. What Adventure Training intended to do was to actually certify that the course was safe to use (t 262.25-31). That is, Adventure Training was to use its expertise in evaluating whether the course was safe or not.
- 43 In August 2000, Transfield became the Comprehensive Maintenance Contractor to the Department of Defence. I shall return to the topic of Transfield later in this judgment. Prior to August 2000, Adventure Training dealt directly with Naval officers at HMAS Stirling.
- 44 On 19 October 2000, Lieutenant Commander Astfalck emailed Richard Hope and confirmed that she was in the process of rewriting the operating procedures to bring them in line with Adventure Training’s suggestions regarding the course maintenance and inspection. She enquired if he recalled the old procedure that involved load testing the belay cables and pulley blocks. She asked Mr Hope, in order to add weight to the changes to the maintenance schedule, if there were any Industry Standards that she could quote in support of the changes. She also enquired whether as six months had elapsed since the last Adventure Training inspection report, if it was time to carry out another inspection (Ex D2/10).
- 45 On 25 October 2000, Richard Hope replied that the industry standards “A guide to Rigging” from Work Cover NSW, 2nd Edition, June 1997; “Challenge Course Standards”, 2nd Edition, January 1998, US publication from the Association for Challenge Course Technology Purcellville, (ACCT) VA 20134 USA; and “Industry Standards Manual”, “Adventure Challenge Course Equipment and Installation Standards”, Ray Franz, Draft 1996 were of use (Ex D2/11).
- 46 It is my view that Lieutenant Commander Astfalck was relying upon Adventure Training for its advice and its expertise to determine what maintenance and inspection procedures were required to be carried out to ensure the safety of the course. It was never the intention of Adventure Training or the Department of Defence that Adventure Training in

conducting inspection, maintenance and certification of the course was limited to matters outlined in SOP 801.

- 47 On 22 March 2001, Transfield issued a “Work Direction” to Adventure Training which directed Adventure Training to conduct an “inspection and certification” of the course. On 10 May 2001, Adventure Training carried out the annual inspection.
- 48 On 24 May 2001, the course became classified as a piece of infrastructure of HMAS Stirling and as such came under Transfield’s remit for maintenance (aside from harnesses, abseiling ropes and helmets which remained the Navy’s responsibility) (t 245). The decision was left for Corporate Services Infrastructure Group (Corporate Services) and Transfield to determine how the work was to be carried out (t 246.5-9 – also see Ex D3/3.169).
- 49 In October 2001, the plaintiff had reported that the strand vices on the course had become distorted (t 290.43). As a result, Lieutenant Commander Astfalck decided to close the course until repairs could be effected. Lieutenant Commander Astfalck wanted the annual inspection scheduled for April or May 2002 to be brought forward to December 2001. Ultimately, this is what occurred.
- 50 Adventure Training had advised the Department of Defence that, in its opinion, cables on the course should not be the subject of load testing *in situ*, but rather that those cables should be removed to an external NATA testing facility and load tested there. Lieutenant Commander Astfalck knew that Adventure Training was “not going to load the cables” *in situ*. Lieutenant Astfalck agreed with the decision not to load test the cables *in situ*, as she thought load testing was a “poor solution to testing a course”. Having heard what Adventure Training had to say in relation to load testing *in situ*, both Lieutenant Commander Astfalck, and those to whom she reported, understood that Adventure Training would not load the cables on the course when conducting the inspections.
- 51 On 28 November 2001, Transfield requested that Adventure Training provide a quotation to “carry out assessment of course and certify”. Adventure Training was also asked by Transfield to replace some “strand vices” as the plaintiff, when conducting a monthly inspection of the course at the end of October 2001, had found that these “strand vices” had become distorted (Ex D 3/3 - 208).
- 52 On 10 December 2001, Adventure Training submitted a quotation to Transfield. Transfield issued a Service Order to Adventure Training. The quotation referred to the replacement of all strand vices on the high ropes course with new hard eyes. Under the heading “Terms and Conditions” on the quotation, reference is made to constructions staff. That reference read:

“One of our Project Managers will be assigned to carry out the upgrade of the Team Challenge Activities. He will be able to ensure the integrity of the constructions, and completion within the time period specified. You can be sure of the safety of your activities when you have fully insured experienced professionals from Adventure Training Systems install your Adventure Activities.” (Ex D3/3 - 211)
- 53 On 12 and 13 December 2001, Dwight Lovlin of Adventure Training carried out an inspection of the course (Ex D3/3 – 214). On 17 December 2001, he furnished a report to Transfield that relevantly read:

“An inspection was carried out on all elements and found to be in safe working order. On each element all cables, eyebolts (and nuts) strand-vices, wire rope grips, stays and belay pulleys were checked and found to be ok. Belay wire rope lines and belay pulleys are 20 months old at time of this report.” (Ex D3/3 - 215).

54 When Lieutenant Commander Astfalck duly received a copy of this report she decided to reopen the course. The plaintiff's inspection of the course conducted on 29 January 2002 may well have been the first one since the course had been reopened.

## **Liability of Adventure Training**

55 When carrying out maintenance and certification of the course's safety, Adventure Training owed participants of the course including the plaintiff a duty of care. Where a duty of care arises under the ordinary law of negligence, the standard of care required is that which is reasonable in the circumstances. The degree of care under that standard necessarily varies with the risk involved, including both the magnitude of the risk of an accident happening, and the seriousness of the potential damage if an accident should occur. Depending upon the magnitude of the danger, the standard of "reasonable care" may involve a degree of diligence so stringent as to amount practically to a guarantee of safety – see **Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13; (1992-1994) 179 CLR 520** at 554.

56 The course involved participants undertaking challenging physical activities at a height of at least 10 metres above ground level. The participants were required to wear safety equipment and be secured by at least one safety rope at all times. If a participant was not properly secured and was to fall from a height of 10 metres, it is likely that a participant such as the plaintiff would suffer serious personal injury. The magnitude of danger was high.

57 The plaintiff relied upon the particulars of negligence against Adventure Training. They were firstly, failure in May 2001 and/or December 2001 to adequately inspect the restraint ropes attached to the support poles of the High Ropes course; secondly, failure to remove the covering material over the swaged ends of the fixed steel wire ropes to inspect and report on the safety of the steel wire ropes; thirdly, failure to investigate the potential for rust and/or failure of the wire rope underneath any covering; fourthly, failure to ensure that there was a back up support for the steel wire ropes; fifthly, failure to check for weakness and corrosion of the fixed steel wire ropes; sixthly, failure to take due care and safety in respect of the ultimate users of the course; seventhly, failure to remove the swaged end of the strop to detect and/or check for and/or treat corrosion at the end of the strop and/or in related parts; and eighthly, and failure to replace the strop pursuant to its contract in May and/or December 2001 (SFAS/C – 21/05/2007).

58 From the preponderance of the evidence given, I find that since the time of the course's inception no-one routinely checked the condition of the safety strops underneath the shrink wrap cover.

59 I remind myself of the well known passage from **Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40** at 47-48 where Mason J (as he then was) said:

"A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone [1951] UKHL 2; [1951] AC 850*, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.

In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

See also recent discussion of **Shirt** in New South Wales v Fahy [2007] HCA 20.

60 QBE on behalf of Adventure Training submitted that Adventure Training had no duty to remove the cover for two reasons. They are that firstly, it was instructed not to do so; and secondly, pursuant to its arrangements with the Department of Defence, it was obliged to conduct its inspection of the course in accordance with SOP 801.

61 According to QBE, Adventure Training was contractually obliged to perform a particular type of inspection, being an inspection in accordance with SOP 801. For the reasons given earlier, and in paragraph [45], Adventure Training was not contractually obliged to adhere to SOP 801. That was not the intention of Adventure Training nor the Department of Defence. SOP 801 (and others) was in the process of being rewritten. In performing this inspection, Adventure Training was not to disassemble the strop. Such an inspection would ordinarily have involved a load test of the strop. Both Adventure Training and the Navy were of the view that load testing should not occur *in situ*. Instead, Adventure Training recommended that load testing take place off site at NATA. Evidently, this recommendation was not followed. This had the effect, in practical terms that in the "SOP 801 Schedule 2", inspection the Strops were inspected as if it was a Schedule 1 inspection.

62 According to QBE, Adventure Training was retained to visually inspect the strop (without disassembling it) and to perform no load testing on it. QBE also submitted that there is no evidence that it was the usual practice of rigging contractors to remove covers such as those on the strop or that any reasonable rigging contractor in the position of Adventure Training would have done so on 12 December 2001.

63 It is my view that it ought to have been obvious to Adventure Training, and to its servant or agent, Mr Lovlin, who was a qualified rigger, that rust and corrosion could occur on all safety wires and safety strops. The course facilitators on a routine basis, and Adventure Training, checked for visible rust and corrosion on the visible safety wires and safety strops. It should also have been obvious to Adventure Training that rust and corrosion occurred both on the visible and non-visible portions of those safety wires and safety strops. **It should also have been obvious to a reasonable person in the position of**

**Adventure Training that the safety cable was an arrest or anchor point, the purpose of which was to safeguard users falling from great heights and suffering serious injury or death during the use of the course.**

- 64 In these circumstances, when Adventure Training was carrying out routine maintenance of the type performed in December 2001, it should have removed the shrink wrap cover from the safety strop to enable visual inspection of the safety wire, and if it did so, the rust and corrosion would have been revealed. The corrosion and rust under the shrink wrap cover was such that the safety wire was likely to fail. In my view, it was foreseeable that if this was not done, the safety strop could fail and a participant, facilitator or maintainer would fall and injure himself or herself. Such an inspection could easily have been done. The evidence of Warrant Officer Gaias illustrated that the shrink wrap could have been removed with a Stanley knife or similar sharp tool.
- 65 Had this been done, the clear and advanced signs of corrosion would have been obvious to anyone. The safety cable could easily have been removed from its position on the pole by undoing the heavy bolt on the mallion with a spanner. A replacement with a new strop would have been relatively inexpensive. It is my view that Adventure Training was negligent in not inspecting underneath the shrink wrap cover on the safety strop. There was a cheap and inexpensive way to do this. Adventure Training's negligence caused the plaintiff to fall and suffer injuries to his head, pelvis and left wrist. In any event, an order has already been made that damages are to be assessed as against Adventure Training.

### **Liability of Transfield**

- 66 It is pleaded by the plaintiff that Transfield entered into a contract with the Commonwealth of Australia to provide maintenance and other services, and that Transfield was liable to inspect, rectify, maintain, or arrange inspection, rectification and maintenance of the course. The plaintiff pleaded that as part of its duty to inspect, Transfield knew or ought to have known that persons would be using the course and would be liable to suffer severe injury, loss or damage should the course not be properly maintained, repaired and regularly inspected. It is further pleaded that Transfield carried out an inspection of the course in May 2001, and that it had a duty to ensure repairs and maintenance were carried out in a proper and competent manner, and that Transfield had a non-delegable duty of care to inspect, maintain and repair the course, given that they knew, or should have known the potential risk of injury should repairs not properly be carried out. Transfield denied that it had a non-delegable duty.
- 67 In about August 2000, Transfield entered into the comprehensive maintenance contract with the Commonwealth of Australia, Department of Defence. The contract for Western Australia (the contract) was executed on 29 August 2000. Two classifications are relevant, namely fixed plant and equipment (FP & E), and general building and facilities management (GB & FM) which I will discuss in more detail shortly.
- 68 Transfield admitted that it was required, in accordance with its contract with the Commonwealth of Australia, to ensure repairs and/or maintenance work carried out on the course was performed in a proper and workmanlike manner – see clause 10.7(c) of the contract. Initially, these repairs and/or maintenance work in relation to the course fell within the General Building and Facilities Management (GB&FM).
- 69 If the Commonwealth required work to be procured, it contacted the help desk service (also referred to in evidence as part of the Corporate Services Infrastructure Group) and

the contract administrator issued a direction to the contractor – see clause 3.1 of the contract.

- 70 Transfield could carry out some types of work for Defence using its own employees. The type of work was limited to trade work, such as electrical, mechanical trades (t 372.3). Alternatively, Transfield could subcontract work out under the contract. Clause 10.5 (control of Contractor's, Employees and Sub-contractors) required that Transfield must employ and ensure that its sub-contractors employ, in connection with the Contractor's activities, only persons who are careful, skilled and experienced in their respective trades and callings.
- 71 On 24 May 2001, Department of Defence wrote to Transfield concerning a variation in the contract relating to the course (D3/3.169).
- 72 Prior to November 2001, Transfield attended the facility with Nobles to allow them to carry out an inspection. According to Mr Richard Eden, the contracts manager of Transfield, Nobles were the competent and licensed party that would be providing the work (t 374.36-44). Transfield's role was to ensure that Nobles could have access to the site. Transfield needed to be satisfied that Nobles had clearly understood what the tasks were that they were required to perform. Nobles would then provide a quote to Transfield, which Transfield in turn would submit to the Department of Defence to form part of the variation response.
- 73 Transfield's variation response dated 8 November 2001 (per Richard Eden) to Mr David Brooks, Department of Defence, relevantly stated:
- "Please find attached the quotation received from A. Nobles & Son Ltd, a NATA accredited and fully licensed test and inspection authority for lifting equipment and rigging. In addition Transfield has included a detailed breakdown of the HMAS STIRLING Ropes Course due to the costs associated with this facility.
- Transfield & Nobles have undertaken a comprehensive inspection of all facilities and have identified a significant number of non-conforming ropes and fitting (Reference AS 1891.2 Supp 1 – 2001). We have therefore proposed an initial GB&FM repair of \$5,000.00 to undertake immediate repairs.
- Furthermore, Nobles have advised that the structural aspects of the HMAS STIRLING Ropes and Confidence Course cannot be certified to any recognized industry or Australian standard. We therefore wish to clarify that our proposal does not include (sic) the inspection, testing or certification of any trees or timber support posts. We further recommend the review of this facility from a safety and compliance perspective."
- 74 The cost of the variation was quoted at \$21,120 plus GST. On 13 November 2001, the variation was approved. The course now fell under the Fixed Plant and Equipment classification. On 13 November 2001, Transfield was requested by Defence to ensure a process was in place to provide appropriate inspection of timber supports.
- 75 In the meantime, the plaintiff in his capacity as maintainer, reported that certain strand vices on the course were elongated. Transfield engaged Adventure Training to rectify that problem and also brought forward the annual inspection to coincide with the repair work. The quote (Ex D3/3 - 211) from Adventure Training directed to Transfield costed inspection and report of high and low rope facilities, replacement of strand vices, labour, travel accommodation and expenses.
- 76 On 28 November 2001, Steve Clarke, maintenance supervisor of Transfield, faxed Richard Hope of Adventure Training requesting a quote for, firstly carrying out an

assessment of the course and certification; and secondly, for the replacement of all strand vices with new and hard eyes. A copy of the course layout was attached, so that the two vices that were deformed were identified. They were located on the walking cable of the postman's walk and at the trapeze cable.

77 Transfield issued a service order (Ex D3/3 – 213). The work Adventure Training performed is described in that document as “all strand-vice units had thimbles installed. Course inspection completed with general maintenance of bolt tightening and line tensioning and rust removal as well as galv painting. Platform repairs.”

### **Does Transfield owe the plaintiff a duty of care? If so, what is it?**

78 In **Burnie Port Authority**, the concept of a “non-delegable” duty of care was explained by the joint judgment of the High Court (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) where it was said (at 550-551):

“It has long been recognised that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and “more stringent” kind, namely a “duty to ensure that reasonable care is taken”: *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672 at 686. Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. One of the classic statements of the scope of such a duty of care remains that of Lord Blackburn in *Hughes v Percival* (1883) 8 App Cas 443 at 446:

“That duty went as far as to require [the defendant] to see that reasonable skill and care were exercised in those operations ... If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself ... but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.”

In *Kondis v State Transport Authority* in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee.”

79 The categories of relationships that give rise to a non-delegable duty are not closed. But there are a number of recognised categories of relationship which will give rise to a “non-delegable” duty of care. They include:

- Employers and employees (*Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672);
- Hospitals (for the negligence of their personnel) and patients (*Cassidy v Ministry of Health* [1951] 2 KB 343, relied on by Kirby P in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 556);

- The duty owed by a school to pupils under its care (*Commonwealth v Introigne* [1982] HCA 40; (1982) 150 CLR 258 and *New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511);
- Occupiers and possibly entrants who are invitees;
- Bailees and bailors (*Morris v CW Martin & Sons Ltd* [1966] 1 QB 716).

80 In the recent High Court decision of **Leichhardt Municipal Council v Montgomery** [2007] HCA 6; (2007) 81 ALJR 686, Kirby J cautioned against attempts to extend the recognised categories of non-delegable duties. His Honour stated at [36]:

“If there is no conceptual unity to the recognised instances of non-delegable duties in tort, repeated observations in this Court suggest that the presently recognised categories should not be expanded.”

81 Callinan J shared similar sentiment in **Montgomery**. In allowing the appeal from the New South Wales Supreme Court, His Honour stated at [190]:

“The unanimous judgment of this Court in *Sullivan v Moody* [2001] HCA 59; [(2001) 207 CLR 562] speaks of the necessity for coherence in the law. All of this is to suggest that this Court should scrutinise with great care, and generally reject the imposition of non-delegable duties, unless there are very special categories warranting an exception, as to which nothing further need be said here. On any view this case does not fall within a necessary exception.”

82 Callinan J went further, questioning not only extending the scope of non-delegable duties but also questioning their very existence. His Honour stated at [187]-[188]:

“Enough has been said, I think, to question whether there has ever been an entirely sound basis for a principle of non-delegability, or a principle of non-delegability as far reaching as, or of the kind, to which *Halsbury* [*Halsbury's Laws of England*, 2nd ed, vol 16], and some of the cases referred to and upon which the Court of Appeal relied here and earlier.

In any event, recent authority of this Court leans strongly against non-delegability and absolute liability in tort cases. *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; [(1997) 188 CLR 313], which might suggest otherwise, has almost certainly been at least impliedly overruled by *Jones v Bartlett* [2000] HCA 56; [(2000) 205 CLR 166], and *Sobrusky v Egan* [1960] HCA 9; [(1960) 103 CLR 215], which appeared to impose, by means of a special and oppressive form of vicarious liability, non-delegability in substance, has at least to be doubted as a result of the reasoning of this Court in *Scott v Davis* [2000] HCA 52; [(2000) 204 CLR 333].”

83 A non-delegable duty may therefore arise under one of three circumstances: (i) where the relationship between the plaintiff and the defendant is sufficiently analogous to existing categories of cases of non-delegable duties; (ii) where the relationship between the plaintiff and the defendant evidences the requisite elements of ‘control’ and ‘special dependence or vulnerability’; or (iii) where the activity being carried out by the defendant’s independent contractor is sufficiently dangerous, or alternatively a substance associated with the activity being carried out by the defendant’s independent contractor is sufficiently dangerous.

84 The facts of this matter do not fall into one of the recognised categories of a non-delegable duty of care. Furthermore, the relationship between the plaintiff and Transfield do not evidence the requisite elements of ‘control’ and ‘special dependence or vulnerability’ to fall into the second category discussed above. Traditionally, the main indicium of ‘control’ and the corresponding ‘special dependence or vulnerability’ is the assumption of responsibility by the defendant over the plaintiff. As I have said previously, this is not

present in this case. This leaves only the final category where the activity being carried out by the defendant's independent contractor is sufficiently dangerous to give rise to a non-delegable duty (hereafter referred to as the "third category").

85 Third category instances of non-delegable duties are not susceptible to the critiques levelled by the High Court in **Montgomery**. First, the **Montgomery** decision can be distinguished as it does not concern extra-hazardous activities: see Gleeson CJ at [18]. Second, the use of third category instances to establish non-delegable duties do not extend the existing categories of non-delegable duty and can be contained to the particular factual matrix [see Corkhill, "Vicarious Liability in sheep's clothing? Non-delegable duties of care in Leichhardt Municipal Council v Montgomery ([2007](#)) 15 Torts Law Journal 111 at 120].

86 In **Montgomery**, Gleeson CJ held at [9]:

"In practice, the difference between a duty to take reasonable care and a duty to ensure that reasonable care is taken matters where it is not an act or omission of the defendant, or of someone for whose fault the defendant is vicariously responsible, that has caused harm to the plaintiff, but the act or omission of some third party, for whose fault the defendant would not ordinarily be vicariously responsible. If a negligent act or omission is that of a defendant, or a person for whose fault the defendant is vicariously responsible (such as an employee), no problem arises. Again, if the nature of a defendant's responsibility is such that it can be discharged lawfully or properly only by the defendant personally, an attempted delegation would be irrelevant. Some responsibilities are non-delegable in the sense that it is of their essence that they be performed by a particular person, perhaps because of trust or confidence reposed in that person. In some cases, a duty to take care involves a duty to act personally. That kind of non-delegability should not be confused with a case where the engagement of a third party to perform a certain function is consistent with the exercise of reasonable care by a defendant, but the defendant's legal duty is not merely to exercise reasonable care but also (if a third party is engaged) to ensure that reasonable care is taken. In such a case, the third party's failure to take care will result in breach of the defendant's duty. The legal consequence is that the circumstance that the third party is an independent contractor does not enable the defendant to avoid liability. It is because of its practical effect of outflanking the general rule that a defendant is not vicariously responsible for the fault of an independent contractor that the identification of this special responsibility or duty is important."

Further, at [23]:

"This raises a more general question concerning non-delegable duties. A "special" responsibility or duty to "see" or "ensure" that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. In many circumstances, it is a duty that could not be fulfilled. How can a hospital ensure that a surgeon is never careless? If the answer is that it cannot, what does the law mean when it speaks of a duty to ensure that care is taken? It may mean something different. It may mean that there should be an exception to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor. The present case illustrates the artificiality of attributing to the appellant a duty to ensure that care was taken. The failure to take care consisted in a workman, in the employment of Roan Constructions, placing a carpet over a telecommunications pit that had a defective cover, in circumstances where the workman should have noticed the defect. Thus a trap was created and the respondent fell into it. To speak of a local council having a duty to

ensure that such an apparently low-level and singular act of carelessness does not occur is implausible. It is one thing to find fault on the part of council officers where there has been a failure to exercise reasonable care in supervising the work of a contractor, or in approving a contractor's plans and system of work. It is another thing to attribute to the council a legal duty of care which obliges the council to do the impossible: to ensure that no employee of the contractor behaves carelessly. The problem is even more acute if the source of this duty of care is said to be found in statute. One of the things that is special about this duty is that it is a duty to do the impossible. That is unlikely to have been intended by the legislature."

### **The Nature of Transfield's Duty**

- 87 Does Transfield merely owe a duty to find a qualified and ostensibly competent independent contractor, or does Transfield owe a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken"? - see **Burnie Port Authority** at 550-551 citing **Kondis** at 686.
- 88 It is my view that Transfield has a duty to exercise reasonable care in acquiring independent contractors. That is because when Transfield contracted out to Adventure Training it was obliged to engage persons who were careful, skilled and experienced in their respective trades and callings (see clause 10.5 of Transfield's contract with the Commonwealth). Adventure Training was regarded as an expert in the field of the course. Adventure Training portrayed itself as having "experienced professionals" to carry out the work. The acquisition of Adventure Training as a subcontractor by Transfield to carry out certain work and inspections on the course fell within Transfield's duty to find a qualified and ostensibly competent contractor.
- 89 It is also my view that Transfield owes a further duty to ensure that reasonable care was taken by any subcontractors they acquired. That is because of the dangerous nature of the activities to be carried out by subcontractors of Transfield. The nature of the contract between Transfield and Adventure Training was one whereby Adventure Training would perform any required repairs to the course and to certify that the course was safe for use by participants. The nature of the work required under the contract left participants in a highly vulnerable position if the work was not properly carried out. Due to the vulnerability of participants, and the dangerousness of the activities in general on the course, it is my view that Transfield was not in a position to subcontract both the work and the responsibility of ensuring it was properly performed on to any individual contractor. Notwithstanding the physical performance of the work by a subcontractor (in this case Adventure Training), Transfield was in a position whereby it had a duty to ensure that reasonable care was taken on the subcontracted work.
- 90 The nature of this "more stringent" duty owed by Transfield is further supported when considering the contract between Transfield and the Commonwealth. Under the heading "Co-ordination of Subcontractors", clause 10.7 provides:
- "The contractor must:
- (a) co-ordinate the work of all subcontractors engaged by it;
  - (b) provide and direct all necessary personnel to administer, supervise, inspect, co-ordinate and control the subcontractors engaged by it; and
  - (c) at all times co-ordinate the Contractor's Activities and ensure execution and completion of the work which is to be carried out by the subcontractors engaged by it in a proper and workmanlike manner according to the obligations of the respective subcontractors."

91 It is therefore my view that Transfield does owe a non-delegable duty of care to the plaintiff. Transfield was able to subcontract out the physical performance of the work, but it retained the responsibility to ensure that the work was properly performed. Adventure Training carried out the work at Transfield's request, the work was not properly carried out, and the plaintiff suffered injury as a result of this negligence. It was Transfield's duty to ensure that this negligence did not occur. Transfield is in breach of this duty as a result of the negligence having occurred, it is liable.

## **Liability of QBE**

92 QBE made four main submissions. They are, firstly, that the policy does not respond, as the liability does not arise out of Adventure Training's business; secondly, that the liability was not in relation to a "product" as defined by the policy; thirdly, that Adventure Training's liability arose for professional advice or service, which the policy excluded; and lastly, that Adventure Training's liability arose for advice given for a fee, which the policy also excluded. I shall deal with each of these in turn.

### **(i) Business**

93 When the plaintiff was injured, there was a "public and private products liability policy" between Adventure Training and QBE in existence. The professional indemnity policy had lapsed. The products liability policy (the policy) set out a "general operative clause" which read:

"The Underwriter will pay to or on behalf of the Insured all sums which the Insured shall become legally liable to pay by way of compensation including claimants' costs and expenses (but excluding fines, penalties, punitive, exemplary and/or aggravated damages). This indemnity only applies to such liability arising out of the Insured's Business ("the business") and as defined by each insured Section of this Policy, subject to the terms, conditions and exclusions of such Section and of this Policy as a whole."

94 Hence, "Business" should have been defined in the Schedule. It is common ground that there was no schedule attached to the policy. As a result, what is covered by the general operative clause has to be read *contra proferentem* and must be interpreted widely.

95 In 1993, when the policy was initially taken out, the proposal stated, under the heading "Nature of Business", "Fabrication, installation, sale and training of outdoor education activities." The certificate of insurance dated 14 June 2001 stated that the "occupation" of Adventure Training Systems is "Retail Sale of Adventure Equipment (Packs, Sleeping Bags, Rock Climbing Gear) and Sale, Installation & Training of Ropes Confidence Courses." The policy came up for renewal on 2 January 2002. The notification to insurer dated 17 December 2001, in reinstating the policy, classed the business as "Fabrication, Installation, Sale and Training for Outdoor Education".

96 On a combined public and products liability form of 22 July 1993, Adventure Training indicated that they required Products Liability insurance, and that payments in relation to installation, maintenance and repair were in relation to "assembly and installation of Ropes Course Activities". It stated that Adventure Training "offer a maintenance inspection of the Ropes Courses we have installed". QBE submitted (at 78) that this is irrelevant as maintenance inspection was never included in the policy, and would normally

be found in a Professional Indemnity Policy. However, it is my view that Adventure Training's disclosure can assist in defining what "Business" means in the insurance contract where it is not clearly defined elsewhere.

- 97 Taking these facts at their highest, and reading the provision *contra proferentem*, in circumstances where the insurer omitted to define the term "Business", it should be construed to include the stated occupation and common business dealings of Adventure Training, which included maintenance inspection of ropes courses.
- 98 However, Adventure Training did not install the course. Rope-Tech Australia, a predecessor of Adventure Training, installed this particular system (see Ex D3/2 - 6). While "business" may include maintenance and inspection of ropes courses it has installed, in my view, "business" does not extend to include ropes courses which it did not install. Thus, the business does not include the maintenance of the course and therefore the policy does not respond.
- 99 If I am wrong, I shall consider QBE's other submissions on whether the policy responds.

## **(ii) Product**

100 QBE in oral submissions submitted that the liability fell outside the scope of the policy, as the training system was not a "Product" within the meaning of the policy.

- 101 The "general operative clause" defined "Product" as:
- "1.2 "Product" means any commodity, article or thing (after it has ceased to be in a possession or under the control of the Insured) which is or is deemed (whether by law or otherwise) to have been manufactured, constructed, grown, extracted, produced, processed, assembled, erected, installed, treated, altered, services, repaired, sold, handled, supplied or distributed by the Insured or by others trading under the name of the Insured, including any container thereof but does not mean a motor vehicle."

- 102 The public liability section of the policy stated:
- "The Insured is indemnified by this Section in accordance with Clause 1 of the General Operative Clause against claims arising out of or in connection with any Product in respect of Injury and/or Damage first happening during the Period of Insurance as the result of an Occurrence."

- 103 The definition of Product specifically includes the terms "repaired", "handled", and "serviced", meaning that the definition of a Product is extended by reference not only to whether the insured installed the system, but whether they maintained it. In my view, the definition of product is wide enough to cover the activities that Adventure Training performed.

## **Exclusion Clause**

104 Under the "general exclusions applicable to all sections of this policy" was the following exclusion:

"Sections 1 and 2 do not cover Liability:

10.4 Caused by or arising out of,

10.4.1 The rendering of or failure to render professional advice or service by the Insured or any error or omission connected therewith.

10.4.2 Advice, design, formula or specification given for a fee.

Provided that this exclusion does not apply to the rendering of first aid or medical services on the Insured's premises by medical persons employed by the Insured."

105 The insurer QBE bears the onus of proving that the exclusion clause applies. Both parties referred to **Legal & General Insurance Australia Ltd v Eather** ([1986](#)) 6 NSWLR 390 at 394 where Kirby P (as he then was) stated:

"...in dealing with the construction of insurance policies three general rules at least are taken to guide courts in the meaning to be ascribed to the language used. The first is that, wherever possible, established constructions, laid down by courts of high authority, should be followed to ensure the uniform interpretation of terms in insurance policies, which are commonly repeated. This rule is founded on the obvious good sense of providing, in a worldwide market of common contracts, an objectively ascertainable and commonly known or knowable dictionary by which the respective rights and obligations of insurers and insured can readily be found.

Secondly, where there is doubt as to the meaning of a policy, particularly in respect of terms contained in standard printed forms proffered by the insurer to the insured, courts, if not otherwise able to resolve the ambiguity, will construe the policy contra proferentem. This principle is grounded in the substantially superior position enjoyed by the insurer to specify, and where necessary amend, the standard terms on which it offers indemnity to its insured.

Thirdly, insurance policies will be construed in their commercial and social setting and having regard to their purposes. If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would effect that purpose, the latter will be preferred: see *Albion Insurance Co Ltd v BodyCorporate Strata Plan No 4303* [[1983](#)] 2 VR 339".

106 QBE's arguments in relation to the exclusion clause were two-fold. QBE submitted that the liability of Adventure Training was excluded as the failure to adequately inspect constitutes a failure to render professional advice or service (which was excluded by clause 10.4.1). QBE alternatively submitted that clause 10.4.2 was brought into effect, as the liability of the first defendant arose out of advice given for a fee, because the failure of Adventure Training to include the corrosion of the metal rope in its inspection report was one for which it had charged a fee.

### **(iii) Professional advice or service**

107 The main area of dispute is in discerning the distinction between Adventure Training carrying out routine maintenance, and when Adventure Training was engaged in providing professional advice or service.

108 While Adventure Training had professional indemnity cover in place at one stage, but it had lapsed, I do not consider this to be a relevant consideration in interpreting this policy.

109 The nature of the "advice" or "service" is summarised in a Memo sent from Transfield to Adventure Training on 28 November 2001, where Steve Clarke, the Maintenance Supervisor, requested a quote for the following:

"1. Carry out assessment of course and certify.

2. Replacement of all strand vices to the high ropes course with new and hard eyes”.
- 110 Counsel for plaintiff referred to a Canadian decision of **Chemetics International Ltd v Commercial Union Assurance Co of Canada** (1984) 11 DLR (4th) where the British Columbia Court of Appeal considered the meaning of “the rendering of professional services”.
- 111 **Chemetics** involved an exclusion clause that excluded liability for loss caused by errors or omissions in the rendering of professional services. The facts of the case involved a pulp bleach plant which was damaged when a tower was overfilled. A jury gave judgment against the insured, but the verdict was not clear enough to prevent the insurer from claiming that the clause of the contract excluded it from liability. His Honour Esson JA, (with whom Macdonald and Hutcheon JJA agreed), was required to assess the meaning of this term. The exclusion clause was loosely worded, and the rule that applied in that jurisdiction (and also applies in Australia) was that any ambiguity is read favourably to the party insured.
- 112 In considering the nature of the contract, His Honour stated that the contract was clearly one which was known to the parties to include provision of some matters, such as engineering and design, some of which would fall within the definition of “professional services” and some which would not. There was nothing in the contract which defined a “professional service”, although the insurer submitted that the training of operators and the provision of manuals amounted to “professional service”. Their Honours disagreed, stating that if that meaning were adopted, any “competent supervisory operating engineer” would satisfy those requirements, excluding persons who could be described as “technicians”. The Court held that even though such persons are obviously “professionals” as compared to “amateurs”, they are not “professionals” within the meaning of the exclusion. It stated, at 757,
- “In that context, it is intended to refer to the kind of services, such as design of the plant, which could normally be expected to be provided only by a professional engineer”.
- 113 QBE referred to the decision of Kirby P (as he then was) in **GIO General Ltd t/as GIO Australia v Newcastle City Council** ([1996](#)) 38 NSWLR 558, stating that it is authority for the general proposition that “professional” means no more than advice and services of a skilful character according to an established discipline.
- 114 The broad view of Kirby P should not be adopted in this case. Firstly, Kirby P did not define “professional” for the purposes of construing the application of an exclusion clause but rather the policy generally. Here the word “professional” appears in the exclusion clause where it is to be read strictly, and *contra proferentem* against the insurer where ambiguity exists. Upon a strict view, the definition of “professional advice and service” cannot be as broad as Kirby P suggested in the context of **GIO**. Secondly, Kirby P’s statement at 568 was specifically made “in the context of a policy written for a local government authority”. **GIO** is not of assistance.
- 115 The view of the definition of “professional” in **Chemetics** is preferable. An insurer cannot use the words “professional advice or service” to exclude liability for every type of advice and service. The word “professional” strictly limits the application of the exclusion clause.
- 116 Whether or not assessment, certification and replacement is the provision of routine maintenance, or a professional service rendered by Adventure Training is a question of

fact, and one that is not delineated by any clear and certain line. On balance, I find that such a request from a maintenance supervisor to carry out work is in the nature of routine maintenance, and not Adventure Training providing professional advice or service. As a result, the liability is not excluded by the operation of the exclusion clause.

#### **(iv) Advice given for a fee**

117 QBE's final contention was that clause 10.4.2 of the Insurance Policy excluded liability where the cover is caused by or arising out of advice given for a fee. It has been admitted into evidence that an invoice was paid for advice given by Adventure Training, in assessing and certifying the course. QBE submitted that Lieutenant Commander Astfalck reopened the course on the basis of the inspection report provided by Adventure Training, and that the plaintiff would not have been allowed to ascend the course whilst it was closed. QBE submitted that what logically follows is that the liability of Adventure Training arises out of its advice, given for a fee, that the course was safe.

118 The nature of this provision was criticised strongly by Hoeben J in the earlier hearing, where he said, at [36],

"In relation to the second argument of QBE, it seems to me too simplistic to hold that the exclusion applies to any advice given for a fee. As was pointed out in *Eather* where ambiguity exists, one has to look at the context of the policy and examine whether a particular interpretation strikes fundamentally at the purpose of the policy. If the word "advice" in exclusion 10.4.2 were entirely unqualified it would, in my opinion, strike at the very purpose of the policy which was to provide product and public liability cover in respect of matters arising out of the insured's business. It is difficult to envisage selling, installation and training in respect of outdoor education activities without the provision of some advice."

119 The nature of the insurance is to protect the insured in relation to their business, and the exclusion clause viewed in such a manner operates to exclude almost entirely the operation of the business in which the provision of advice and service is essential.

120 Interpreting the word "advice" without qualification places an extraordinary meaning upon the contract that it is incapable of bearing. What is in dispute is whether the assessment of the course and its certification, and the replacement of defective parts involved the provision of "advice" within the meaning of the contract.

121 The Macquarie Dictionary gives three meanings to the word "advice". The first is "an opinion recommended, or offered, as worthy to be followed", the second is "a communication, especially from a distance, containing information", and the third is "a formal or professional opinion given, especially by a barrister". The second is too broad to be capable of meaning in the present context. The third is an indication of how advice is often used in an every day context to convey a need for professionalism, and expertise. The first bears a similar meaning to the third, in that an opinion "worthy to be followed" indicates a belief in the expertise of the person imparting the information.

122 The nature of the exclusion clause when read strictly excludes "advice given for a fee". This is a positive clause of the contract, and should not be read to include liability arising out of an omission to give advice. There is no express reference made in the written advice to the "Milking Machine" or to any part of it.

123 Despite this, the liability of Adventure Training must have arisen from advice that they provided. The report must be considered to be advice when taken as a whole. The report

states, "An inspection was carried out on all elements and found to be in safe working order". This is a specific reference to the safety of the course, and it is reasonable to assume that the course was reopened as a result of this statement in the report. It may not have been "professional advice" but it was "worthy to be followed", and therefore it was advice. The advice was followed, and as a result the plaintiff was injured. Therefore, the liability of Adventure Training is excluded by clause 10.4.2 of the QBE Insurance Policy, as it was advice given for a fee.

- 124 The policy does not respond. QBE is not liable to indemnify Adventure Training. The plaintiff's claim against the third defendant, QBE, fails. The first and second defendants are negligent and are liable to pay damages to the plaintiff.

## **Damages**

125 I turn to consider the assessment of damages. I observed the plaintiff carefully while he gave evidence and was cross examined. The plaintiff was well groomed. From time to time he became physically uncomfortable in the witness box, so adjusted his position. When giving evidence in chief he impressed this Court with his recall of detail and the confidence with which he gave his answers. When he was being cross examined his mode of answering questions changed. He was vague and his answers lacked detail. While this Court is unable to say why the plaintiff adopted this technique, I accept his evidence was truthful.

## **Pre-accident Medical History**

126 Prior to the accident, the plaintiff suffered a variety of work and leisure related injuries. These included a number of injuries to his neck, back, shoulder and elbow. The main area of concern is the injuries to his neck. I shall examine them in more detail. The injuries to the other parts of his body were minor in nature and they have been resolved. The plaintiff's complete medical history while in the Navy was made available to the parties. The plaintiff submitted that the injuries to his neck and upper back did not prevent him from engaging in serious physical training and carrying out duties on the course, and they did not inhibit his employment opportunities. Transfield submitted that the plaintiff had not been completely honest about his pre-existing conditions, and that the extent of his injuries were not fully exposed until cross-examination. As said earlier it is my view, that it is only the injuries to his neck which were significant.

127 A daily medical record for 11 August 1981 (Ex D2/15 - 1) records the plaintiff complaining of a stiff neck on the right side after riding a sand buggy. On examination, he was slightly tender with limited movement. There was no swelling. He was advised to attend physiotherapy and was treated with Panadeine. This is the first of a number of complaints relating to the plaintiff's neck.

128 Navy out-patient records from 3 August 1982 state (Ex D2/15 - 2):  
"Weight fell on upper back three years ago. Now upper back pain on right when turning head. T2/T3 space seems enlarged."

129 The plaintiff had been referred by a physiotherapist. He was sent for x-rays on 5 August 1982. The cervical spine x-ray was normal. The thoracic spine x-ray did not demonstrate

any abnormality (Ex D2/15 - 4).

- 130 On 29 May 1990, the plaintiff was diagnosed with cervical spondylosis after getting out of bed and feeling pain at the back left side of the neck (Ex D2/15 - 6). Rotation movement was limited to 20° on the left and right. He had headaches. There was no numbness or tingling sensation. He was very tender at the C3/4 level. The provisional diagnosis was "wry neck" and he was sent for physiotherapy.
- 131 On 10 April 1997, the plaintiff presented to the McKenzie Institute for Cervical Spine Assessment with a four-day history of right-sided neck and shoulder pain after falling off a jet ski (see page 23 of TB3). The pain diagram notes the symptoms on the left side, although they are recorded as being on the right. The previous history includes "regular neck pain and shoulder pain a few times each year".
- 132 On 16 August 2000, the plaintiff attended the physiotherapy department at the base hospital following a whiplash injury in a motor vehicle accident the previous day. He had generalised cervical stiffness and limited mobility (Ex D2/15 - 29). Flexion was 5° and extension 15°. He was treated over 15 consultations, and last attended on 6 October 2000 with marked improvement in pain and full cervical mobility.
- 133 On 9 May 2001, the plaintiff underwent a medical examination in preparation for his discharge from the Navy to the Reserves (Ex D2/15 - 31 & 32). He was diagnosed with a slight restriction of movement in the cervical spine. In his discharge health statement, the plaintiff referred to neck problems for which he was seeking treatment.
- 134 It is my view that the plaintiff had suffered prior injuries to his neck, and as a result he continued to suffer pain in his neck from time to time. The plaintiff would have been susceptible to neck injury and expected to suffer from neck pain in the future had the accident not have occurred, but the neck pain would not have interfered in any significant way with his work life.

### **The medical evidence**

- 135 The plaintiff was admitted to Fremantle Hospital on 29 January 2002. He suffered a fracture of the left iliac blade extending into the left sacroiliac joint, diastasis of left sacroiliac joint and pubic symphysis. In that hospital, the plaintiff underwent two operations, one on his left wrist and he had an intra-medullary nail inserted into his left femur and across his symphysis (Ex J). The nail caused the plaintiff a lot of discomfort and ultimately when he had it removed, the pain in that region lessened.
- 136 The plaintiff was discharged from Fremantle and transferred to Royal Perth Hospital where he underwent surgery to his pelvis on 2 February 2002. On 12 February 2002, he was readmitted to Fremantle Hospital for follow up pelvic surgery. The hospital notes say that he progressed well without complication. On 20 February 2002, he was discharged. Between February and August 2002, the plaintiff's wife Sandy took six months off her legal studies and university to care for the plaintiff.
- 137 In April 2002, the plaintiff was still experiencing pain in his left hip and lower back. By July 2002, the plaintiff slowly improved in his physical condition. He underwent physiotherapy. By November 2002, he could manage about 200 metres of running. To him this was disappointing because pre-accident he was capable of running more than 2½ kilometres.
- 138 For the first six months following the accident, the plaintiff's mobility and ability to care

for himself were severely curtailed. He was unable to provide even the most rudimentary care for himself. When he was discharged from hospital he was in a wheelchair (t 61.58). It was the plaintiff's evidence that when he returned home after hospitalisation he was able to do "nothing at all" and his wife had to do everything to care for him (t 62.40). This included carrying him to and from the toilet and shower, holding him up in the shower, drying him and putting him to bed. He could eat with one hand unassisted, but without the use of a second hand was unable to cut anything (t 62.42-62.48). After six months passed, the need for domestic care tapered off.

- 139 By the end of 2002, the plaintiff said he was getting better every day as the pain reduced, but he still had trouble sleeping. He was able to care for himself in terms of washing, grooming and personal hygiene for the most part (t 66.44). Whilst he had resumed many of his home duties, he had difficulty working low to the ground. He was able to resume some sweeping and cooking. He gave evidence that his symptoms reduced what he could do, and he needed to take regular rest breaks (t 67.43). In late 2002, the plaintiff returned to the Navy as a safety number in the Reserves, but he did not cope well due to pain in his pelvis and hips (t 68.18). By the time he moved to Donnybrook he was independent, with self care and did not require any domestic assistance of the **Griffiths v Kerkemeyer** [1977] HCA 45; (1977) 139 CLR 161 type.
- 140 The plaintiff gave evidence that as he continued to improve, his headaches grew closer and closer together. By mid 2003, he was gradually getting better (t 69.1-69.26). During 2003, the plaintiff says that his wife noticed that he had difficulty remembering things. He also had difficulty maintaining concentration (t 71.05). The plaintiff's conversations with his surgeon about his condition made him feel terribly angry and frustrated (t 71.36). Although psychiatric treatment has been recommended and is favoured by his wife, the plaintiff has a fairly entrenched view that he will not avail himself of the services of a psychiatrist in the future.
- 141 Since mid 2003, the plaintiff says that he felt that he was not getting any better or any worse. When asked if he was still on such a "plateau", he replied that he was "gradually heading south" (t 75.29). In carrying out physical work, such as erecting a shed, the plaintiff describes his symptoms as "shocking" on some days, requiring painkillers. He did some work at a hardware store as a "work trial" in Donnybrook, but suffered hip pain and was too slow at work to gain employment.
- 142 At the outset, so far as the medical evidence is concerned, I accept that the plaintiff is no longer able to carry out the type of physically challenging work he was doing at the time of the accident. He should avoid heavy lifting, repetitive bending and/or twisting due to his injuries, mainly to his pelvis. I shall discuss his psychological and psychiatric condition shortly.
- 143 Professor Ehrlich, orthopaedic rehabilitation specialist, has furnished three reports namely, 10 July 2004, 24 September 2003 and 6 June 2006. He gave evidence and was cross examined. On examination Professor Ehrlich recorded that the plaintiff's head injuries caused headaches, and he has no specific complaints about his left wrist, despite losing a lot of movement. He recorded that the ongoing pain was in the plaintiff's pelvis and left hip. He stated that, "the symptoms are too severe to return to normal duties, but he can manage lighter selected work." Mr Ehrlich's opinion was that the plaintiff should be regarded as unfit to return to his physically demanding pre-injury duties at this stage and may never be able to do so.
- 144 As at 6 June 2006, Professor Ehrlich noted the worsening of the plaintiff's condition and stated that, despite it being possibly decades before the plaintiff's function is so seriously

impaired as to require joint replacement, that the injuries were already sufficiently severe to prevent him carrying

out the amount of physical activity that was required in his previous occupation. He stated that whether or not the plaintiff would require a hip replacement depended on “how sore it is” but said he might when he is in his 50’s (t 188.15).

145 When asked about knee replacement, Professor Ehrlich stated that he had not seen an x-ray of the plaintiff’s knee, but that it would probably show that the plaintiff had osteoarthritis. That meant that the plaintiff would likely require a knee replacement (t 188.20-188.40). At the time Professor Ehrlich examined the plaintiff, he did not have any hernias (t 189.53). Professor Ehrlich stated that the plaintiff’s pre-existing intermittent neck pain did not affect his diagnosis, and that he did not consider the neck pain to be “very significant” (t 190.04-190.20).

146 On 11 July 2003, Judith Davidson, a consultant occupational therapist and hand therapist carried out an assessment on the plaintiff, in the presence of his wife. She recorded that the plaintiff’s was unable to answer most of her questions, and he consistently relied on his wife to provide answers. Ms Davidson suspected that he had ongoing neurological problems as a result of the head injury sustained in the accident (report 1/08/2003). The plaintiff did not present in the manner described by Ms Davidson when he gave evidence in this Court.

147 On 11 August 2005, Dr Stephen Dennis, an occupational physician, examined the plaintiff. He noted the plaintiff’s physical injuries, and indicated the possibility of post-traumatic stress disorder, which would be a barrier to his successful return to the workforce. He opined that the plaintiff was not fit to return to his pre-injury employment, and that his current treatment would need to continue on a symptomatic basis. Dr Dennis was unable to indicate how many hours per week the plaintiff would be able to undertake in suitable employment, but concluded that while the potential for return to full time employment exists, it is not possible at present, and may not be possible in the long-term.

148 On 5 October 2005, Mandy Vidovich, a clinical neuropsychologist examined the plaintiff. In her report dated 10 October 2005, she discussed the outcome of a number of reading, intelligence and memory tests that she carried out on the plaintiff. She assessed the plaintiff’s overall level of intellectual functioning was assessed as being average, with his results on the Working Memory Index and Processing Speed Index marginally weaker than may have been anticipated. She stated that based on the medical history available regarding the nature of the plaintiff’s injuries, and while she noted the changes on his cranial MRI, it would appear most unlikely that the cerebral trauma sustained at the time of the fall had resulted in significant and persistent cognitive dysfunction. She considered any form of closed head injury sustained at the time to be mild in nature.

149 Mr Anthony, a clinical psychologist, came to a different conclusion. Mr Anthony carried out psychometric testing on the plaintiff, and found some deterioration in conceptual ability, both verbal and non-verbal. He considered non-verbal responses to be very slow. Using the Wechsler Memory Scale, Mr Anthony was able to identify memory deficits, particularly in relation to auditory memory. In the Rey Complex Figure Test, the plaintiff scored in the 70th percentile, and responses were considered poorly organised and segmental with errors of omission and integration. His word fluency scores were in the low normal range. Mr Anthony’s view was that the plaintiff did not have the cognitive ability to function at trade level (report 31/05/2006).

- 150 On 22 August 2003, Dr Michael Fallon and Dr Rodney Butler provided a report from the Magnetic Resonance Centre of Perth Radiological Clinic. They found that the MRI scan was consistent with a previous history of a closed head injury. On 24 September 2003, Professor Ehrlich commented on the MRI of the head, finding and confirming that the past head injury was severe enough to cause some bleeding in the brain.
- 151 Dr Teychenne (report 31/05/2006) a consultant neurologist, considered the plaintiff had cognitive deficits as a result of traumatic brain injury. He found the plaintiff to be depressed, and had restriction of straight leg raising on both sides. He noted pain over the lumbar spine. He attributed a limp in the left leg as secondary to the pelvic fractures. He found the plaintiff to have decreased right biceps and triceps reflex and neck pain. Dr Teychenne considered the prognosis in regard to the head injury as, at best, fair, and stated that it will effect the plaintiff's employment potential, at best being able to carry out low grade clerical work. Dr Teychenne considered the plaintiff virtually totally incapacitated for work in view of the cognitive deficits and physical deficits associated with the pelvic fracture and fracture of the left radius bone.
- 152 Dr Richard Wu, a consultant psychiatrist, had interviewed the plaintiff on 10 July 2003, and had carried out a Beck Depression Inventory and a Hamilton Depression Rating Scale on the plaintiff. He scored 26 on the Beck Depression Inventory which substantiated his reported symptoms of depression and placed him in the moderate to severe range of Major Depression. In the opinion of Dr Wu, the plaintiff suffered persisting symptoms of Major Depression and Post Traumatic Stress Disorder, caused by the fall he sustained whilst on active naval duty (report 15/09/2003).
- 153 Dr Peter Morse, a consultant psychiatrist, commented that the plaintiff did not present as depressed. He stated, however, that in his view the MRI findings cannot be ignored, as there was an indication of bleeding on the brain. It may be of a minor nature, but can also indicate quite severe disruption between parts of the brain. He noted a brief period of pre-trauma amnesia. Dr Morse's opinion was that there was quite definite evidence from the MRI findings that he suffered trauma to the brain, and sufficient evidence of actual brain trauma pointing to at least a partial causation of cognitive difficulties. He diagnosed the plaintiff with post traumatic stress disorder. The plaintiff attended Dr Shrub, a psychiatrist, at the behest of Transfield. This report has not been served.
- 154 In order to assess the extent of the plaintiff's injury to his brain, the evidence of those who have known him before and after the accident provide some assistance. While the plaintiff's wife, Sandy, did not give evidence, his friends and fellow Navy Reservists Mr Askew, Mr Clarke and Mr Gaias gave evidence as to their observations of the plaintiff's physical ability and behaviour both before and after the accident.
- 155 Mr Askew visited the plaintiff in hospital four days after the accident. He visited the plaintiff at his home and on his farm at Donnybrook. At his home, Mr Askew observed the plaintiff to be in good spirits and observed that the plaintiff was not limping and his physical ability was similar to before the accident. Mr Askew did not observe any difference in the plaintiff's memory, concentration and personality from before the accident. Mr Askew accompanied the plaintiff when he attempted a "nursery" abseil but the plaintiff complained of pain.
- 156 Mr Allan Clarke visited the plaintiff in hospital, at home at Rockingham and at Donnybrook every few months. Mr Clarke described the plaintiff prior to the accident as active, and said that if you gave him a job he was reliable and would do a very good job. The plaintiff was fit and competent.

- 157 Mr Clarke observed that after the accident, the plaintiff was not as competent and was worried. He stressed about his future. Mr Clarke did not observe the plaintiff carrying out any work on the property. A few times after the accident, Mr Clarke and a group of friends took the plaintiff out for some bicycle rides along forest tracks for about five kilometres. The plaintiff was very slow and hesitant. Mr Clarke was a kayak instructor and arranged for the plaintiff to come to three sessions. The plaintiff only lasted for about half an hour and it was only on the third attempt that the plaintiff managed to achieve an "Eskimo" roll. However, Mr Clarke had been white water kayaking with the plaintiff prior to the accident and at that stage he did not consider the plaintiff capable of performing an Eskimo roll.
- 158 Mr Gaias gave evidence that he has known the plaintiff for over 20 years. Prior to the accident he observed the plaintiff to be a very keen and fit person. They ran together participating in events as a team. According to Mr Gaias, the plaintiff was very tenacious, a hard worker, reliable and not the sort of man who would shirk work. He could always be relied on, would do a good job and do his fair share (t 329.54-56; 330.1-6).
- 159 Mr Gaias observed that since the accident there is a big difference in the plaintiff's physical prowess. He described the plaintiff as still being very determined, doing the best that he can but there was no comparison to what he used to be able to do. Mr Gaias said that the plaintiff had to be positive and happy, but he was sure that he was not the same person that he was when they used to run and do all those other more physical activities such as climbing and abseiling, kayaking and going down rapids (t 336.32-50). I accept that since the accident there have been subtle changes in the plaintiff's personality which have been observed by Mr Clarke and Mr Gaias. It is my view that the plaintiff suffered some mild brain damage which has slightly affected his personality, memory and concentration. This view is supported by the MRI scan and Dr Ehrlich, Dr Teychenne and Dr Morse.
- 160 Dr Alan Home, an occupational physician, (report 18/09/2006) reported that the plaintiff's condition had stabilised, but due to his ongoing low back discomfort related to activity, the plaintiff was not fit for his pre-injury occupation. Dr Home was of the opinion that the plaintiff has reached maximum medical improvement in relation to his left wrist and hip injuries but he is incapable of undertaking heavy manual labour which involves heavy loading through his left wrist and left hip region, and within these parameters, the plaintiff is capable of full time employment.
- 161 Dr Home opined that the plaintiff is physically capable of undertaking a wide range of work including work as a domestic cleaner, a trainer in a light mechanical workshop, a process worker, shop assistant or workshop supervisor. According to Dr Home, the plaintiff is fit to train for work as an estimator or supervisor within the mechanical trades or sheet metal workshop environment.
- 162 Mr Michael Alexeeff, a consultant orthopaedic surgeon, (reports 21/11/2006 & 24/11/2006) reported that the plaintiff remained symptomatic but had recovered reasonable function. He found no major neurosurgical intra-cranial injury. He was of the opinion that the plaintiff should sensibly avoid heavy lifting, working in an awkward posture, activities requiring repetitive bending and/or twisting and other generally heavy and physically demanding work.
- 163 Both Dr Home and Mr Alexeeff were of the opinion that the plaintiff would not require nursing, an attendant and/or domestic care in the future, nor would he require physiotherapy, occupational therapy or remedial therapy.

## **General damages**

- 164 The plaintiff claims \$280,000 for non economic loss. Transfield submitted that, while there is no issue that the plaintiff suffered serious injuries in the fall, he has made a reasonable recovery and is capable of more than he has been prepared to admit, either to doctors who have examined him, or to the Court and that an appropriate amount for non economic loss is \$175,000.
- 165 I have outlined the plaintiff's injuries and disabilities earlier in this judgment. In summary, the plaintiff suffered serious injury to his pelvis which has left him with pain, and the disabilities which have been outlined earlier. He has lost some movement in his left wrist. He suffers headaches which are worsening. He has gone from being an extremely physically fit man to one less so. While he has made a good recovery from his injuries, his condition will not improve. In fact the condition of his pelvis may deteriorate over time. He is more likely than not to have suffered some slight brain damage which has affected his personality, concentration and memory. He has lost confidence. He can no longer participate in sporting activities that he enjoyed, nor maintain his physical fitness in which he took pride.
- 166 Prior to the accident, the plaintiff had worked fulltime for 21 years in the Navy. While he had left the Navy, he was working as a reservist on the course which he enjoyed. He is no longer able to perform any job which requires this type of physical prowess. Taking these matters into account I assess the plaintiff's general damages at \$220,000.
- 167 I calculate interest on past general damages at 2% on half the general damages for a period of 5.6 years making a total of \$12,320.

## **Past out of pocket expenses**

- 168 The parties have agreed that past out of pocket expenses are in the sum of \$18,224.22. I allow that amount.

## **Future out of pocket expenses**

- 169 The plaintiff claims for future out of pocket expenses made up of firstly, attendances to general practitioners and specialists; secondly, future medical treatment; thirdly, medication; and fourthly, physiotherapy and massage. The amount claimed for psychiatric assistance is for the sum of \$2,000. While it is unlikely that the plaintiff will seek out psychiatric treatment (t 94) it is possible that over time he may change his mind. In accordance with the principle in **Malec v JC Hutton Pty Ltd (No 2)** [1990] HCA 20; (1989-90) 169 CLR 638 I should make an allowance for this possibility. Dr Morse recommended the plaintiff see a psychiatrist as frequently as weekly or fortnightly for two or three months, and then once a month for another six months. Dr Morse did not expect a change in the plaintiff's state within the next two years. I allow the sum of \$1,500 for psychiatric assistance.
- 170 The plaintiff's cost of analgesic medication is \$5.00 per week (x 1255.2) which equates to \$6276. He takes painkillers and just soldiers on (t 91). The claim for analgesics is necessary and reasonable. I allow it.

- 171 The plaintiff claims visits to general practitioners at four times per annum at \$54.00 per attendance (\$216 per year, \$4.15 per week x 1255.2) which equates to \$5209.08, and on attending a specialist once per year at \$200 (\$3.85 per week x 1255.2) which equates to \$4832.52. I allow the general practitioner consultations as the plaintiff needs prescriptions every six months. Additionally, he suffers from headaches which are worsening. He will require additional consultations as he is likely to suffer from osteoarthritic changes in the future. The plaintiff will require specialist consultations which I consider reasonable, particularly as he may need surgery in the future. The amount for future medical and specialist consultations total the sum of \$10,041.60. I allow this amount.
- 172 In relation to physiotherapy, the plaintiff claims physiotherapy/massage six times per annum at \$60 per visit (\$360 per year, \$6.92 per week x 1255.2), which equates to \$8686. The plaintiff says that he gains substantial benefit from physiotherapy and hydrotherapy and would continue such treatment (t 94.39). This amount is reasonable and I allow the sum of \$8686.
- 173 In relation to future surgery, Professor Ehrlich gave evidence of the probability of the plaintiff requiring future surgery at age 50 and then the possibility of surgery again at the age of 70 (t 187-188). Some allowance should be made for the possibility of future surgery. I allow the sum of \$10,000.
- 174 The total amount for future out of pocket expenses is \$36,503.60.

### **Past economic loss**

- 175 The plaintiff submitted that the evidence established that he was in a position to obtain work as a crane driver, and was likely to obtain that work, and would also continue working as a Naval Reservist on weekends and every alternate month for 2 days per weekend. A Naval Reservist currently earns \$135.00 per day tax free (t 329). I would have had some reservations with allowing for this in the future because of the age of the plaintiff, but the other reservists who gave evidence were of similar age or older than the plaintiff. A crane driver earned an average weekly income between 2001 and 2006 of \$1,194.70 nett per week. The plaintiff submitted that added to this amount should be one day per weekend at \$135 (tax free) making a total economic loss, on average between 2001 and 2006 of \$1,329.70 per week.
- 176 Since the accident, the plaintiff has performed some minor work as a Naval Reservist. However, according to the plaintiff this amount should be taken into account by allowing him the sum of \$1,200 per week from the date of the accident to December 2006, and then when he obtained employment at the caravan park it should be calculated at \$1,000 per week until the date of judgment.
- 177 Transfield submitted that the plaintiff, while employed full time in the Navy and immediately before his discharge, worked as a marine technician earning approximately \$1,000 per week. The plaintiff submitted that he only has a 33% residual earning capacity. Transfield submitted that the plaintiff's residual earning capacity is substantially greater than this, and likely to be of the order of 66%.
- 178 The plaintiff left the Navy because he apparently got seasick (t 18.24). He was honourably discharged on 30 July 2001, and immediately resumed work as a part-time Reservist, working an average of 2.7 days per week - see Navy Minute dated 18 March

2002 (Ex. D).

- 179 The plaintiff started his working career in the Navy as a shipwright and obtained experience in sheet metal work; woodwork; high pressure welding; metal and wood lathe work; ICE engines (petrol and diesel); refrigeration and air conditioning; Occupational Health and Safety; and management of staff. After serving on HMAS Moresby for 3½ years, the plaintiff was transferred to a teaching job at HMAS Cerberus where he taught air conditioning and refrigeration (t 18.45-55).
- 180 He completed a number of courses while in the Navy, including a Certificate in Heavy Engineering; Certificate in Marine Propulsion Operation; Certificate in Vocational Instruction; Associate Diploma of Engineering in Marine Systems Maintenance; Certificate III in Marine **Technician**; and Certificate IV in Frontline Management.
- 181 After the plaintiff left the Navy, he requested a posting for five days per week from 11 February 2002 to 14 June 2002. His fulltime posting would have concluded on Friday, 24 May 2002. Thereafter, he would have continued on a part-time basis for 2-4 days per week indefinitely, up to a maximum of 150 days per annum (t 44.57). The plaintiff initially earned \$115 nett per day as a reservist. Currently, reservists earn \$135 per day (t 329.31).
- 182 The plaintiff received training as a 60 tonne crane driver with Brambles. He also obtained a forklift driver's ticket and dogman's ticket, as part of his training before leaving the Navy (t 25.5). The plaintiff gave evidence that at the time he put in his notice to be discharged from the Navy, it was his

intention to work as a crane driver and maintain his fitness and friendships with sports personnel by undertaking weekend work with adventure training (t 24.35). He thought he could do at least one day per weekend, and possibly all weekend alternating each month (t 45.47).

- 183 At the time of the accident, the plaintiff was working 4 days per week as a Naval Reservist with the intention of endeavouring to increase this work to 5 days per week (t 44) while awaiting the opportunity to commence work as a crane driver for which the plaintiff had been trained (t 24).
- 184 Mr Craig Forsyth trained the plaintiff in crane operations over the period of one month, and found the plaintiff to be competent. He said that there was a lot of crane driving work in north western Australia. He said that crane driving required mental and physical fitness. It required long periods of concentration, and required you to sit in the cabin for extended periods. He had done predominantly 58 hour weeks for the last twelve months. Mr Forsyth's Taxation Office Notices of Assessment are in evidence, from 1998 to 2006. His 2006 taxable income was \$88,083. His payslip (Ex R) of 16 May 2007 indicated that from 9 May to 15 May 2007 he earned \$1,858 nett (\$2,783 before tax) for 68 hours work. There was work available for the plaintiff as a crane driver about 20 minutes drive from Donnybrook, and in many parts of north west Western Australia (t 321.17-321.22).
- 185 The plaintiff had completed his training as a crane driver. His trainer found him to be competent. The plaintiff has never been an idle man. He had a 20 year career in the Navy. I accept that had the accident not occurred, the plaintiff would have gained fulltime employment as a crane driver and additionally he would have worked one weekend per month as a reservist. Between 2001 and 2006, the average weekly income of a crane driver was \$1,194.70 nett. Added to this is a weekly amount of \$67.50 (2 x

$135 \div 4$  weeks). The plaintiff would have earned \$1,262.20 per week. I accept that the plaintiff was unable to find suitable remunerative employment between the date of the accident and December 2006. The amount for past economic loss for this period is \$1,262.20 x 252 weeks, which equates to \$318,074.40. From December 2006 to date, the plaintiff earned \$300 gross per week (\$272.25 nett per week). The plaintiff's economic loss for this period is \$989.95 for 34 weeks, which equates to \$33,658.30.

186 The total amount allowed for past economic loss is \$318,074.40 plus \$33,658.30, which equates to \$351,732.70.

### **Interest on past economic loss**

187 After deduction is made for \$70,633.93 compensation paid, the plaintiff claims interest on past economic loss at 9% for 2.5 years. The plaintiff is entitled to interest on past economic loss. Applying the arithmetic - \$351,732.70 – \$70,633.93 = \$281,098.77. \$281,098.77 x 9% x 2.5 = \$63,247.22.

### **Loss of superannuation on past economic loss**

188 The plaintiff claims lost superannuation for the work as a crane driver at 8.5% per annum on the gross figure of \$1,850 per week, which equates to \$44,973.50 (\$1,850 x 8.5% = \$157.25 weekly x 286 weeks).

189 I calculate the plaintiff's lost superannuation at \$44,973.50.

### **Residual earning capacity and future economic loss**

190 The evidence shows that the plaintiff has made attempts to return to the workforce. While at Donnybrook, the plaintiff worked with CRS and did work trial placement at the local hardware store for approximately four months, three to four days per week. He did everything in the store from using the tools, packing the shelves, assisting people with what building materials they did or did not need, to assisting customers with what they need to feed their animals. The plaintiff gave evidence that he started off okay until the weather started to get a bit cold and his hip began to play up. He was told that he was just too slow and not fast enough in the shop and that when the work trial was over he would not have a job there (t 78.37-43). He felt good about himself but his body just was not coping with being on the floor for four hours straight without a break. The pain in his hips was just terrible, mainly in his left leg (t 78.48-56).

191 In mid 2004, the plaintiff and his wife purchased a pristine property in Donnybrook that is approximately 25 acres. The plaintiff was able to perform various activities around his Donnybrook property. He gave evidence that if he felt uncomfortable, he could go and do something else, something different. He could sit on the tractor and go and tear up a paddock, go into the house and vacuum, wash the dishes, prepare tea or peel potatoes (t 79.17-22). He gave evidence that from the mid July 2004 onwards that he was capable of performing all tasks around the house, the paddock and the yard (t 79.51-55). It is my view that from mid July 2004 the plaintiff was able to perform some type of light work for several hours per day, two to three days per week.

192 The plaintiff tried to find other work at Donnybrook. He approached people around the place and he helped them out mainly to build his own experience. He helped a guy down the road with his lawnmower business. The plaintiff clarified this by saying that the lawnmower guy really help him by letting him observe, watch the preparation and the mechanics at work and they would give him pointers on how to break down the machines and how to build them up again, but it was very different from the Navy. It gave him experience and he was able to learn different things. He was able to put this experience to use around the farm basically with the small engines. But he was not capable of doing this for any paid work (t 81.25-52).

193 In 2006, the plaintiff approached a family friend and helped him out at his orchard for a couple of days a week for three or four months. It was very easy work. He stood in a cherry picker and if his legs became tired he could sit down. It was a good job. He was not paid for this work but was given fruit (81.56-59, 82.5-37).

194 The plaintiff gave evidence that he would not be capable of performing the type of work he was doing prior to the accident as an adventure training facilitator. He said that he no longer had the physical capability that he had prior to the accident. Nor would he be able to do work as a shipwright, because apart from not having the physical ability to traverse in a ship he would not be able to make the complicated decisions that he used to be able to (t 89). I accept that this is so.

195 In late 2006, the plaintiff and his wife moved to Broome as Sandy had obtained a full time job as a mediator in Broome. The plaintiff found a job in a caravan park doing maintenance work. This involved digging holes with a shovel. The jarring gave him bad headaches and his body did not like it much so he asked if he could rake leaves instead. He presently works four to five days per week doing three hours in the morning then another couple in the afternoon. The caravan park is a big one with over 600 sites (t 82-84). He earns \$15 per hour gross. Hence, the plaintiff is currently working about five hours per day for four or five days per week which equates to between \$300 to \$375 gross per week (\$272.25 to \$330.37 per week nett).

196 I accept that the plaintiff is capable of undertaking light unskilled work for between four to five hours per day, for about three days per week provided he can move around freely and take a break of a few hours in between shifts. I accept that there are days when the plaintiff experiences more pain in his pelvis and left hip than others. On the days when he is in a lot of pain he is capable of less work than the days when he is in less pain.

It is possible that the plaintiff could gain some employment teaching at a TAFE, as he has had some prior experience as a teacher which he found enjoyable. But this opportunity is limited in that he cannot give practical demonstrations if it involves him moving into awkward positions.

197 It is my view that it may be more difficult for the plaintiff to continue work for four to five days as the condition of his pelvis and hip may deteriorate in the future. Taking all of this into account, I assess the plaintiff's residual earning capacity, as the plaintiff claims, at 33% of \$1200 per week. This equates to the sum of \$568,180.80 after the deduction for vicissitudes is made ( $\$1200 \text{ per week} \times 844 \times 0.66 \times 0.85$ ).

### **Loss of superannuation on future economic loss**

198 The plaintiff claims for loss of superannuation on future economic loss at 9% on the gross figure. This equates to \$51136.27 (9% of \$568,180.80). I allow this sum.

## **Domestic assistance**

199 In **Griffiths v Kerkemeyer**, the High Court held that damages are recoverable for gratuitous domestic and nursing services by a plaintiff who suffers a personal injury due to the tortious act of the defendant. The plaintiff may recover **Griffiths v Kerkemeyer** damages even though he or she does not have a duty to account to the provider of the services, for example where gratuitous services are provided by family or close friends. Damages are assessed by reference to the market cost of providing the services - see **Van Gervan v Fenton** [1992] HCA 54; (1992) 175 CLR 327 ; 109 ALR 283.

### **The first six months after the accident**

- 200 On 20 February 2002, the plaintiff was discharged from hospital and was totally incapacitated for a period of six months (t 64). The plaintiff claims eight hours per day for six months at \$32 per hour (\$1,792 per week x 26 weeks) which equates to \$46,592. Transfield submitted that the plaintiff remained significantly incapacitated for the first six months following his accident. Transfield's position is that, while the plaintiff required assistance in his activities of daily living, the allowance for two hours per day at \$19 per hour should be made. This equates to \$6,916. It is my view that the plaintiff required extensive domestic assistance for the first six months. I allow the full amount claimed by the plaintiff of \$46,592.
- 201 The plaintiff claims interest on past domestic assistance at 8.5% for five years. This equates to \$19,801.60. He is entitled to this amount and I allow it. The total amount for past domestic assistance and interest is \$66,393.60.

### **Future domestic assistance**

- 202 The plaintiff claims two hours per week at \$21 per hour x 1255.2. This equates to \$52,718.40. Transfield submitted that the plaintiff would not require any domestic assistance in the future.
- 203 It is more likely than not that the plaintiff's condition in his left hip and pelvis will worsen over time, and he will not be able to carry out tasks which require heavy manual labour on the farm. While he and his wife purchased the property after the accident, it had been part of their plan prior to the accident. It is likely that he will be able to continue with lawn mowing and those types of tasks in the foreseeable future. He is not able to climb ladders to attend to household maintenance. To reflect this, I allow a global sum of \$25,000.

### **Costs**

- 204 Costs are discretionary. Costs normally follow the event. The plaintiff is to pay the third defendant's costs as agreed or assessed. The first and second defendants are to pay the plaintiff's costs as agreed or assessed.

### **Total amount of damages**

205 I propose to enter judgment against the first and second defendants in this amount once my arithmetic has been checked by the parties. Now that the parties have checked the arithmetic and the agreed amendments have been made in this judgment I make the following orders.

### **JUDGMENT**

(1) The first and second defendants are to pay the plaintiff the sum of \$1,457,711.91.

### **The Court orders that:**

(2) The plaintiff's claim against the third defendant is dismissed.

(3) The plaintiff is to pay the third defendant's costs as agreed or assessed. The first and second defendants are to pay the plaintiff's costs as agreed or assessed.

### **SCHEDULE**

	\$
General damages	220,000.00
Interest on general damages	12,320.00
Past out of pocket expenses	18,224.22
Future out of pocket expenses	36,503.60
Past economic loss	351,732.70
Interest on past economic loss	63,247.22
Loss of superannuation on past economic loss	44,973.50
Future economic loss	568,180.80
Loss of superannuation on future economic loss	51,136.27
Past domestic assistance	66,393.60
Future domestic assistance	25,000.00
<b>Total damages</b>	<b>\$1,457,711.91</b>

206 Total damages are rounded to \$1,457,712.00.

I certify that this and the 64 preceding pages are a true copy of the reasons for judgment of Associate Justice Harrison.

Dated: Thursday, 2 August 2007

Associate